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Humanitarian debate: Law, policy, action

**International**  
**Conference of the**  
**Red Cross and**  
**Red Crescent**

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## EDITORIAL

Ever since it was first held in 1867, the International Conference of the Red Cross and Red Crescent has been a unique forum for discussing issues of humanitarian concerns with the Movement of the Red Cross and Red Crescent and the states. The thirty Conferences held in more than 140 years bear witness to the birth and development of the law of war and the history of the Red Cross and Red Crescent Movement. Humanitarian challenges, humanitarian norms, and the relations between governments and the Red Cross and Red Crescent form the backbone of the International Conference.

Many issues arising at the Conference are dealt with in other international fora, but the specific Red Cross and Red Crescent angle and the added value justify addressing similar issues such as environment and migration. The orientation towards victims – and what each issue means for them – remains hereby the deciding parameter.

By reaffirming the responsibility of all states to respect and ensure respect for international humanitarian law, the Conference regularly explores new challenges and trends as observed in contemporary armed conflicts. The ICRC's mandate and the whole Red Cross and Red Crescent history are indeed inextricably linked to the origins and development of international humanitarian law, and the challenges to it are of essential importance for the International Conference. The predominant preoccupation is certainly to ensure access to and protection and assistance for victims of armed conflicts and other situations of violence. Constraints in a changing conflictual environment increase the difficulty in gaining such access – hence, the importance of acceptance and understanding by all belligerents of the rules on international humanitarian law and of the respect due to humanitarian action, in particular when undertaken under the protection of the red cross, red crescent, and red crystal.

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The Conference brings together, at equal level, the 194 states parties to the Geneva Conventions, the International Committee, the National Red Cross and Red Crescent Societies (currently numbering 186), and their International Federation. In this four-yearly Conference, more than 2000 delegates, including a great number of observers, gather for five days to debate and share views and experiences, both formally and informally. The participation of nearly all states in the International Conference testifies to the recognition of the Red Cross and Red Crescent specificity as a universal and privileged humanitarian actor, distinct from the

UN system. It underlines the partnership between the components of the Movement and governments, in particular the auxiliary role of National Societies to their public authorities in the humanitarian field. Together with the Movement – their main partner in protecting and assisting the victims of armed conflicts and natural or technological disasters – states seek to increase the effectiveness of international emergency response and to build local capacity to address the most vulnerable members of their own society.

Politically loaded discussions about the participation of states, National Societies, and/or observers have sometimes overshadowed the content of the Conference and even led, in 1991, to its cancellation, when the participation of Palestine could not be solved beforehand. Usually, however, the Red Cross and Red Crescent character and careful preparation have succeeded in avoiding a politicization of the Movement. The Conference is part of a complicated and lengthy process, which starts with the elaboration of the agenda, followed by the drafting of the reports and a broad consultation process, and finishing with the implementation of the decisions after the Conference. This preparatory and follow-up process facilitates an ongoing dialogue between the Red Cross and Red Crescent Movement and the states on humanitarian issues.

Plenary sessions and commissions are the main formal forum for participants to debate and discuss the items on the agenda and form the basis of the most important Conference ‘outcomes’. Often, however, the decision-oriented drafting committee is the most salient part of the Conference: the dry language of the resolutions is but a partial reflection of the process of decision-making that largely shapes the future orientation of humanitarian law and humanitarian action in the long term.

*Toni Pfanner  
Editor-in-Chief*

## Interview with Masood Khan\*

*Masood Khan has been Pakistan's Ambassador to the People's Republic of China since September 2008. From March 2005 to September 2008, Ambassador Khan served as Pakistan's Permanent Representative to the United Nations Office and other International Organizations in Geneva. As an official of Pakistan's Ministry of Foreign Affairs, he has served in Islamabad and abroad for thirty years. In 2009, he was promoted to the highest rank – that of Federal Secretary – in Pakistan's civil service. Earlier, among other functions, he worked as the Ministry of Foreign Affairs' Director-General for the United Nations and for Disarmament, and as its spokesman. Over the years, he has acquired expertise in multilateral diplomacy, security and disarmament issues, human rights, humanitarian diplomacy, and social development. He has also specialized in international conferences, having held several leadership positions, such as President of the Conference on Disarmament, President of the 6th Review Conference of the Biological Weapons Convention, Coordinator of the Group of the Organisation of Islamic States in Geneva, Chairman of the International Organization for Migration Council, Chairman of the International Labour Conference Reform Committee, and Chairman of the Drafting Committee of the 30th International Conference of the Red Cross and Red Crescent.*



***You have been involved in many international conferences. How do you situate the International Conference of the Red Cross and Red Crescent?***

It's a unique process. Of course, I have chaired many other conferences, but the International Conference of the Red Cross and Red Crescent is different because it brings together roughly three sets of stakeholders and constituents: the National Red Cross and Red Crescent Societies; the international components of the Red Cross and Red Crescent Movement;<sup>1</sup> and states. What you see here is an *interface*. The Movement's influence multiplies because of the 100 million

\* The interview was conducted on 27 January 2010 by Toni Pfanner, Editor-in-Chief of the *International Review of the Red Cross*.

volunteers in the vast network of National Societies which work directly with populations.

***Could it be categorized more as a state-oriented conference, or rather as a conference with greater importance for the non-state participants?***

The International Conferences are important for states and the National Societies. When I chaired the Drafting Committee in 2007, there was a prior consultation with National Societies. One of the delegates from the National Societies stood up and said, ‘Yes, we are going into the International Conference, but it will be dominated by the member states, and National Societies will not have an adequate voice.’ And I replied, ‘We will make sure – and you should make sure – that National Societies’ points of view are heard loudly and clearly’, and that’s precisely what happened. I would say that, here, National Societies have an edge because they are interacting and working directly with the communities.

***Is the added value of the International Conference the interaction between states and non-state entities in discussing humanitarian issues?***

Absolutely. In one sense, the International Conference has a better structure, let’s say, than the United Nations (UN). In the UN, you have the General Assembly and the subsidiary bodies of the UN. The relations between the UN and the non-governmental organizations (NGOs) are regulated by rules which were updated by the Economic and Social Council (ECOSOC) in 1996. These rules restrict NGO participation. But in the International Conferences there is direct and effective participation of National Societies. They also have their finger on the pulse of the people. National Societies are also much more than NGOs. They have the character and the orientation of civil society and interact with it, but they also have a semi-formal position in all societies of the world. The work that they do gives them prestige and respect in the national communities. In addition to National Societies, the consultations with the private sector, academic institutions, and media widen the Movement’s horizons and sharpen its understanding of contemporary issues.

***When participating in the International Conference, one has the impression that it’s not so different from other state conferences, especially in the drafting committees where the states influence more than the National Societies do. National Societies are sometimes hesitant to address their causes.***

The International Conference is a very good model for multilateral conferences, because here states do play their role but under some limitations. States play a pivotal part in the implementation of many of the decisions that the International Conferences take. At the same time, states must benefit from the background,

1 The International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (the Federation).



feedback, perspectives, and contribution of National Societies. That's what happens not only in the International Conference plenaries but also in the restricted Drafting Committee sessions.

One should not look at the two days of Drafting Committee sessions in isolation. In fact, a series of very hectic activities precede those two days. There are stakeholder consultations. For example, the ICRC or the Federation will go and talk to all the stakeholders, whether National Societies or the states concerned, or other international organizations. Only after completing that lengthy process, do you come to the Drafting Committee itself. A lot of work goes into the preparations before you get to the final setting. The ICRC and Federation officials regularly consulted states prior to the 2007 International Conference, and met with key ambassadors, either in one-on-one or group settings. As designated Chair of the Drafting Committee, I undertook many such consultations myself; but the ICRC and the Federation's consultations facilitated our task immensely.

***The International Conference debates on humanitarian law and humanitarian action – topics which are also discussed in other fora, such as the Security Council debates on the protection of civilians, the Human Rights Council, the Third Committee and so on. How do you see the difference? Is there really an added value compared to the discussions which states already have in other contexts on very similar or even identical topics?***

In fact, this subject came up for discussion amongst Geneva-based Ambassadors in 2007 in the run-up to the International Conference. Under the draft Declaration and Resolution on 'Together for Humanity', we were looking at measures to reduce vulnerability to environmental hazards and degradation, help vulnerable migrants, prevent or mitigate violence in urban settings, and facilitate access to public health. Of course, all these measures were being discussed in a purely humanitarian context. There are other agencies that are dealing with these issues – the United Nations Environment Programme, the International Organization for Migration, and the World Health Organization.

In the context of the International Conference, somebody used a very good expression: we were not looking at the 'science' or 'anatomy' of these issues; we were looking at the humanitarian dimensions of these issues. These dimensions are a legitimate area of interest for the International Conference and I don't think that the last Conference trespassed, in any sense, into the territory of any of the international organizations, including the UN.

In fact, the Conference produced good outcome documents. The Guidelines on the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, adopted by the Conference, was one such document. We saw its relevance and value in Haiti recently. Initially, there were some apprehensions on the part of the governments whether the Guidelines would be a prescriptive, legalistic framework. However, it was clarified at that point that the Guidelines were non-binding. What I like most about this document is that it was a 'free gift' from the Movement to states.

Towards the end of this consultative process, Ambassadors in Geneva were convinced that the attention given to these issues by the International Conference did not infringe on the mandates of either the UN or its specialized agencies.

***The Conference should therefore address all main humanitarian challenges?***

I would say, yes. For instance, when you're talking about humanitarian challenges, the border between human rights law and humanitarian law is thin. The two have never been distinctly separate, but in our times the distinction has become further blurred, particularly in areas of conflict and disaster. What we have seen is that a combination of organizations and actors deal with emergencies and conflicts by forming networks. Let me go back to a direct experience. When Pakistan was hit by an earthquake in 2005, the Red Crescent Society of Pakistan was one of the earliest respondents, and an effective one, I must say! It had the full support and weight of the ICRC and the Federation behind it. National Societies in general are one of the most effective participants in disaster response and management. Besides, their contribution is widely recognized. The National Societies have the necessary means and presence in communities to make a difference. The International Conferences act as a catalyst in bringing together all actors.

***So the important part is that such a large gathering and a discussion takes place? Even if the Conference does not create hard law, it can nevertheless maybe influence humanitarian action and even state policies, as well as helping to put forward a humanitarian agenda?***

Absolutely – I would say that raising these issues in a collective setting is important, and the International Conference provides that setting to the international community. After having reached some momentous decisions, the ICRC, the Federation, and the National Societies are not going to implement them all by themselves. They would work in close partnership with public authorities as well as other actors of national and international civil society. The Conference sets out the humanitarian agenda, defines moral imperatives, outlines social and legal responsibilities, and thus becomes a vehicle for influencing national and international humanitarian action. The Conference can at times be more productive than hard law, because the driving force behind it is *persuasive* rather than *coercive*.

***Originally the International Conference was much more linked to the Geneva Conventions and international humanitarian law issues and it gave an impetus for development in this area. Do you still see the International Conference as being important for the development or affirmation of international humanitarian law, which is nowadays also discussed in the Security Council, the Human Rights Council, the International Law Commission, and other fora?***

International humanitarian law is the foundation of the humanitarian Red Cross and Red Crescent Movement in any part of the world, because it aims to ensure

protection of human life and dignity in the worst circumstances, such as armed conflicts. The humanitarian movement has many manifestations, but international humanitarian law is the core of international humanitarian action. Humanitarian law also has to be responsive to new situations. At the same time, it has to remain relevant to traditional and non-traditional conflicts. In 2007, cluster munitions, for instance, were being discussed in other settings – CCW [the Convention on Certain Conventional Weapons] and the Oslo Process – but the Conference pronounced itself on this issue despite all the sensitivities involved. Reaffirmation and development of international humanitarian law by the International and Diplomatic Conferences have their own intrinsic and proven value. The Security Council, the Human Rights Council and the International Law Commission do not undermine or supplant the International Conference. On the contrary, their work creates an enabling environment for the Movement's humanitarian work.

***While the International Conference may affirm international humanitarian law rules and push for some development, there is less discussion on the implementation of and respect for this law. There is perhaps a perception on the part of the participants that the International Conference may not be the right forum to address this politically loaded issue. Do you see the role of the International Conference as being a discussion of general issues of international humanitarian law rather than concrete situations? Should the latter rather be avoided for fear of politicizing the Conference, as sometimes happens in other fora?***

The Conference is focused both on law-making and implementation. There should be more emphasis on implementation. The International Conference cannot dissociate itself from the concrete situations. Law-making and rule-setting are never done in an abstract environment. The discussions at the International Conference are correlated to real-life situations. The Conference can never be reduced to a discussion forum. Moreover, the work at the International Conference is supported by the strong sinews of National Societies. After setting the humanitarian agenda, the Red Cross and Red Crescent Movement has to step forward to solicit and enlist the support of public authorities and other actors to implement the measures it has adopted. I do not think that the International Conference should avoid pronouncements on emergent issues or implementation measures. Even if it attempted to do so, it would not succeed. The last conference could not have avoided the issue of climate change. Politicization is an altogether different matter. While addressing any issue, the Movement must make conscious efforts to maintain its neutrality, impartiality, and independence.

***The Conference takes place every four years. Can it cope with all the emerging issues?***

One of the weaknesses I identified was that, in this day and age, the gap of four years between the International Conferences is too long. Things are moving so rapidly. I can understand the conservative approach adopted by the ICRC and the

Federation. My personal view is that there should be yearly meetings. You have referred to the Human Rights Council – that body practically meets throughout the year. I'm not talking just about the formal sessions but also the inter-sessional meetings. This also applies to the Security Council. When the Security Council is debating an issue, it is also simultaneously looking at the humanitarian dimensions and is practically meeting 24/7. I think that more Conferences would be useful for the Movement.

***In the past, there were sometimes attempts to hold intermediary conferences, specifically on international humanitarian law and only with the participation of states. On the state level, a special Conference for the Protection of War Victims was held in 1993 after the Rwanda genocide, and there was a First Periodical Meeting of states parties to the Geneva Conventions in 1998. Could such meetings in between the International Conferences – possibly with the participation of the Red Cross and Red Crescent Societies and dealing with more specific, urgent problems – provide a solution?***

Yes, absolutely. Inter-Conference meetings led by the ICRC and the International Federation will be helpful in promoting the humanitarian agenda. In 2008, there was an international financial crisis. I don't know to what extent this development influenced the calendar of the ICRC and the Federation, but that crisis had huge humanitarian repercussions, particularly in the developing countries. The indigent segments of society didn't know where to go. Other fora did address the crisis, but I do not know how much time the Red Cross and Red Crescent have been able to devote to this problem. There were many other issues, such as the hike in oil prices and food insecurity in 2008, which had huge humanitarian costs. I'm not saying that each and every issue should be taken up by the Movement; but many of the pressing problems which are addressed by National Societies in national contexts could be deliberated by the ICRC and the Federation in a collective setting on a real-time basis.

***Where one region is particularly affected by a specific problem, could you imagine supplementing the International Conference with regional conferences, or do you feel it is better to work at the global level?***

There could be issue-specific conferences, as well as region-specific conferences, depending on the issue. This is a good idea.

***Are large-scale problems better dealt with in informal or formal conferences?***

This will be determined by the nature of the problem. If it is a problem affecting all humanity, then probably a formal, general conference would be good. Informal meetings are good for resolving a specific problem. The results of an informal process should be brought before a formal body or plenary in the interest of transparency and legitimacy. Informal meetings are excellent tools for the preparatory processes.

***International Conferences are costly and entail long preparation. At the same time, states and National Societies are already engaged in a lot of other work. Couldn't a proliferation of meetings make the way forward very difficult?***

Proliferation of meetings should be avoided at all costs. That said, there are humanitarian costs that we must bear in mind. Other organizations are meeting all the time to respond to crises. For instance, I know that, in the aftermath of the international financial crisis, the International Labour Organization responded specifically with regard to the concerns for labour, and gave an assessment on labour conditions and labour productivity affected by the crisis.

I think that the international components of the Red Cross and Red Crescent Movement will have to make an assessment in consultation with states and National Societies with regard to the financial costs for holding frequent conferences. There would be costs involved, and that's why one would have to weigh very carefully the pros and cons of coming up with a new calendar of conferences. On the 'pro' side, the Movement would be more responsive to international humanitarian challenges. On the 'con' side, I would say that there would be proliferation and waste. One would have to resolve the tension between these two pulls and see where the equilibrium lies. What is clear is that the Conferences should not duplicate what National Societies are already doing. Their function is to synthesize and guide. Therefore, rigorous self-discipline and institutional introspection must be exercised in taking decisions about convening a conference.

***What issues do you see as being proper to the International Conference? As mentioned, international humanitarian law was traditionally the major issue; now other humanitarian issues such as climate change and natural disasters are becoming very important, also on the political agenda.***

My immediate response to this question is that hard international humanitarian law should be the basic anchor, backed up by emerging soft law. Its genesis can be traced back directly to the humanitarian concerns of the late nineteenth century, and it is directly relevant to situations of armed conflict, whether between states or armed groups.

However, more and more calamities are now taking place in other spheres, for instance disasters, climate change, implosion in dysfunctional societies. Migration, which is not in itself an illegal or unusual activity, also throws up many new challenges. Prevention of disease and improvement of health, which have long been a concern of the Red Cross and Red Crescent Movement, still sit at the centre of the international community's agenda. It covers health promotion and curative care. It would be myopic for the Movement to be oblivious to the effects of climate change on vulnerable populations. The foundation should remain international humanitarian law, which should continue to evolve. However, other soft law provisions must apply to diverse situations around the world where the Movement has to respond effectively.

***To broach one specific international humanitarian law issue: there has been much debate recently about the proliferation of nuclear weapons, a highly politicized issue which is likely to have a tremendous humanitarian impact if these weapons are used. Should such issues of nuclear non-proliferation and disarmament, in your opinion, find a place at the International Conference of the Red Cross and Red Crescent? Or should they simply be left to the Disarmament Conference here in Geneva?***

Let us hope that nuclear weapons are never used. If they are ever used, deliberately or accidentally, humanitarian costs will be huge. For this reason preparedness and response are such an important part of the international agenda. The General Assembly, the Security Council, the Conference on Disarmament, the International Atomic Energy Agency, and a host of national agencies are dealing with these issues. As a standing invitee at the UN Inter-Agency Standing Committee, the ICRC and the Federation can monitor developments in this regard and contribute to decision-making. Right now, the space allowed to NGOs at disarmament fora, as compared to other fora such as the Human Rights Council, is limited. The ICRC, however, enjoys a special status, which it can fully utilize. For years, the ICRC has been discussing the disastrous effects of conventional weapons. After internal deliberation, the Movement may well focus, on a more substantive basis, on the consequences of the possible use of weapons of mass destruction.

***Many international conferences are highly politicized, and very contentious political issues seem to be ruled out at the International Red Cross and Red Crescent Conferences to avoid confrontations.***

If you have an international setting with different issues on the table, then differences are bound to crop up. This is natural and healthy. It should not always be called 'confrontation', a word which has negative connotations. Whether it is the United Nations Security Council, the General Assembly, or the Human Rights Council, states (and NGOs) will come to these fora with different perspectives. Engagement to aggregate their interests should not be perceived as confrontation. What is important is that the Chairs and their associates should employ effective methodologies to reach decisions.

There are situations where consensus cannot be reached, even if all the efforts in the world have been made. If consensus is not an absolute requirement under the rules of procedure, the other course of action would be to go to a vote and see what the majority wants. Then go ahead and take a decision. The minority should respect that decision.

Consensus is important especially for the Movement, because the wider the participation in decision-making, the more effective its implementation will be. Therefore, due diligence should be done to reach consensus. Failing this, instead of delaying the decision indefinitely, the best course of action is to go to a vote and come to a closure.

***You experienced this yourself at one Conference, where a vote was taken with regard to the adoption of the third emblem. When trying to reach a consensus, there is a danger of watering down the rule or the resolution. How do you reconcile the tension between trying to achieve consensus while ensuring that the content of a resolution is still meaningful?***

There were two such instances – first the Diplomatic Conference on the adoption of an additional distinctive emblem, the red crystal, alongside the red cross and red crescent in 2005; and then the 29th International Conference of the Red Cross and Red Crescent in 2006 on the same subject. There were differences of opinion that could not be reconciled. The way out was a vote.

The decision taken by the majority has been implemented since then. There are some residual problems in implementation but, if the vote had not been taken, there would still be no decision. When there is a clear difference of opinion which cannot be reconciled, go through the voting procedure.

The second example is the consultations in 2007 for the 30th International Conference, when I was Chair of the Drafting Committee. One declaration and four resolutions were adopted by the Conference. We adopted these resolutions by consensus, but they did not reflect the lowest common denominator. We worked for value addition. We achieved it. We discovered the ‘median point’ that suited all. To add value, one had to work with stakeholders and not try to walk past them. This approach worked.

***The question of participation of states or even National Societies in the Conference has often been heavily debated. It even prevented a Conference from taking place when the 1991 Conference in Budapest was cancelled because of a dispute over the participation of Palestine. How can one deal with such a problem which might overshadow the whole Conference?***

These are difficult situations and there are no easy answers. You can’t have any neat prescriptions for such a situation. What can be done is to take well-thought-out diplomatic initiatives and use the clout of some of the member states, as well as influential National Societies, to resolve the issue. It works if you work behind the scenes, and if you work with sincerity and integrity. Sincerity and integrity are abstract terms, but they can be sensed instantly and work miracles in building trust. Interlocutors would hear each other out and explore ways to accommodate the concerns of the main actors who are driving a divide. In such a situation, there are facilitators who can help out in good faith. It is always prudent to use their good will and skills for building bridges.

***Normally the International Conference takes into account the policies followed by the UN or other fora on questions of participation. Should there be the same policy which is followed in all fora, or could there potentially be flexibility taking into account the special character of the Red Cross and Red Crescent Conference? Could, for instance, certain non-state actors which are***

***very influential on the humanitarian agenda be invited in some capacity? Or would this in your view cause undue politicization?***

I can understand the compulsions of the Movement to bring such entities in, but one has to be careful. I have listened to the debate in many settings on involving non-state actors. ‘Non-state actor’ is a broad-ranging euphemism, as a matter of fact, and one has to define it and deconstruct it. If there are terrorist outfits, determined as such by international law but masquerading as respectable organizations, don’t legitimize them. I’ve seen many situations where a terrorist group strives to associate itself with the ICRC or the Federation to gain recognition and respectability. This should be avoided.

The ICRC and the Federation may have to transact with such organizations in conflict situations – but transaction is one thing, and recognition quite another. One has to strike a balance. This issue requires more debate to acquire greater legal clarity.

***The International Conference is a huge gathering of more than 2,000 delegates over three days. You emphasized in the beginning that the process as such, as well as the preparation of the Conference, is very important. Many participants feel that everything is already decided beforehand in the consultation process. Could the International Conference be a more dynamic gathering, or is it in the nature of the Conference itself that it may only be the tip of the iceberg of the preparation process?***

Looking at the last Conference, I know that the ICRC and the Federation had started the preparatory process much earlier. To set out and refine conference priorities, they had consulted with National Society staff, research institutes, academic institutions, NGOs, National Societies, and related international organizations, such as UNHCR [The Office of the United Nations High Commissioner for Refugees], IOM [the International Organization for Migration], and WHO [the World Health Organization]. In Geneva itself, I know that ambassadors were consulted a number of times. If the ICRC or Federation knew that a country was interested in a particular issue, there would be one-on-one or group consultations.

Even if the decisions are pre-cooked – and I don’t say that they are – the stakeholders have already taken part in decision-making in one form or the other in a much more extensive way than just being in a conference hall. I call this consultative process unique and effective, because this is different from the way we make decisions in the UN General Assembly. In the General Assembly, we make statements and people draft resolutions and then discuss them, either in open settings or behind the scenes, and come to an understanding. In the International Conference, on the other hand, you hold wider consultations – not just in Geneva during or prior to the Conference but in capitals and in many locations all around the world.

So, on the one hand there is this model, unique to the International Conferences of the Red Cross and Red Crescent. On the other hand, there is the familiar Human Rights Council or General Assembly model, where there is an



emphasis on formal meetings lasting for weeks or months. Here again, one would have to weigh carefully pros and cons, but I don't think that simply because the International Conferences have a short duration, their decision-making process is less efficacious.

***The International Conference has taken place in many countries around the world – for example, in the Philippines, Romania, Iran, Turkey, India, and Canada. In recent years, the Conference has been held in Geneva, mainly because the diplomats here deal with the same issues and are used to the international fora in Geneva. Would you favour once again reaching out to different regions in order to strengthen the Movement's universality, or rather concentrating on the diplomatic decision-making process, which is somewhat Geneva-oriented?***

I clearly prefer Geneva. I think Geneva is the best location in the world for conferences because of its ambience, conference facilities, access, security, and ease of doing business. Geneva has its own unique symbolism, particularly for the Red Cross and Red Crescent Movement. When you go to a new location, you have to go through the hassle of negotiations with the host government, selecting the venue, arranging conference facilities. Invariably, a lot of time is wasted in such efforts.

That said, from time to time it might be prudent to take the Conference to different parts of the world for wider ownership, if for no other reason. That decision would depend on a number of factors: the added value that such a location can bring; the profile that you want to give to this Conference; and whether it should be in a developed country, a developing country, or a middle-income country. I have participated in many conferences in Geneva and in other parts of the world. Being based in Geneva, I was familiar with the entire city and hence felt most comfortable. When you go to a new location, it is always disconcerting for delegates, as they try to rearrange their briefs and lives for seven to eight days. For the sake of political symbolism, however, it may occasionally be beneficial to take the International Conference to new locations.



# The International Conference of the Red Cross and Red Crescent: challenges, key issues and achievements

**François Bugnion\***

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## **Abstract**

*Since the constituent Conference in October 1863, which gave birth to the Red Cross,<sup>1</sup> the International Conference of the Red Cross and Red Crescent has met on thirty occasions. The first meeting took place in Paris in 1867 and the thirtieth in Geneva in November 2007. What contribution has the Conference made to the development of international humanitarian law and humanitarian action? What are the main challenges that the Conference has had to face? Where has it succeeded and where has it failed? These are the questions that this article seeks to answer.*

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\* This article is a personal contribution and does not necessarily reflect the views of the International Committee of the Red Cross. English translation by Mrs Glynis Thompson.

## The International Conference of the Red Cross and Red Crescent: an unparalleled forum

### The composition of the Conference

The matters submitted to the International Conference, the nature of its debates, and the bearing of its decisions are determined by its composition. Virtually unique among international bodies, the International Conference of the Red Cross and Red Crescent brings together institutions born out of private initiative – the components of the Red Cross and Red Crescent Movement – and the States parties to the Geneva Conventions.<sup>2</sup>

This hybrid composition, which brings together institutions established as a result of private initiative and states, derives from the organization's objectives. As Henry Dunant and the other founders of the Red Cross saw it, the intention was not to establish new public agencies but to set up voluntary relief societies that would be based on private initiative and would rely on private support.<sup>3</sup> However, in order to be able to provide relief for the wounded on the battlefield, the new societies had to establish a strong relationship with the civil and military authorities already in peacetime.<sup>4</sup>

- 1 Following a practice that is more than one hundred years old, I will use the expression 'International Red Cross' or, more simply, 'Red Cross' to designate the International Red Cross and Red Crescent Movement, particularly when referring to periods in which those expressions were the only ones in official use.
- 2 The only body with a similar composition is the International Labour Conference, which brings together the member states of the International Labour Organization and the trade union federations and employers' federations of those countries.
- 3 The history of the foundation of the Red Cross is well known and there is extensive literature on the subject. The following personal accounts and other works are of particular interest: J. Henry Dunant, *A Memory of Solferino*, English version provided by the American Red Cross, reprinted by the ICRC courtesy of the American Red Cross, ICRC, Geneva, 1986 (original French edition: *Un souvenir de Solferino*, Imprimerie Jules-Guillaume Fick, Geneva, 1862); Henry Dunant, *Mémoires*, text compiled and presented by Bernard Gagnebin, Henry Dunant Institute, Geneva, and Éditions L'Age d'Homme, Lausanne, 1971, in particular pp. 32–121; Alexis François, *Le berceau de la Croix-Rouge*, Librairie A. Jullien, Geneva, and Librairie Édouard Champion, Paris, 1918; Pierre Boissier, *History of the International Committee of the Red Cross: From Solferino to Tsushima*, Henry Dunant Institute, Geneva, 1985, pp. 7–121; François Bugnion, 'La fondation de la Croix-Rouge et la première Convention de Genève', in Roger Durand (ed., with the collaboration of Jean-Daniel Candaux), *De l'utopie à la réalité: Actes du Colloque Henry Dunant tenu à Genève au palais de l'Athénée et à la chapelle de l'Oratoire les 3, 4 et 5 mai 1985*, Henry Dunant Society, Geneva, 1988, pp. 191–223; François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, ICRC, Geneva and Macmillan, Oxford, October 2003, pp. 1–28.
- 4 The plan of the founders of the Red Cross took practical shape in the Resolutions and Recommendations adopted by the constituent Conference of October 1863, which gave birth to the Red Cross. Those Resolutions formed the basis upon which the National Red Cross and Red Crescent Societies were established and the statutory framework of the Movement until the adoption by the Thirteenth International Conference of the Red Cross, held in The Hague in 1928, of the first Statutes of the International Red Cross. The Resolutions and Recommendations of the constituent Conference are reproduced in *Compte rendu de la Conférence internationale réunie à Genève les 26, 27, 28 et 29 octobre 1863 pour étudier les moyens de pourvoir à l'insuffisance du service sanitaire dans les armées en campagne* (excerpt from *Bulletin* No. 24 of the Geneva Public Welfare Society), Imprimerie Jules-Guillaume Fick, Geneva, 1863, pp. 147–149; *Handbook of the International Red Cross and Red Crescent Movement*,

That relationship was to be maintained at two levels. At the national level, each National Society was to ‘get in touch with the Government of its country, so that its services may be accepted’ in case of war.<sup>5</sup> At the international level, the relationship was upheld by virtue of the states participating in the International Conference of the Red Cross, beginning with the first conference, which was held in Paris in 1867.

According to the revised Statutes of the International Red Cross and Red Crescent Movement (‘the new Statutes’ of the ‘Movement’) adopted by the Twenty-fifth International Conference of the Red Cross, held in Geneva in October 1986,<sup>6</sup> the members of the International Conference are the delegations from: duly recognized National Red Cross and Red Crescent Societies;<sup>7</sup> the International Committee of the Red Cross (ICRC); the International Federation of Red Cross and Red Crescent Societies (‘the Federation’); and the states parties to the Geneva Conventions.<sup>8</sup> The delegations from the National Societies, the ICRC, the Federation, and the states have equal rights as members of the International Conference. They are all entitled to take part in the deliberations and in the ballots, during which each delegation has one vote.<sup>9</sup>

The International Conference meets in principle once every four years. However, the periods between two conferences have sometimes been longer, either because there was no desire to meet (1869–1884), or because the Conference was prevented from meeting by a widespread conflict (1912–1921, 1938–1948), or by political impediments connected with the representation of certain states or certain political entities. For instance, the International Conference was unable to meet between 1957 and 1965 because of differences of opinion about the representation of China. Similarly, the Conference that should have taken place in Budapest in 1991 had to be cancelled at the last minute because of differences of opinion about the participation of Palestine.

The attributions of the International Conference are derived from the procedures followed at the first conferences and, since 1928, from the Statutes. We will now turn to those attributions.

14th edition, ICRC and Federation, Geneva, 2008, pp. 515–516; Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 4th edition, M. Nijhoff Publishers, Leiden and Boston, 2004, pp. 361–363.

5 Article 3 of the Resolutions of the constituent Conference of October 1863, *Handbook*, above note 4, p. 515.

6 Statutes of the International Red Cross and Red Crescent Movement (‘Statutes’), adopted by the Twenty-fifth International Conference of the Red Cross, held in Geneva in October 1986, in *International Review of the Red Cross*, No. 256, January–February 1987, pp. 25–59; *Handbook*, above note 4, pp. 517–534.

7 The National Society of Israel uses the name Magen David Adom (Red Shield of David).

8 Statutes, Art. 9, para. 1.

9 *Ibid.*, Art. 9, para. 2.

## The attributions of the Conference

According to the Statutes, ‘The International Conference is the supreme deliberative body for the Movement’.<sup>10</sup> It has sole competence to amend the Statutes and the Rules of Procedure of the Movement, to take the final decision on any difference of opinion as to the interpretation and application of the Statutes and Rules, and to decide on any question that may be submitted to it by the ICRC or the Federation about their differences of opinion. It contributes to the unity of the Movement and to the achievement of the latter’s mission in full respect of the Fundamental Principles; it contributes to the respect for and development of international humanitarian law; it may assign mandates to the ICRC and to the Federation within the limits of their statutes and of the Statutes of the Movement; however, it may not modify either the Statutes of the ICRC or the Constitution of the Federation or take decisions contrary to such statutes.<sup>11</sup> Lastly, the Conference elects the members of the Standing Commission of the Red Cross and Red Crescent, which is the trustee of the International Conference between conferences and as limited by the attributions conferred on it by the Statutes of the Movement.<sup>12</sup>

According to the Statutes, ‘the International Conference shall adopt its decisions, recommendations or declarations in the form of resolutions’.<sup>13</sup> Although the Conference endeavours to adopt its resolutions by consensus, there is nothing to prevent it from proceeding by voting. The vote may be taken by secret ballot or by roll call. What influence do the resolutions of the Conference have? That question now needs to be examined before we turn to the main challenges facing the International Conference.

## The legal effects of the decisions of the International Conference

From the time of the Second International Conference (which met in Berlin in 1869) onwards, National Society delegates were asked to come with precise instructions and sufficient authority to be able to exercise their right to vote.<sup>14</sup>

10 *Ibid.*, Art. 8.

11 *Ibid.*, Art. 10.

12 Established by the Thirteenth International Conference of the Red Cross, held in The Hague in 1928, the Standing Commission comprises nine members – two representatives of the ICRC, two representatives of the Federation, and five members of National Societies, each elected in a personal capacity by the International Conference. On the origin and functions of the Standing Commission, see François Bugnion, ‘The Standing Commission of the Red Cross and Red Crescent: its origins, role and prospects for the future’, in Liesbeth Lijnzaad, Johanna van Sambeek, and Bahia Tahzib-Lie (eds.), *Making the Voice of Humanity Heard: Essays on Humanitarian Assistance and International Humanitarian Law in Honour of HRH Princess Margriet of the Netherlands*, Martinus Nijhoff Publishers, Leiden and Boston, December 2003, pp. 41–59.

13 Statutes, Art. 10, para. 5.

14 Circulars from the Prussian Central Committee, 23 November 1868 and 1 March 1869, *Compte rendu des Travaux de la Conférence internationale tenue à Berlin du 22 au 27 avril 1869 par les Délégués des Gouvernements signataires de la Convention de Genève et des Sociétés et Associations de Secours aux Militaires blessés et malades*, Imprimerie J.-F. Starcke, Berlin, 1869, pp. 3–5 and 7–9. The proceedings of the first fifteen conferences were published only in French; as from the Sixteenth International

Likewise, it has always been acknowledged that government delegates do not act in a personal capacity but on behalf of the states whose official position they express through their statements and votes.<sup>15</sup>

While the International Red Cross and Red Crescent Movement is essentially a non-governmental international association, the participation of government representatives at the International Conference gives the meeting a hybrid status, both private and public. As Richard Perruchoud points out, the composition of the International Conference also determines the legal effects of the resolutions adopted:

The votes of government representatives transform what was originally a private matter into a semiprivate legal act, of a mixed nature: conference resolutions thus impinge on the sphere of public international law because of the status of those who drafted and approved them, and any obligations they may contain may be binding on states, to an extent to be determined later.<sup>16</sup>

Two types of resolution assume a particular status by virtue of their constitutional or fundamental nature: the Statutes of the Movement and the Fundamental Principles of the Red Cross and Red Crescent. The aim of the Statutes is to regulate relations between the components of the Movement. They constitute the legal basis for all deliberations of the Conference and its subsidiary bodies, and therefore assume a constitutional character that determines their legal effect with regard to the components of the Movement and to the states within the context of the Conference. Perruchoud writes, justifiably, that

The constitutive instrument states in a mandatory fashion the rights and obligations of the members and determines the powers of the statutory bodies; its obligatory nature necessarily stems from its constitutive status since, by the will of the parties, it creates an association.

...

The fact that the Statutes were not adopted as a treaty does not mean that states are not bound by them: governments are free to give their consent in any way they choose. Although the Statutes were not adopted in the form of an international treaty, they nevertheless constitute an international instrument which, by its nature, binds the States.<sup>17</sup>

We can therefore conclude, along with Perruchoud, that:

By their vote, the states recognized the existence of the International Red Cross ... Consequently, the Statutes apply to them in their entirety, both the

Conference (London, 1938), the proceedings were also published in English and, as from the Eighteenth Conference (Toronto, 1952), in Spanish.

15 Richard Perruchoud, *Les résolutions des Conférences internationales de la Croix-Rouge*, Henry Dunant Institute, Geneva, 1979, pp. 46–49 and 394–397.

16 *Ibid.*, p. 48.

17 *Ibid.*, pp. 106, 107–108. In a similar vein, see Auguste-Raynald Werner, *La Croix-Rouge et les Conventions de Genève*, Georg & Cie, Geneva, 1943, p. 79.

provisions defining the authority of the Movement's statutory bodies and those specifying the attributions of the ICRC or the League.<sup>18</sup>

Similarly, when the Fundamental Principles of the Red Cross were adopted, it was acknowledged that they represented standards of behaviour for the National Societies, the ICRC, and the Federation. When the new Statutes were adopted by the Twenty-fifth Conference, the Fundamental Principles were included in the Preamble to these Statutes, which clearly shows the constitutional and fundamental nature of those principles.

The Fundamental Principles are not of themselves binding on the states, which are, by definition, political institutions. However, they may nonetheless constitute an indirect source of obligations for the states. The Statutes stipulate that 'All participants in the International Conference shall respect the Fundamental Principles and all documents presented shall conform with these Principles'.<sup>19</sup> The Fundamental Principles are therefore a source of obligations for the states within the context of the Conference. Likewise, by virtue of the Statutes, the states have undertaken 'at all times [to] respect the adherence by all the components of the Movement to the Fundamental Principles'.<sup>20</sup> Hence, while the states are not directly obliged to respect the Fundamental Principles of the Movement outside the context of the International Conference, they must comply with them within its context and accept that the Red Cross and Red Crescent institutions must adhere to them at all times.<sup>21</sup>

Although most of the resolutions of the International Conference are exhortational in nature and are thus similar to resolutions of international organizations, some resolutions are meant to lay down rules that are binding upon the members of the Movement. That is, in particular, the case regarding the Regulations on the Use of the Emblem of the Red Cross or the Red Crescent by the National Societies, the Principles and Rules for Red Cross and Red Crescent Disaster Relief, the Principles and Rules for Red Cross and Red Crescent Development Cooperation, the regulations concerning funds and medals, and, of course, the Statutes and the Fundamental Principles.

Having thus reviewed the composition and attributions of the International Conference, we can now turn to the main challenges that the Conference has faced. A distinction may appropriately be made between the issues relating to the composition of the Conference on the one hand and those that concern humanitarian law and humanitarian action on the other.

18 R. Perruchoud, above note 15, p. 108. In 1991, the General Assembly of the League of Red Cross Societies decided to change the institution's name to the International Federation of Red Cross and Red Crescent Societies.

19 Statutes, Art. 11, para. 4.

20 *Ibid.*, Art. 2, para. 4.

21 I will return to the genesis and scope of the Statutes and the Fundamental Principles in discussing the organization of humanitarian action (see below).



## Issues relating to the composition of the International Conference

### Participation issues and the risk of the Conference falling apart

It would be distorting the truth to say that issues relating to the composition of the International Conference did not arise prior to World War II. Issues of that kind had already been raised in the nineteenth century but, until 1939, they did not prevent the Conference from meeting or from carrying out its work. For example, despite the civil war in Spain, the two rival Spanish Societies agreed to take part in the Sixteenth International Conference, which met in London in June 1938.<sup>22</sup>

Things were quite different in the second half of the twentieth century. Three issues seriously undermined the meetings of the International Conference: the question of the representation of China; the expulsion of the South African government delegation; and the question of the participation of Palestine.

### *The question of the representation of China*

World War II led to the division of Germany and of Korea, paved the way for the division of Vietnam, and triggered the resumption of the Chinese civil war, which resulted in the defeat of the Kuo Min Tang armies on the mainland and the withdrawal of the Chinese nationalists to the island of Taiwan (then Formosa).

However, while the ‘two Germanies’, the ‘two Koreas’, and the ‘two Vietnams’ reluctantly agreed to sit side by side at international conferences, the embattled Chinese brothers agreed on one point only – that there was only one China. In other words, the presence of one of the Chinese governments excluded the other. However, whereas the nationalist government no longer had any control over most of the territory or population of China, it had managed – thanks to the support of the United States and its allies – to continue to represent China in the United Nations and retained China’s seat as a permanent member of the Security Council.<sup>23</sup> This question was to blight the Eighteenth and Nineteenth International Conferences and to impede the Conference that was scheduled to meet in Geneva in 1963 to mark the centenary of the Red Cross.

In the face of the rival claims of the two Chinese governments, the Standing Commission of the International Red Cross, whose task is, in particular, to supervise the preparation of the International Conferences, thought it had found a fair and impartial solution by inviting the two Chinese governments – the government in Beijing as the government whose responsibility it was to implement the Geneva Conventions on the mainland and the government in Taipei as the

22 *Sixteenth International Conference of the Red Cross, London, 20–24 June 1938, Report*, The British Red Cross Society, London, 1938, p. 21.

23 On 25 October 1971, the United Nations General Assembly decided to recognize the People’s Republic of China as the sole legitimate representative of China in the United Nations and as a permanent member of the Security Council.

government whose duty it was to implement the Geneva Conventions on the island of Taiwan.<sup>24</sup>

At the Eighteenth International Conference, held in Toronto in July–August 1952, the solution adopted by the Standing Commission was violently attacked from all sides, giving rise to purely political debates that poisoned the atmosphere. In the end, the conference confirmed by 58 votes to 25 with 5 abstentions the line followed by the Standing Commission to send invitations to the National Societies and to the governments. Having failed to obtain the expulsion of the Beijing government, the delegation of the Republic of China decided to leave the conference.<sup>25</sup>

At the Nineteenth Conference, which met in New Delhi in October–November 1957, the government of the Republic of China refused to take part in the conference, although it sent delegates to the Indian capital, because it had been invited as the ‘Taiwan government’ and not as the ‘Republic of China’. The United States government submitted a draft resolution according to which ‘all governments invited to attend the conference [were to] be addressed according to their own official titles’ – that is, the name each of them gave itself.<sup>26</sup> This draft resolution was doubly unacceptable to the delegates of the People’s Republic of China and to the Chinese Red Cross since it envisaged a double representation of China and since, if the draft were accepted, the Taiwan government would take its seat at the Conference as the ‘Republic of China’, although it had ceased to exercise any authority on the mainland. The Beijing government sought to counter this move by submitting a draft resolution that set out to prohibit any form of invitation addressed to Taiwan.<sup>27</sup>

The predicament prompted endless discussions. To enable the conference to deal with the issues of substance for which it had been convened, it was decided to postpone any decision with regard to the draft resolution submitted by the United States and to the Chinese counter-draft until the final plenary session. When the matter was finally put to the vote, the US draft resolution was accepted by 62 votes to 44 with 16 abstentions.<sup>28</sup> Declaring that the Conference had violated its own statutes, the delegates from the People’s Republic of China and the Chinese Red Cross left the room as a formal sign of protest. They were followed by a third of the delegations, including that of the Indian Red Cross, the host Society.<sup>29</sup> As the

24 The Republic of China had taken part in the 1949 Diplomatic Conference and had signed the new Geneva Conventions of 12 August 1949. It was also bound by its ratification of the 1929 Conventions. The People’s Republic of China, which did not take part in the 1949 Diplomatic Conference, acceded to the Geneva Conventions of 12 August 1949 on 28 December 1956.

25 *Eighteenth International Conference of the Red Cross, Toronto, July–August 1952, Report*, Canadian Red Cross Society, Toronto, 1952, pp. 11–12, 47–49 and 53–69. Catherine Rey-Schyr, *De Yalta à Dien Bien Phu: Histoire du Comité international de la Croix-Rouge, vol. III, 1945–1955*, ICRC and Georg Éditeurs, Geneva, 2007, pp. 120–125.

26 *Nineteenth International Conference of the Red Cross, New Delhi, October–November 1957, Report*, Indian Red Cross, New Delhi, 1958, pp. 53–55.

27 *Ibid.*, pp. 60–68.

28 *Ibid.*, pp. 141 and 161, Resolution XXXVI.

29 *Ibid.*, pp. 141–146.

conference drew to a close, the delegates from Taiwan entered the half-empty room in triumphant mood.<sup>30</sup> The conference ended as a psychodrama.

Shortly before the dramatic vote, the New Delhi Conference had accepted an invitation from the ICRC, the League, and the Swiss Red Cross to hold the Twentieth International Conference in Geneva in October 1963, the conference being intended to be the culmination of the events organized to mark the centenary of the founding of the Red Cross.<sup>31</sup> However, between 1957 and 1963, no progress was made towards a solution on the issue of the representation of China. Given the risk of causing a new rift within the Movement and generating purely political discussions, which would have cast a dark shadow over the commemorative events, the Standing Commission grudgingly decided to postpone the Twentieth International Conference for two years.<sup>32</sup>

That Conference finally met in Vienna in October 1965. The Beijing government and the Chinese Red Cross refused to take part because invitations were sent to 'the Chiang Kai Shek clique'.<sup>33</sup> In the meantime, however, relations between Beijing and Moscow had cooled considerably, with the result that the USSR and her allies merely made relatively platonic protests, without withdrawing from the Conference, which was then able to deliberate in a peaceful atmosphere.<sup>34</sup> Similarly, only the Republic of China (Taiwan) took part in the Twenty-first International Conference, held in Istanbul in September 1969.<sup>35</sup>

In the end, the Taiwan government fell into its own trap. On 25 October 1971, the United Nations General Assembly decided to recognize the People's Republic of China as the sole legitimate representative of China and to expel the Taiwan government from all United Nations bodies.<sup>36</sup> Since the matter of the representation of China had been settled by the international community's main political body, the Movement could simply fall in line with that solution. Only the People's Republic of China and the Chinese Red Cross were invited to the Twenty-second International Conference, held in Tehran in November 1973.<sup>37</sup> The same procedure was adopted for subsequent conferences.

30 *Ibid.*, p. 145.

31 *Ibid.*, pp. 130–131 and 162, Resolution XL.

32 *Centenary Congress of the International Red Cross, Commemoration Day, Council of Delegates, Report*, ICRC, League, and Swiss Red Cross, Geneva, 1963, pp. 101–102.

33 ICRC Archives, record of the plenary meetings of the ICRC, letter from Mrs Li Te-chuan, President of the Chinese Red Cross, to Ambassador André François-Poncet, Chairman of the Standing Commission, 30 January 1965, annexed to President Samuel Gonard's letter to the members of the ICRC, 24 February 1965. *Twentieth International Conference of the Red Cross, Vienna, 2–9 October 1965, Report*, Austrian Red Cross, Vienna, 1965, pp. 39–40 (int. Lauda).

34 *Ibid.*, pp. 39–44.

35 *Twenty-first International Conference of the Red Cross, Istanbul, 6–13 September 1969, Report*, Turkish Red Crescent Society, Istanbul, 1969, p. 9.

36 Resolution 2758 (XXVI) 1971, adopted on 25 October 1971; *Resolutions Adopted by the General Assembly during its Twenty-sixth Session, 21 September–22 December 1971*, United Nations General Assembly, Official Records: Twenty-sixth Session, Supplement No. 29 (A/8429), p. 2.

37 *Twenty-second International Conference of the Red Cross, Tehran, 8–15 November 1973, Report*, Iranian Red Lion and Sun Society, Tehran, 1973, p. 12.

The issue that had dominated several international conferences thus disappeared from the Movement's agenda as soon as the United Nations General Assembly settled it in a way that was consonant with the factual situation. However, it was not long before other issues relating to the composition of the Conference arose.

### *The expulsion of the South African government delegation*

The Twenty-fifth International Conference had several important issues on its agenda, including the revision of the Statutes. However, as soon as the Conference began, these issues were overshadowed by a motion tabled on behalf of the African Group by the government of Kenya requesting the suspension of the South African government delegation because the Pretoria government's policy of apartheid was flouting the universally recognized humanitarian rules and principles, because that policy had been universally condemned, and because the South African government did not qualify to represent the majority of the South African people.<sup>38</sup> The motion was supported by most of the delegations from countries of the Developing World and by those from the Soviet bloc. It was opposed by the delegations from Western countries and by a number of National Societies on the grounds that it had no legal basis, that it involved the Conference in politics, that it violated the fundamental principle of universality, and that it was necessary to maintain a dialogue with the apartheid regime.

After three days of discussions, which had trained the spotlight on the Conference, the motion was adopted by 159 votes to 25 with 8 abstentions.<sup>39</sup> Considering that the question was political, the ICRC and forty-six National Societies refused to take part in the voting. When asked to leave the room, the Permanent Representative of South Africa threw down his badge with a dramatic gesture that was recorded for posterity by television companies the world over.

In the West, the expulsion of the South African government delegation provoked strong emotion. There were many who, while condemning apartheid, saw that decision as violating the Statutes and Fundamental Principles of the Movement. As was pointed out by the French delegate before voting took place, 'any association, organization or movement that does not respect its own Statutes is doomed'.<sup>40</sup> 'The Conference capsizes' was the headline in the *Journal de Genève* just a few hours before the fateful vote.<sup>41</sup>

38 Statement by Ambassador D. D. Afande, *Twenty-fifth International Conference of the Red Cross, Geneva, 23–31 October 1986, Report*, Swiss Red Cross, Berne, 1987, pp. 79–80.

39 *Twenty-fifth International Conference of the Red Cross, Geneva, 23–31 October 1986, Report*, pp. 97–98.

40 Statement by Minister Jean Mouton Brady, *ibid.*, p. 85.

41 'Croix-Rouge: la conférence chavire', in *Journal de Genève*, 25 October 1986, p. 16. See also Jacques Moreillon, 'Suspension of the government delegation of the Republic of South Africa at the Twenty-fifth International Conference of the Red Cross (Geneva, 1986): different perceptions of the same event', in *International Review of the Red Cross*, No. 257, March–April 1987, pp. 133–151; Yves Sandoz, 'Analyse juridique de la décision de suspendre la délégation gouvernementale sud-africaine de la XXV'

However, every cloud has a silver lining. The trauma caused by the expulsion of the South African delegation was so profound that no one wanted to take the risk of causing further divisions. The new Statutes, which were the most sensitive issue on the Conference agenda, were thus adopted by consensus in a matter of minutes and without debate.<sup>42</sup>

The Twenty-fifth Conference had decided that the following Conference would be held in 1990 in Cartagena (Colombia).<sup>43</sup> However, because of the difficulties associated with the question of the representation of Palestine, the next Conference did not meet until 1995 in Geneva. In the intervening period, the system of apartheid had been dismantled in South Africa so that the question of the representation of the South African government did not arise. During that time, however, the question of Palestinian representation had wrecked another conference.

### *The question of the participation of Palestine*

While the Twenty-fifth Conference was entangled in the debate about the suspension of the South African government delegation, the Permanent Observer of Palestine to the European Office of the United Nations passed to the Chairman of the Conference a letter in which he asked for Palestine to be allowed to take part in the conference. Switzerland, the country hosting the conference, offered the good offices of its diplomatic service to prevent the issue from further clouding an already stormy atmosphere.

At the end of discreet negotiations, Palestine abandoned its request for a debate on the question of its participation on condition that the Chairman of the Conference made a statement requesting that an appropriate solution to the question of Palestinian participation be found before the next conference. The Chairman made that statement just before the closing ceremony of the Twenty-fifth Conference,<sup>44</sup> thus avoiding a second debate on a question of participation but in a way that amounted to placing a time bomb beneath the floor of the next Conference.

In the interim, other circumstances raised the stakes. Following the Israeli offensive in Lebanon in the summer of 1982, the leadership of the Palestine Liberation Organization (PLO) had to withdraw to Tunis, from where it proclaimed a Palestinian state. On 21 June 1989, Switzerland received a message from the Permanent Observer of Palestine stating that the Executive Committee of the PLO had decided to accede to the four Geneva Conventions of 12 August 1949 and

Conférence internationale de la Croix-Rouge', in *Annuaire français de droit international*, Vol. 32, 1986, pp. 591–602.

42 *Twenty-fifth International Conference of the Red Cross*, above note 38, pp. 121–122. Paul-Émile Dentand, 'Croix-Rouge: derniers compromis', in *Journal de Genève*, 1 November 1986, p. 24.

43 Because of the insecure situation prevailing in Colombia, the Colombian Red Cross Society found itself obliged to give up organizing the Conference. The Standing Commission decided that the Conference would meet in Budapest in 1991.

44 *Twenty-fifth International Conference of the Red Cross*, above note 38, p. 145.

to the Protocols additional to those Conventions.<sup>45</sup> Considering that it was not its role as the depositary state to decide whether or not Palestine was entitled to accede to the Geneva Conventions, Switzerland passed the Palestinian note to the states parties to the Geneva Conventions without expressing an opinion. Some states parties welcomed the Palestinian communication as an act of accession, while other states refused to consider Palestine as a state party to the Geneva Conventions.

The Standing Commission, whose task it was to prepare the Twenty-sixth International Conference, was thus caught up in the imbroglio over the legal status of Palestine. While the Arab States asked for Palestine to be invited as a state party to the Geneva Conventions, and thus as a full member of the Conference, other states were no less firmly opposed to its participation. As the leadership of the PLO had supported Saddam Hussein during the Iraqi occupation of Kuwait and in the first Gulf War (1991), the United States, in particular, was opposed to Palestine having any part in the Twenty-sixth International Conference.

As an institution of the Movement, the Standing Commission, which was, in particular, in charge of preparing the list of Conference members, was unable to settle such an eminently political issue as the international status of Palestine. With the support of a group of accredited diplomats in Geneva, it tried to find a compromise solution. The Arab group finally agreed to Palestine being invited as an observer, but the United States rejected that solution. Negotiations continued until the eve of the Conference but no agreement was reached. At its meeting in Budapest, less than twenty-four hours before the start of the Conference, the Standing Commission realized that it was impossible to find common ground and that the Conference risked going ahead without the Arab group if Palestine were not invited as an observer, and without the United States and Israel if Palestine were invited, even as an observer. The Commission resolved, with heavy hearts, to postpone the Twenty-sixth Conference, although many delegations had already arrived in the Hungarian capital and others were on their way.

For the Movement, it was a bitter defeat.

## For whom the bell tolls: the death knell of the International Conference?

The day after the Budapest fiasco, a number of voices within the Movement were heard to proclaim loudly that the International Conference had died at Budapest and that it was neither possible – nor even desirable – to try to make it rise from its ashes. The stigma was even greater because it had not been possible to re-elect the Standing Commission, as it is the Conference itself that elects the members of the Standing Commission. How could a commission whose mandate was long over and that bore the scars of such a resounding defeat overcome the setback that it had just experienced?

45 D. Schindler and J. Toman, above note 4, p. 649.

The National Societies and the Federation did not seem unduly troubled by the demise of the International Conference because the Federation bodies constitute discussion forums that are more important to them. Things were different at the ICRC. Faced with the conflicts in the former Yugoslavia and the Caucasus, not to mention older conflicts, the ICRC was hard hit by the demise of a forum that gave it an opportunity to discuss humanitarian issues with the states parties to the Geneva Conventions. Once again, therefore, the ICRC took initiatives to revive the International Conference.<sup>46</sup> It managed to do so thanks to Swiss diplomatic support. As it happened, the ICRC persuaded Switzerland, acting in its capacity as the depositary state of the Geneva Conventions, to convene an ad hoc conference of the states parties to the Geneva Conventions, the ICRC, and the Federation. The National Societies would be represented by their Federation.<sup>47</sup> As the State hosting the Conference, Switzerland was in a position to decide whether an invitation should be sent to Palestine, on the assumption that no state would take the responsibility for causing the meeting to break down by questioning the decisions made by the host state.

The International Conference for the Protection of War Victims took place in Geneva from 30 August to 1 September 1993 and was a complete success. There was no debate on issues of participation. The important report that the ICRC had prepared<sup>48</sup> was well received and the conference adopted by consensus, virtually unchanged, the final declaration that the ICRC had drawn up with the help of a negotiating group.<sup>49</sup> Confidence was thus restored and, immediately after the conference, the ICRC and the Federation set to work preparing the Twenty-sixth International Conference, which was held in Geneva from 1 to 7 December

46 The ICRC had already twice saved the International Conference from death. Following the Franco-Prussian War in 1870–1871, the recriminations between the former belligerents were so violent that the Austrian Red Cross Society, which had invited the Third International Conference to meet in Vienna in 1871, preferred to postpone the Conference indefinitely. After ten years of trying in vain to get the Austrian Red Cross to honour its commitments, the ICRC resolved to convene the Third International Conference itself; the Conference was held in Geneva in September 1884. Similarly, after World War I, the French Red Cross declared that it would not take part in meetings with the German Red Cross unless the latter apologized for Germany's violations of the law of war. The German Red Cross replied that it did not have to apologize for crimes attributed to the imperial government and that violations had in any case been committed by both sides. Having spent more than two years trying to work out an agreement, the ICRC decided to convene the Tenth International Conference, which was held in Geneva from 30 March to 7 April 1921. The French Red Cross refused to take part.

47 The National Societies could not be invited because the composition of the conference would then have been identical to that of the International Conference. However, while the Swiss government, the depositary of the Geneva Conventions, may convene a meeting of the states parties to those Conventions, it has no authority to convene the International Conference unless it is mandated to do so by the Conference itself or by the Standing Commission.

48 'International Conference for the Protection of War Victims (Geneva, 30 August–1 September 1993): report on the protection of war victims, prepared by the International Committee of the Red Cross, Geneva, June 1993', in *International Review of the Red Cross*, No. 296, September–October 1993, pp. 391–445.

49 'International Conference for the Protection of War Victims (Geneva, 30 August–1 September 1993): final declaration of the Conference', in *International Review of the Red Cross*, No. 296, September–October 1993, pp. 377–381.

1995. Palestine was invited as an observer and that solution did not provoke any discussion at the conference<sup>50</sup> or at any subsequent conferences.

The issues relating to the composition of the Conference, which had taken centre stage during the cold war years, did not arise at the Twenty-sixth Conference. If there were still a few skirmishes at later conferences, they never threatened the holding of the Conference, nor prevented its work from being carried out smoothly. The Conference was thus able to address issues relating to humanitarian law and humanitarian action, issues to which we will now turn.

## **Issues relating to humanitarian law and humanitarian action**

It would, of course, be impossible to list in just a few pages all the issues relating to the different matters of substance tackled at the thirty International Conferences of the Red Cross and Red Crescent that have taken place since 1867. At this juncture, a selection is made of what might be considered to be the most important issues, although the choice is admittedly arbitrary and may be legitimately criticized.

For the purpose of clarity, these issues will be grouped around the following five main topics: the development of international humanitarian law; the mandate of the International Red Cross and Red Crescent Movement; the organization and principles of humanitarian action; the relations between the components of the Movement and the states; and the implementation of international humanitarian law.

### **The development of international humanitarian law**

If history were to record just one contribution that the International Conference of the Red Cross and Red Crescent has made to human progress, it is no doubt the impetus given to the development of international humanitarian law that must be singled out. Indeed, each of the stages in that development benefited from the stance adopted by the Conference.

It was, for instance, the three recommendations adopted by the constituent Conference of October 1863 for the benefit of governments that paved the way for the convening of a Diplomatic Conference and for the adoption of the initial Geneva Convention of 22 August 1864. Similarly, the Seventeenth International Conference, which was held in Stockholm in August 1948, did not merely examine each article of and approve the draft revised or new Geneva conventions drawn up by the ICRC with the assistance of government experts to take account of the lessons of World War II; it also declared that ‘these drafts, in particular the new convention on the protection of civilians, correspond to the fundamental aspirations of the peoples of the world’ and recommended ‘that all governments meet at

50 *Twenty-sixth International Conference of the Red Cross, Geneva, 1–7 December 1995, Report*, ICRC and Federation, Geneva, 1996, p. 40.



the earliest possible moment in Diplomatic Conference for the adoption and signature of the texts now approved'.<sup>51</sup> Likewise, the Twenty-second International Conference gave its support to the draft Protocols additional to the Geneva Conventions.<sup>52</sup>

Indeed, every stage in the development of international humanitarian law has been supported by the positions adopted by the Conference, which has always given its backing to the projects that the ICRC had submitted to it – with one important exception.

Following the widespread bombing of cities during World War II, culminating in the destruction of Hiroshima and Nagasaki, the ICRC initiated consultations regarding the protection of the civilian population against the effects of hostilities. With the help of highly qualified experts, the ICRC prepared draft rules to limit the dangers to which the civilian population was exposed in wartime. These were in fact a draft convention to restore the principle of the immunity of the civilian population from attack, define military objectives that are the only legitimate targets for attack, prescribe the precautions to be taken in attack, and prohibit target-area bombing and

weapons whose harmful effects – resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents – could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.<sup>53</sup>

If accepted, this provision would have amounted to the prohibition of any use of nuclear weapons, at least in land warfare.

The *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War* were submitted to the Nineteenth International Conference. The most controversial point was, of course, the prohibition of nuclear weapons. The delegates from the socialist countries complained that the ICRC draft was too vague and demanded that nuclear and thermonuclear weapons should be banned outright. The delegates of the Western countries condemned prohibition as unrealistic unless it were accompanied by general disarmament and an efficient system of inspection. The Conference finally requested the ICRC to transmit the Draft Rules to the governments for their consideration.<sup>54</sup> This was no more than window-dressing. In fact, the proposal was scuppered.

51 *Seventeenth International Conference of the Red Cross, Stockholm, 20–30 August 1948, Report*, Swedish Red Cross Society, Stockholm, 1948, p. 93, Resolution XIX.

52 *Twenty-second International Conference of the Red Cross, Tehran, 8–15 November 1973, Report*, p. 122, Resolution XIII.

53 *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, 2nd edition, ICRC, Geneva, April 1958, p. 12; D. Schindler and J. Toman, above note 4, p. 342.

54 *Nineteenth International Conference of the Red Cross*, above note 26, pp. 153–154, Resolution XIII; *Nineteenth International Conference of the Red Cross, New Delhi, October–November 1957, Final Record Concerning the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, ICRC, Geneva, April 1958, cyclostyled.

In recent years, the International Conference has expressed support for the prohibition of antipersonnel landmines<sup>55</sup> and blinding laser weapons,<sup>56</sup> as well as for the Third Protocol additional to the Geneva Conventions on the emblem.<sup>57</sup>

## The mandate of the International Red Cross and Red Crescent Movement

The constituent Conference of October 1863, which gave birth to the Red Cross, only presented the duties and the attributions of the future National Societies in very general terms and hardly mentioned the duties and attributions of the ICRC, which was expected to be dissolved soon after. One of the first tasks of the International Conferences was therefore to define the mandate of the National Societies and that of the ICRC, and it was to become one of the main concerns of the first Conferences.

### *The role of the National Societies in peacetime*

The first issue raised was that of the role of the National Societies in peacetime. The National Societies had actually been set up in order to provide assistance for wounded soldiers. From that point of view, their main task in peacetime was envisaged as being to prepare to fulfil their responsibilities in wartime and, in particular, to recruit and train ‘zealous volunteers’, as Henry Dunant had called them. However, when preparing for the Second International Conference, the National Societies stressed the fact that they could not recruit, train, and, in particular, maintain the motivation of their volunteers solely with a view to being ready to act in case of a war that no one really wanted to take place. The National Societies therefore wanted to develop peacetime activities, especially in the area of training hospital staff, caring for the sick, and fighting epidemics and other disasters that may occur in peacetime.

As the founder of the organization, the Geneva Committee had set itself up as the defender of full respect for the aims for which the Red Cross had been established. It saw peacetime activities as endangering the initial objectives: absorbed by such activities, the National Societies would quickly forget their primary mission of providing assistance for wounded soldiers on the battlefield.

The disagreement led to an initial debate on the role of the National Societies, a debate which the Geneva Committee lost. The Second International Conference adopted a resolution through which it encouraged the National

55 *Twenty-sixth International Conference of the Red Cross*, above note 50, p. 126, Resolution II, G.

56 *Ibid.*, pp. 126–127, Resolution II, H.

57 *Twenty-eighth International Conference of the Red Cross and Red Crescent, Geneva, 2003, Report*, ICRC and Federation, Geneva, 2004, pp. 30–31, Resolution III. On the contribution of the International Conference to the development of international humanitarian law, see also Philippe Abplanalp, ‘The International Conferences of the Red Cross as a factor for the development of international humanitarian law and the cohesion of the International Red Cross and Red Crescent Movement’, in *International Review of the Red Cross*, No. 308, October 1995, pp. 520–549.

Societies to develop their peacetime activities, particularly efforts to combat epidemics and other disasters, by developing their local sections, recruiting volunteers, and training male and female nurses.<sup>58</sup>

### *The composition and tasks of the ICRC*

Although the Geneva Committee initially thought that its mission would come to an end with the adoption of a treaty protecting wounded soldiers and the medical services on the field of battle, it soon became evident that this Committee had to be preserved in order to look after the common interests of the Movement and facilitate the exchange of communications between the new National Societies.

It was therefore no less urgent to define the composition and role of the Geneva Committee, and several International Conferences debated that question. Whereas the Committee itself had for a number of years envisaged expanding to include a representative of each National Society, it completely reversed its position in that regard at the end of the Franco-Prussian War of 1870–1871. Whereas everyone imagined that, in the event of war, the National Societies would stay above the fray, the young National Societies were seen blowing the most vindictive propaganda trumpets and tearing each other apart. The ICRC was not going to forget that bitter lesson easily, particularly as it was to be repeated to a lesser or greater degree in subsequent conflicts. At the same time, the Franco-Prussian war had revealed the importance of the role of a neutral intermediary, played by the Geneva Committee, in case of war, in order to facilitate the exchange of communications not only between the National Societies of the warring countries but also between the governments themselves.<sup>59</sup>

The question of the composition and attributions of the ICRC was to occupy the first four International Conferences. The first two discussed this issue without reaching any conclusions as to the composition, but conferred on it a task that was to expand considerably with the outbreak of the Franco-Prussian war – that of establishing in wartime a correspondence and information bureau to facilitate the exchange of messages and the forwarding of relief.<sup>60</sup>

The Third and Fourth International Conferences, in Geneva in 1884 and in Karlsruhe in 1887, were faced with two resolutely opposed plans. On the one hand, the Central Committee of the Russian Red Cross had submitted a proposal for the reorganization of the Red Cross that set out to regulate the relationship

58 *Compte rendu des Travaux de la Conférence internationale tenue à Berlin*, above note 14, pp. 3–5, 7–9, 15–18, 27–36, 153–208, 211–215, 251–253; P. Boissier, above note 3, pp. 229–230, 233–234. The representatives of the ICRC did not take part in the debate on that issue at the Berlin Conference, probably considering that it needed to be settled by the National Societies themselves. However, in the preliminary correspondence, the ICRC had indicated its opposition to such an extension of the National Societies' field of activity.

59 On the development of the activities of the International Committee during the Franco-Prussian war of 1870–1871, see P. Boissier, above note 3, pp. 241–269; F. Bugnion, *International Committee of the Red Cross*, above note 3, pp. 32–37.

60 *Compte rendu des Travaux de la Conférence internationale tenue à Berlin*, above note 14, p. 254, Resolution IV/3.

between the Red Cross institutions on the basis of a treaty and to transform the Geneva Committee into a genuine international organization with a representative of each National Society. The Geneva Committee would thus have had authority over the National Societies. In wartime, its mission would have been to prevent violations of the Geneva Convention by sending neutral delegates to the scene of hostilities to monitor the way in which the belligerents were fulfilling their obligations.<sup>61</sup> On the other hand, the ICRC asked for its composition and attributions to be maintained as they had developed in response to practical experience.<sup>62</sup>

The discussions were particularly lively. What was at stake in the Russian draft was not merely the composition of the ICRC but also the independence that had been enjoyed by the National Societies since the work began. And that is what caused the proposal to fail. Ultimately, the Karlsruhe Conference adopted a resolution that confirmed the status quo:

In the general interests of the Red Cross, it is expedient to maintain the International Committee, which has its headquarters in Geneva, in the form it has had since the birth of the movement.

As it has done previously, it will continue to:

- a) work to maintain and develop relations between the Central Committees;
- b) notify the constitution of new National Societies, after ascertaining the basis on which they are founded;
- c) publish the *Bulletin international* ...;
- d) set up, in wartime, one or several international information agencies through whose good offices the National Societies can send relief, in money or in kind, for the benefit of the wounded of belligerent armies;
- e) offer, in wartime, if it is required, its mediation or that of its agencies to the National Societies of belligerent countries for the forwarding of their correspondence.<sup>63</sup>

Hence, more than twenty years after its establishment, the ICRC had finally been defined and its composition and attributions maintained.

### *The protection of prisoners of war*

The International Conference was to re-open the debate on the mandate of the Red Cross following the First International Peace Conference, which was held in

61 *Troisième Conférence internationale des Sociétés de la Croix-Rouge tenue à Genève du 1er au 6 septembre 1884, Compte rendu*, ICRC, Geneva, 1885, pp. 61–66, 69, 84–85, 86; *Du rôle du Comité international et des relations des Comités centraux de la Croix-Rouge*, Report submitted by the International Committee to the International Conference of Red Cross Societies in Karlsruhe in 1887, ICRC, Geneva, 1887, pp. 9–14; *Quatrième Conférence internationale des Sociétés de la Croix-Rouge tenue à Karlsruhe du 22 au 27 septembre 1887, Compte rendu*, Central Committee of the German Red Cross Associations, Berlin, 1887, pp. 92–93, 95–97, 101.

62 *Troisième Conférence internationale des Sociétés de la Croix-Rouge*, above note 61, pp. 74–83; *Du rôle du Comité international*, above note 61, pp. 22–24; *Quatrième Conférence internationale des Sociétés de la Croix-Rouge*, above note 61, pp. 19–20, 90, 93–94.

63 *Ibid.*, p. 90.

The Hague from 18 May to 29 July 1899. By a strange inconsistency, the Hague Conference had entrusted tasks to relief societies for prisoners of war, which did not exist.<sup>64</sup>

Were relief societies for prisoners of war to be set up in response to the decisions of The Hague Conference? That was bound to fail. The public would see them as symbolizing a defeatist attitude. Inactive during peacetime, those societies would lapse into lethargy. The tasks envisaged by The Hague Conference therefore had to be entrusted to societies that already existed and, of these, only the Red Cross was in a position to mobilize the resources that would be needed to provide assistance for prisoners of war in the event of prolonged fighting. However, was that not leading the Red Cross away from its objectives? Until then, the Red Cross had only dealt – officially at least – with the sick and wounded.

That debate was to carry on through three International Conferences.<sup>65</sup> Finally, the Ninth International Conference, held in Washington in May 1912, adopted a resolution according to which the Red Cross decided to provide assistance for prisoners of war as specified by The Hague Convention and which made the ICRC the linchpin of assistance for prisoners of war. Resolution VI of the Washington Conference made the following provision:

The Ninth International Red Cross Conference, considering that Red Cross Societies are naturally called upon to assist prisoners of war ..., recommends that these Societies should organize, in peacetime, 'Special Commissions' which, in wartime, would collect and forward to the International Committee of Geneva relief for distribution to servicemen in captivity.

The International Committee, through the intermediary of neutral delegates accredited to the Governments concerned, shall ensure the distribution of relief to individual prisoners and shall distribute other gifts between the different prisoner of war depots, taking into account the donors' wishes, the needs of the prisoners and directions of the military authorities.

...

The Special Prisoner of War Commissions shall get into touch with the International Committee of Geneva ...<sup>66</sup>

Two years later, the outbreak of World War I was to reveal the importance of that resolution.

64 Regulations respecting the Laws and Customs of War on Land annexed to The Hague Convention (II) of 20 July 1899, Art. 15. On the origin of that provision, see F. Bugnion, in *International Committee of the Red Cross*, above note 3, pp. 69–71; Roger Durand, 'Les prisonniers de guerre aux temps héroïques de la Croix-Rouge', in R. Durand, above note 3, pp. 225–297.

65 The Seventh, Eighth, and Ninth International Conferences, held in St Petersburg in 1902, in London in 1907, and in Washington in 1912.

66 Resolution VI, *Neuvième Conférence internationale de la Croix-Rouge tenue à Washington du 7 au 17 mai 1912, Compte rendu*, The American Red Cross, Washington, 1912, p. 318.

## *The Red Cross and civil war*

The law of war was born of confrontation on the battlefield between sovereigns with equal rights. When the Red Cross was founded, it was quite natural for minds to be focused on international armed conflicts. Similarly, the original Geneva Convention of 22 August 1864 was legally binding only on the contracting parties: that is, between states.

However, with the 1876 insurrection in Herzegovina, the Red Cross found itself faced with the question of its scope for action in case of civil war.<sup>67</sup> Yet it was not until the Ninth International Conference that the question of Red Cross action in case of civil war was submitted to the Conference.<sup>68</sup> The debate came to a sudden end. General Yermolov, the Russian government representative, vehemently opposed any discussion of that question, with the result that the Conference took no decision.<sup>69</sup>

The question was raised again at the Tenth International Conference, held in Geneva from 30 March to 7 April 1921. In the meantime, the ICRC and several National Societies had taken action during the civil war in Russia that followed the October Revolution (1918–1921).<sup>70</sup> In fact, the Red Cross had been called upon to take action in the event of civil war by the very parties who, in Washington, had been the most violently against it. Moreover, several National Societies had taken action in their own countries in the disturbances that followed World War I.<sup>71</sup> Therefore, although the matter featured on the agenda of the Tenth Conference, it was not in order to discuss the principle of Red Cross intervention in case of civil war – which had already been established – but to determine the form to be taken by that intervention. At the end of a lengthy debate, the Conference adopted an important resolution in which the Red Cross affirmed ‘its right and duty of affording relief in case of civil war and social and revolutionary disturbances’; it asked for the principles of the Geneva and Hague Conventions to be respected by analogy in case of civil war and made the ICRC the linchpin of Red Cross action in such situations.<sup>72</sup>

67 ‘L’insurrection dans l’Herzégovine’, in *Bulletin international des Sociétés de la Croix-Rouge*, No. 25, January 1876, pp. 1–4; ‘Une mission au Monténégro: rapport présenté au Comité international de la Croix-Rouge par ses délégués’, in *Bulletin international des Sociétés de la Croix-Rouge*, No. 26, April 1876, pp. 55–70.

68 This occurred on the initiative of the American Red Cross, which had submitted to the Conference a report on the question of Red Cross intervention in case of civil war. *Neuvième Conférence internationale de la Croix-Rouge tenue à Washington du 7 au 17 mai 1912, Compte rendu*, pp. 45–48, 200–203.

69 *Ibid.*, p. 45.

70 On the action taken by the ICRC during the Russian civil war, see F. Bugnion, in *International Committee of the Red Cross*, above note 3, pp. 250–258.

71 This was, in particular, the case of the German Red Cross, the Finnish Red Cross, the Polish Red Cross, the Portuguese Red Cross, the Ukrainian Red Cross, and the Turkish Red Crescent. Each of the National Societies had submitted to the Tenth International Conference a report on the role of the Red Cross in case of civil war.

72 *Dixième Conférence internationale de la Croix-Rouge tenue à Genève du 30 mars au 7 avril 1921, Compte rendu*, ICRC, Geneva, 1921, pp. 217–218, Resolution XIV.

The importance of Resolution XIV of the Tenth International Conference should not be underestimated. It was on that resolution that the ICRC was to base the considerable work that it managed to carry out throughout the Spanish civil war (1936–1939).<sup>73</sup> Moreover, that resolution paved the way for the adoption of Article 3 common to the four Geneva Conventions of 1949, a veritable ‘convention in miniature’<sup>74</sup> that establishes the minimum legal standards applicable to non-international armed conflicts and authorizes the ICRC to offer its services to the parties to such conflicts.

### *The Red Cross and peace*

The Red Cross is a humanitarian organization; it is not a pacifist organization. However, from the very beginning, the Red Cross was keen to make its rejection of war clear, so that its work to mitigate the suffering caused by war could not be perceived as legitimizing war.<sup>75</sup> For one hundred years, such stances hardly went further than platonic declarations. The Red Cross considered that it could not take any initiatives to prevent war or to put an end to a conflict since these were obviously political issues. Its view was that, if it ventured into that territory, it would betray its fundamental principles and jeopardize its opportunities for action if war were to break out despite its initiatives.

Matters took a rather different turn at the time of the Cuban missile crisis in October 1962, which took humanity to the brink of a nuclear war between the United States and the Soviet Union. When the tension between Washington and Moscow was at its peak, the President of the ICRC took advantage of the fact that the executive director of the ICRC was in New York to inform the United Nations that, should the need arise, the ICRC was willing to support the efforts of the Secretary-General, who was trying to find a peaceful way out of the crisis.<sup>76</sup>

That initiative was not long in getting under way. On the night of 29–30 October 1962, the United Nations Secretary-General asked the ICRC to provide support with regard to an inspection of the Soviet ships en route to Cuba to ascertain that they were not carrying nuclear weapons. That request left the ICRC facing an extremely difficult choice. On the one hand, it placed the ICRC at the heart of the confrontation between Moscow and Washington. On the other hand,

73 On the action of the ICRC during the Spanish civil war, see F. Bugnion, in *International Committee of the Red Cross*, above note 3, pp. 266–283; Pierre Marqués, *La Croix-Rouge pendant la Guerre d’Espagne (1936–1939): les missionnaires de l’humanitaire*, L’Harmattan, Paris and Montreal, 2000.

74 This expression was coined by the Soviet delegation at the 1949 Diplomatic Conference.

75 On this subject, see the introductory speech given by Gustave Moynier at the constituent Conference of October 1863, *Compte rendu de la Conférence internationale réunie à Genève*, above note 4, pp. 8–9.

76 ‘Interoffice memorandum’ from Martin Hill, Assistant Secretary-General, to C. V. Narasimhan, Chef de Cabinet of the Secretary-General, 26 October 1962, reproduced in Chadwyck-Healey Inc. and The National Security Archives (eds.), *Documents on the Cuban Missile Crisis 1962*, Microfiche Collection, Chadwyck-Healey, Alexandria, VA, 1990, document 1392, quoted by Thomas Fischer, ‘The ICRC and the 1962 Cuban missile crisis’, in *International Review of the Red Cross*, No. 842, June 2001, p. 294. It should be pointed out that the only record of the ICRC initiative is to be found in this document. Neither President Léopold Boissier nor Roger Gallopin, the Executive Director, reported on the ICRC’s contact with the United Nations.

however, everything obviously had to be done to prevent a nuclear war. Ultimately, the ICRC decided that it could not stand on the sidelines when world peace and the very future of humanity were at risk. It therefore decided to agree in principle to follow up the Secretary-General's request and to send its former President to New York to clarify the kind of action to be taken.<sup>77</sup>

That acceptance in principle was met with impassioned responses from the general public and, even more, within the National Societies – just as strong as the emotions released by the unprecedented crisis. The reactions ranged from hearty approval to downright condemnation. Long-time Red Cross volunteers returned their membership cards as a formal sign of protest. Once the crisis was over, the ICRC therefore deemed it necessary to submit the initiatives that it had taken to the Council of Delegates, meeting in Geneva in 1963,<sup>78</sup> and then to the Twentieth International Conference, held in Vienna in 1965.

As stated in its Resolution X, the Twentieth Conference encouraged

the International Committee of the Red Cross to undertake, in constant liaison with the United Nations and within the framework of its humanitarian mission, every effort likely to contribute to the prevention or settlement of possible armed conflicts, and to be associated, in agreement with the States concerned, with any appropriate measures to this end.<sup>79</sup>

With that resolution, the Conference gave its approval to the action of the ICRC during the Cuban missile crisis and encouraged it to take similar initiatives should world peace again be threatened. It was nonetheless understood that that resolution was not to lead to a fundamental redirection of the work of the ICRC or the Red Cross as a whole, whose priority was to remain humanitarian. Having been adopted in reference to exceptional circumstances, it was only to be enforced in exceptional circumstances.

In fact, as far as I am aware, the ICRC has only invoked Resolution X of the Twentieth Conference on two occasions – at the time of the Israeli invasion of Lebanon in the summer of 1982 and at the time of the occupation of Kuwait by Iraq in the summer of 1990.<sup>80</sup> As the President of the ICRC, Léopold Boissier, observed in

77 ICRC Archives, minutes of the plenary session held on 31 October and 1 November 1962; *Annual Report 1962*, pp. 31–35. See also T. Fischer, above note 76, pp. 287–309; Françoise Perret and François Bugnion, *De Budapest à Saïgon: histoire du Comité international de la Croix-Rouge, Vol. IV, 1956–1965*, Georg Editor and ICRC, Geneva, December 2009, pp. 473–502.

78 The Council of Delegates brings together the representatives of the Red Cross and Red Crescent National Societies, of the ICRC, and of the Federation. The Standing Commission had decided to hold the Council of Delegates in Geneva in 1963, instead of the International Conference that it had had to give up convening because of the divergences on the question of the representation of China. On the origins, the role, and the attributions of the Council of Delegates, see Elzbieta Mikos-Skuza, 'The Council of Delegates', in Lijnzaad, van Sambeek, and Tahzib-Lie, above note 12, pp. 123–136.

79 *Twentieth International Conference of the Red Cross*, above note 33, pp. 100–101, Resolution X.

80 ICRC Archives, Minutes of the Executive Council of the ICRC, 1 July 1982, 11 and 12 August 1982, 19 August 1982, 26 August 1982; Minutes of the ICRC Assembly, 19 August and 1 September 1982; *International Review of the Red Cross*, No. 230, September–October 1982, pp. 295–296; *Annual Report 1982*, p. 58; *Keesing's Contemporary Archives*, 1983, pp. 31914–31920; F. Bugnion, *International*



his report on the Council of Delegates, which met in Geneva in September 1963 on the occasion of the hundredth anniversary of the foundation of the Red Cross: 'Peace, which has always been the key issue, never fails at congresses that set out to strengthen it to unleash discussions which are both troublesome and hazardous'.<sup>81</sup>

In fact, the question of peace was one of the main bones of contention at the International Conferences that were held during the cold war. The Soviet Union and its allies wanted the Conference to denounce the aggression that, according to Marxist–Leninist doctrine, could only be caused by capitalist states, whereas the governments and the National Societies from Western countries were absolutely unwilling to go further than to condemn war in general terms, since to denounce the aggression and to name the aggressor were political issues that fell within the remit of the United Nations. Ultimately, it proved possible to avoid splitting the Movement – thanks, in particular, to the systematic application of the rule of consensus for every resolution relative to peace. Indeed, what would have been the credibility of a resolution on peace adopted following a vote that divided the Conference?

Of course, the International Conference adopted many other resolutions that were intended to extend the mandate of the Movement – for example, concerning assistance for refugees<sup>82</sup> and displaced persons.<sup>83</sup> As this article cannot analyse them all, I have chosen to focus on those discussions that entailed major changes of direction by the Movement.

Finally, it should be noted that, while the International Conference has adopted a good number of resolutions regarding the mandate of the National Societies or of the ICRC, it has made hardly any mention of the mandate of the Federation. This is both because the ICRC and the Federation occupy different positions on the chessboard of international relations and because the mandate of the Federation stems from the decisions taken by the Federation's bodies, rather than from the resolutions of the International Conferences.

## The organization and principles of humanitarian action

The matter of how humanitarian action is organized has been a feature of virtually every International Conference. As it would be impossible to summarize each of

*Committee of the Red Cross*, above note 3, pp. 490–491. ICRC Archives, file 232 (214–00), Note 241 from the Baghdad delegation and annexes, 12 September 1990; *Annual Report 1990*, pp. 78–79; Christophe Girod, *Tempête sur le désert: le Comité international de la Croix-Rouge et la guerre du Golfe, 1990–1991*, Établissements Émile Bruylant, Brussels, and L. G. D. J., Paris, 1995, pp. 64–65.

81 'La paix, qui est bien le problème crucial de tous les temps, déchaîne inmanquablement dans les congrès qui prétendent lui trouver quelque affermissement des débats aussi pénibles que dangereux.' Léopold Boissier, Statement on certain aspects of the centenary of the Red Cross, presented to the ICRC in its session on 3 October 1963, document D 841, appended to the minutes of the plenary session on 3 October 1963, p. 2.

82 Resolution XXI of the Twenty-fourth International Conference (Manila, 1981) and Resolution XVII of the Twenty-fifth International Conference.

83 Resolution IV, A, of the Twenty-sixth International Conference.

the discussions here, I have chosen to focus on the two most important issues for the Movement and the States: the Statutes of the International Red Cross and Red Crescent Movement; and the Fundamental Principles of the Red Cross and Red Crescent.

### *The Statutes of the International Red Cross and Red Crescent Movement*

For more than half a century, the Red Cross had a relatively loose structure shaped by the resolutions of the constituent Conference of October 1863, which gave birth to the Red Cross, and a few resolutions that were intended to define the tasks of the National Societies and those of the ICRC. Each International Conference adopted its own rules of procedure, which were based on those of the preceding conferences.

The creation of the League of Red Cross Societies at the end of World War I, outside the statutory framework of the International Conference, obliged the Movement to equip itself with statutes.<sup>84</sup> As pressure to merge was being put on the ICRC and the League from all sides, both institutions felt under threat. In those conditions, it is not surprising that the relations between the two rapidly became hostile.

A considerable share of the work of three International Conferences<sup>85</sup> and a special Conference held in Berne in 1926<sup>86</sup> were devoted to the issue of establishing statutes. It was all in vain. All plans to reorganize the international Red Cross submitted to the Tenth, Eleventh, and Twelfth International Conferences failed to find approval. The same happened at the Conference in Berne.

Whereas the National Societies that had founded the League were keen to preserve a federal body within which they were duly represented, the ICRC wished to maintain the independence that it considered vital to the continuation of its mission. Despite its admiration for the League of Nations, it remained convinced that war was not a scourge that could be eradicated with a stroke of the pen and that it should preserve its position as a neutral intermediary, the importance of which had been highlighted by World War I.

This is not the place to reflect on the arduous negotiations to re-establish Red Cross unity, which continued for more than eight years.<sup>87</sup> Having considered in vain a large number of merger plans, the final conclusion was that the

84 On the creation of the League of Red Cross Societies, see Daphne A. Reid and Patrick F. Gilbo, *Beyond Conflict: The International Federation of Red Cross and Red Crescent Societies, 1919–1994*, Federation, Geneva, 1997, pp. 26–41.

85 The Tenth, Eleventh, and Twelfth International Conferences, held in Geneva in 1921, 1923, and 1925.

86 *Conférence internationale spéciale de la Croix-Rouge tenue à Berne du 16 au 18 novembre 1926, Compte rendu*, Swiss Red Cross, Berne (s.d.).

87 For the history of those negotiations, reference could be made, in particular, to the following works: André Durand, *History of the International Committee of the Red Cross: From Sarajevo to Hiroshima*, Henry Dunant Institute, Geneva, 1978, pp. 139–194; D. A. Reid and P. F. Gilbo, above note 84, pp. 52–54 and 79–86.

complementary nature of the ICRC and the League should be maintained. To find a way out of the deadlock, the ICRC and the League appointed two negotiators who had taken no part in the previous discussions: Judge Max Huber, a recently elected member of the ICRC, and Colonel Paul Draudt, Vice-President of the League. In a few months, they succeeded in preparing a draft agreement that maintained both the ICRC and the League in terms of their composition and attributions, but incorporated them into a broader overall structure, the International Red Cross.<sup>88</sup> The Thirteenth International Conference, held in The Hague in October 1928, adopted unanimously with five abstentions the draft Statutes of the International Red Cross as prepared by Huber and Draudt.<sup>89</sup> For both the ICRC and for the League, these Statutes, finally adopted after eight years of fruitless negotiations and clashes, truly constituted a peace treaty.

Despite the tremendous operations that it conducted during World War II and despite the Nobel Peace Prize that was awarded to it for the second time in 1944, the ICRC found itself in the dock following the capitulation of Germany and Japan. It was held responsible for the fate of Soviet prisoners of war in German hands, nearly three million of whom had died in captivity; it was accused of having done nothing to protect the partisans and resistance fighters held by the Axis powers; and, finally, it was criticized for having remained silent about the concentration camps and the genocide.<sup>90</sup>

The Soviet Union and its allies led the charge and called for a revision of the Statutes, which would make it possible to do away with the ICRC and to transfer all its attributions to the League. Faced with that situation, the ICRC's strategy was to channel all its efforts into the process of revising the Geneva Conventions – for the ICRC, that revision was even more urgent because it was convinced that the world was heading rapidly for a third world war – and, in the meantime, to block any renegotiation of the Statutes.<sup>91</sup>

This strategy worked. Whereas the Seventeenth International Conference, held in Stockholm in August 1948, devoted most of its work to analysing the draft conventions prepared by the ICRC, it did not tackle the question of the revision of the Statutes. That question was submitted to the Eighteenth Conference, held in Toronto in 1952. In the meantime, the parameters had completely changed. First, the new Geneva Conventions had been adopted, confirming the position of the ICRC, to which reference is made in numerous provisions. Second, the ICRC had shown the usefulness of its role as a neutral intermediary in the field in several

88 Colonel Draudt and Max Huber, 'Rapport à la XIII<sup>e</sup> Conférence internationale de la Croix-Rouge sur les statuts de la Croix-Rouge internationale', in *Revue internationale de la Croix-Rouge*, No. 119, November 1928, pp. 991–1010.

89 *Treizième Conférence internationale de la Croix-Rouge tenue à La Haye du 23 au 27 octobre 1928, Compte rendu*, Imprimerie nationale, The Hague, 1929, pp. 12–19, 48–75, 85, 101–114, 117–118, 182–186.

90 C. Rey-Schyr, above note 25, pp. 42–48.

91 *Ibid.*, pp. 51–134; Dominique-D. Junod, *The Imperiled Red Cross and the Palestine–Eretz-Yisrael Conflict 1945–1952: The Influence of Institutional Concerns on a Humanitarian Operation*, Kegan Paul International, London and New York, 1996, *passim*.

conflicts, particularly during the Arab–Israeli conflict of 1948–1949.<sup>92</sup> Lastly, the cold war fronts had hardened. The West no longer had any reason to sacrifice the ICRC on the altar of its relations with Moscow.

The draft new Statutes, prepared by a joint commission of the ICRC and the League under the auspices of the Standing Commission,<sup>93</sup> triggered stormy debates at the Toronto Conference, where the atmosphere was in any case clouded by the question of the representation of China. The USSR and its allies rejected all the provisions relating to the ‘so-called International Committee’. Ultimately, however, the new Statutes were adopted by 70 votes to 17.<sup>94</sup>

Things were quite different at the Twenty-fifth International Conference. As that Conference was emerging from three days of traumatic discussions leading to the expulsion of the South African government delegation, no one wanted to take the responsibility for causing a new split by criticizing the new draft statutes prepared by a joint commission of the ICRC and the League. It was therefore by consensus and virtually without debate that the Twenty-fifth Conference adopted the Statutes that are in force today.<sup>95</sup>

### *The Fundamental Principles of the Red Cross and Red Crescent*

From the very beginning, the Red Cross was aware of following a number of basic principles that were dictated by the institution’s aims and by the nature of the activities that it proposed to carry out. To a large extent, these principles were expressed in the Resolutions and Recommendations of the constituent Conference of October 1863 and in Article 6 of the Geneva Convention of 22 August 1864, which states that ‘Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for.’

From then on, there were countless references to the fundamental principles of the Red Cross; in 1869, the Berlin Conference asked the ICRC to ensure that the principles were upheld and disseminated.<sup>96</sup> In order to be accepted as members of the movement, new National Societies had to adhere to the fundamental principles,<sup>97</sup> demonstrating that the existence of these principles was accepted and their authority recognized.

92 On the action of the ICRC during the 1948–1949 Arab–Israeli conflict and on the way in which that action became part of the ICRC’s survival strategy, see, in particular, D.-D. Junod, above note 91.

93 *Statutes of the International Red Cross and Rules of Procedure of the International Conference of the Red Cross: Proposed Revision*, submitted by the Standing Commission of the International Conference of the Red Cross to the XVIIIth International Red Cross Conference (Document A 18), Geneva, 7 December 1951, cyclostyled.

94 *Eighteenth International Conference of the Red Cross*, above note 25, pp. 33–39, 96–101, 161–168.

95 Resolution XXXI, *Twenty-fifth International Conference of the Red Cross*, above note 38, pp. 121–122, 166.

96 *Compte rendu des Travaux de la Conférence internationale tenue à Berlin*, above note 14, pp. 80–84, 264.

97 *Organisation générale et programme de la Croix-Rouge (D’après les décisions prises dans les Conférences internationales par les Fondateurs et les Représentants de cette Institution)*, 2nd edition, ICRC, Geneva, 1898, pp. 25–26.

However, for almost a century little effort was made to establish a coherent and universally accepted definition of those principles. In 1874, Gustave Moynier, President of the ICRC, made a first attempt to formulate the principles of the Red Cross. Noting that the Red Cross Societies were linked by ‘the pledge that they had made to conduct themselves according to certain common rules’, Moynier distinguished four main principles – centralization, preparedness, mutuality, and solidarity.<sup>98</sup>

When revising its own statutes after World War I, the ICRC made reference to four ‘fundamental and uniform principles that are at the basis of the Red Cross institution, namely: impartiality, political, religious, and economic independence, the universality of the Red Cross and the equality of its members’.<sup>99</sup> That list could not, however, be considered exhaustive. So even though the existence and binding nature of the fundamental principles was universally accepted, they remained largely undefined. The Red Cross unceasingly claimed to adhere to fundamental norms but appeared unwilling – or unable – to specify their content. That shortcoming was to have disastrous consequences in the inter-war period and, even more so, during World War II. The most serious instances of disregard for those norms were observed at certain National Societies, in particular the German Red Cross, and the Movement was unwilling and unable to respond to them.<sup>100</sup>

The League’s Board of Governors<sup>101</sup> took up the question after World War II. To the four existing principles they added thirteen others, in which the aims of the Red Cross, its fundamental principles, and some rules of procedure were jumbled together.<sup>102</sup> The Toronto Conference endorsed this new list, while stressing that the four original principles remained the ‘cornerstones of the Red Cross’, a remark that only added to the confusion.<sup>103</sup>

Since the process of formulating the fundamental principles of the Red Cross had been started, universally acceptable wording needed to be found. The Standing Commission decided to set up a joint ICRC–League commission for the purpose. On the basis of the resolutions of past Conferences and particularly of the contribution made by Max Huber and Jean Pictet, who had advanced the issue

98 Gustave Moynier, ‘Ce que c’est que la Croix-Rouge’, in *Bulletin international des Sociétés de la Croix-Rouge*, No. 21, January 1875, pp. 1–8; André Durand, ‘Quelques remarques sur l’élaboration des principes de la Croix-Rouge chez Gustave Moynier’, in Christophe Swinarski (ed.), *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l’honneur de Jean Pictet*, ICRC, Geneva, and Martinus Nijhoff, The Hague, 1984, pp. 861–873.

99 Statutes of the International Committee of the Red Cross, 10 March 1921, Art. 3, in *Revue internationale de la Croix-Rouge*, No. 28, April 1921, pp. 379–380.

100 On the situation of the German Red Cross during World War II, see Dieter Riesenberger, *Das Deutsche Rote Kreuz: Eine Geschichte 1864–1990*, Ferdinand Schöningh, Paderborn, 2002, esp. pp. 269–371; Birgitt Morgenbrod and Stephanie Merkenich, *Das Deutsche Rote Kreuz unter der NS-Diktatur, 1933–1945*, Ferdinand Schöningh, Paderborn, 2008.

101 Now the General Assembly of the International Federation of Red Cross and Red Crescent Societies.

102 Board of Governors, 19th session, Oxford, 1946, Resolution XII, amended by Resolution VII of the 20th session, Stockholm 1948, *Handbook*, above note 4, pp. 721–724.

103 *Eighteenth International Conference of the Red Cross*, above note 25, pp. 112–113 and 148, Resolution X.

considerably,<sup>104</sup> the joint commission prepared a draft of seven articles that was sent to all National Societies and approved unanimously by the Council of Delegates, meeting in Prague in 1961.<sup>105</sup> The draft was then submitted to the Twentieth International Conference, where it was adopted unanimously under the title ‘Proclamation of the Fundamental Principles of the Red Cross’.<sup>106</sup> Since then, the Fundamental Principles – which are solemnly read out at the opening ceremony of each International Conference – have been recognized as the Movement’s basic charter. Their authority has never been questioned.

When the Statutes of the International Red Cross were revised, the Proclamation of the Fundamental Principles – whose wording has remained unaltered, save for the replacement of ‘Red Cross’ by ‘International Red Cross and Red Crescent Movement’ – was incorporated into the Movement’s new Statutes.<sup>107</sup> Their position in the preamble underscores both the statutory nature of the Fundamental Principles and their pre-eminence in ‘Red Cross law’.

In its judgement of 27 June 1986 in the case of military and paramilitary activities in and against Nicaragua, the International Court of Justice acknowledged unambiguously that the Fundamental Principles of the Red Cross must be respected by states when they were involved in providing humanitarian assistance:

An essential feature of truly humanitarian aid is that it is given ‘without discrimination’ of any kind. In the view of the Court, if the provision of ‘humanitarian assistance’ is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely ‘to prevent and alleviate human suffering’, and ‘to protect life and health and to ensure respect for the human being’; it must also, and above all, be given without discrimination to all in need.<sup>108</sup>

The International Court of Justice thus clearly recognized the mandatory force of the Fundamental Principles of the Red Cross; they not only oblige states to allow Red Cross and Red Crescent bodies to abide by them, but they are also a source of obligations for states themselves, if the latter claim to be engaged in humanitarian activity.

104 Max Huber, *La pensée et l’action de la Croix-Rouge*, ICRC, Geneva, 1954; Jean S. Pictet, *Red Cross principles*, ICRC, Geneva, 1956.

105 *Council of Delegates of the International Red Cross, Verbatim Report, Prague, 1961*, p. 46. At the Council of Delegates, there was only one debate, started by a statement made by the President of the Alliance of Red Cross and Red Crescent Societies of the USSR. That debate concerned the role of the Red Cross with regard to the preservation of peace, which was mentioned in connection with the principle of humanity.

106 *Twentieth International Conference of the Red Cross*, above note 33, pp. 51–52 and 99–100, Resolution VIII. See also Hans Haug, with Hans-Peter Gasser, Françoise Perret, and Jean-Pierre Robert-Tissot, *Humanity for All: The International Red Cross and Red Crescent Movement*, Paul Haupt Publishers, Berne, Stuttgart, and Vienna, and Henry Dunant Institute, Geneva, 1993, pp. 443–490.

107 *International Review of the Red Cross*, No. 256, January–February 1987, pp. 27–28; *Handbook*, above note 4, pp. 519–520.

108 International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement of 27 June 1986, *ICJ Reports 1986*, p. 125.

## Relations between the components of the Movement and the states

By virtue of its composition, the International Conference is a privileged forum for dialogue on the co-ordination of humanitarian action carried out by the components of the Movement and by the states. To different degrees, that question has been addressed at most Conferences. The Thirtieth International Conference adopted an important resolution on the 'Specific nature of the International Red Cross and Red Crescent Movement in action and partnerships and the role of National Societies as auxiliaries to the public authorities in the humanitarian field'.<sup>109</sup>

Similarly, the entire debate regarding the emblem questioned the relation between the components of the Movement and the states, since the same emblems are used to protect health services in wartime and to identify the personnel and property of the National Societies in wartime and in peacetime.<sup>110</sup>

## The implementation of humanitarian law

The International Conference has been too deeply involved in the development of international humanitarian law to take no interest in its implementation. In fact, the ICRC has not merely submitted a report on its activities to each International Conference. It has also taken advantage of this forum of dialogue between the components of the Movement and the states to review the situation regarding the implementation of international humanitarian law.<sup>111</sup> The statement by the President of the ICRC has always been one of the highlights of the International Conference.

That question has often given rise to Homeric debates at the Conference, particularly when specific situations have been under scrutiny. Indeed, some delegations have taken advantage of the ICRC's report to denounce violations of humanitarian rules that may be attributed to one state or another. The tensions dividing the international community have then erupted within the Conference, as was the case for the issues of participation. These debates are nonetheless necessary,

109 *Together for Humanity: Thirtieth International Conference of the Red Cross and Red Crescent, Geneva, 26–30 November 2007: Council of Delegates of the International Red Cross and Red Crescent Movement, Geneva, 23–27 November 2007: Resolutions*, ICRC – Federation, Geneva, 2008, pp. 78–80, Resolution 2.

110 On this issue, see François Bugnion, *Red Cross, Red Crescent, Red Crystal*, ICRC, Geneva, 2007.

111 As an example, see two key reports that the ICRC submitted to the Twenty-eighth and to the Thirtieth International Conference: Twenty-eighth International Conference of the Red Cross and Red Crescent, Geneva, 2–6 December 2003, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report prepared by the ICRC, October 2003 (document 03/IC/09); Thirtieth International Conference of the Red Cross and Red Crescent, Geneva, 26–30 November 2007, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, document prepared by the ICRC, October 2007 (document 30IC/07/8.4). Both reports are available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/section\\_ihl\\_reaffirmation\\_and\\_development?opendocument](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/section_ihl_reaffirmation_and_development?opendocument) (last visited 16 March 2010).

and experience has shown that many states prepare thoroughly in order to be able to face their peers at the forthcoming international conference.

The ICRC, for its part, attaches great importance to that opportunity to discuss the implementation of international humanitarian law with the states. Even if the resolutions adopted by the Conference in that respect are not as such binding on the parties to the conflict, they nonetheless constitute a position adopted by the international community that needs to be taken into account by the belligerents. An appeal by the International Conference to ensure respect for humanitarian law could leave no one indifferent, especially if it is adopted unanimously. Moreover, the resolutions adopted by the International Conference have sometimes made it possible to settle controversies about the interpretation of the Geneva Conventions.

Thus, after the Hungarian uprising and the Soviet intervention of 4 November 1956, which forced nearly 200,000 Hungarians into exile, a controversy arose between the government in Budapest and the governments of the countries accepting the Hungarian refugees. While the host countries asked for families to be reunified either in Hungary or in the host country, in accordance with the wishes of the people concerned, the Hungarian government decided to give priority to the return of refugees to Hungary and refused to take part in any discussion on the possibilities of emigration. The Nineteenth International Conference settled the matter by adopting a resolution in which it urged all National Societies and governments to ‘facilitate by every means the reunion of persons, both adults and children, with their families in accordance with the wishes of such persons, and in the case of minor children in accordance with the wishes of the recognized head of the family no matter where domiciled’.<sup>112</sup>

Likewise, during the Algerian War, the French authorities imposed a ‘medical blockade’ on the regions in the hands of the insurgent forces.<sup>113</sup> In its Resolution XVII, the New Delhi Conference made ‘an urgent appeal’ to all governments so that:

- a) the wounded may be cared for without discrimination and doctors in no way hindered when giving the care which they are called upon to provide in these circumstances,
- b) the inviolable principle of medical professional secrecy may be respected,
- c) there may be no restrictions, other than those provided by international legislation, on the sale and free circulation of medicines, it being understood that these will be used exclusively for therapeutic purposes.<sup>114</sup>

112 *Nineteenth International Conference of the Red Cross*, above note 26, p. 155, Resolution XX.

113 Any delivery of medicines to areas held by the insurgent forces was prohibited and the doctors were required to report suspicious injuries, which amounted in fact to preventing wounded insurgents from receiving treatment. Conversely, a number of French medical doctors were killed in ambushes or attacks.

114 Resolution XVII, *Nineteenth International Conference of the Red Cross, New Delhi, October–November 1957, Report*, pp. 103–104 and 154–155.



The Conference thus has the authority to interpret the rules of humanitarian law. However, only those resolutions adopted unanimously may be taken as an authentic interpretation, and only such unanimous resolutions may be considered as providing an interpretation that is binding on the states.

## Looking to the future

History has a value of its own, but a review of the past may also be a means of gaining a better understanding of the present and preparing for the future. Today's question is 'What are the main challenges facing the International Conference?'

No crystal ball can tell us today what the main problems regarding participation or matters of substance facing the International Conferences in the future will be. A study of the past nonetheless allows us to identify seven issues that deserve special consideration: the meeting place of the International Conference; the timing of the International Conference; participation by the states; the constitution of a body to manage political crises; organization of the work; the election of the Standing Commission; a changing environment.

### The venue for the International Conference: Geneva or ...

There is nothing in the Statutes of the Movement that obliges the Conference to be held in Geneva and in the past it has often taken place in other cities: for example, Paris (1867), Berlin (1869), Karlsruhe (1887), Rome (1892), Vienna (1897), St Petersburg (1902), London (1907), and Washington (1912). Holding the Conference in another city than Geneva is an effective way of making the Movement known in different parts of the world. Provided that the Conference achieves the objectives for which it is convened, the profile of the National Society hosting the Conference is also enhanced.

It must, however, be admitted that, in accepting the National Societies' invitations to host the next International Conference, the Movement has not always been dealt a good hand. For instance, the Fourteenth Conference accepted the invitation of the Japanese Red Cross to hold the next conference in Tokyo and it took place in the Japanese capital in 1934. Although it is not evident from the Conference *Proceedings*, many delegates must doubtless have felt uneasy about the idea of meeting in the capital of a country that had set out to take over another country.<sup>115</sup> In response to an invitation from the Spanish Red Cross, the Fifteenth Conference decided that the next conference would be held in 1938 in Madrid.

115 Between 1931 and 1933, Japan had invaded the Chinese provinces of Manchuria and Jehol and had combined these two provinces to create the puppet state of 'Manchukuo'. To force China to cease boycotting Japanese goods, Japan had also occupied the Shanghai region. On 31 May 1933, an armistice had put an end to the fighting, but everyone knew that this was only a truce and that the hostilities could resume at any moment.

However, it had to be held in London because of the civil war in Spain. Similarly, the Seventeenth International Conference accepted the invitation of the American Red Cross to hold the next conference in Washington in 1952. It was held in Toronto because the government of the United States refused to issue visas to the representatives of the People's Republic of China. Moreover, the Twenty-second Conference met in Tehran in 1973, the Twenty-third in Bucharest in 1977, and the Twenty-fourth in Manila in 1981. Those conferences were opened by the Shah of Iran, Nicolae Ceaușescu, and Ferdinand Marcos respectively, whose photos and speeches duly feature in the *Proceedings* of those Conferences.

There are therefore considerable advantages to holding the Conference in Geneva. First, it avoids having to make sensitive choices if several National Societies offer to invite the International Conference. It also avoids the risk of meeting in a country that has a sorry reputation with regard to human rights or that is involved in an armed conflict. The diplomatic corps in Geneva has experience of the practice of multilateral diplomacy and of humanitarian issues, which it handles all year round, and may therefore take part in preparing the International Conference.<sup>116</sup> And finally, holding the Conference in Geneva simplifies the preparatory work and reduces transport and travel expenses for the ICRC and the Federation, which provide most of the services of the Conference secretariat.

Indeed, the Twenty-fifth, Twenty-sixth, Twenty-seventh, Twenty-eight, Twenty-ninth, and Thirtieth Conferences met in Geneva. Should that practice be enshrined in the Statutes of the Movement? The ICRC and the Federation would be unwise to suggest it since this could be perceived as an expression of arrogance or as the desire to lay claim to a monopoly. In my opinion, practice merely needs to be allowed to consolidate a tradition that is being established.

## The timing of the International Conference: spring or autumn

All the Conferences convened since the Nineteenth International Conference have met in the autumn, when the attention of governments is already mobilized by the General Assembly of the United Nations. Would it not be advisable for the Movement to examine the possibility of holding the Conference in the spring, at dates that do not, of course, conflict with the annual session of the Human Rights Council?<sup>117</sup>

## Participation by the states

Some observers have seen participation of the states in the International Conference as threatening the independence of the Movement. There is indeed a contradiction between the provision in the Statutes that defines the International

<sup>116</sup> The arguments in favour of holding the International Conference in Geneva do not apply to the Council of Delegates since the states do not take part in it.

<sup>117</sup> I am grateful to Mrs Angela Gussing Sapina, Deputy Director of Operations at the ICRC, for suggesting this simple but valuable proposal.

Conference as ‘the supreme deliberative body for the Movement’<sup>118</sup> and the fact that half the members of the Conference are government representatives that are not members of the Movement. What parliament would agree to admit delegates who were not members of the parliament in question?

Moreover, although the Statutes stipulate that ‘All participants in the International Conference shall respect the Fundamental Principles’,<sup>119</sup> participation by the states has often led to politicization of the International Conference and to purely political debates, particularly on the representation of one state or another or of one political entity or another. Thus, the issues of the representation of China, South Africa, and Palestine undermined the debates at the Eighteenth, Nineteenth, and Twenty-fifth International Conferences respectively and forced the Standing Commission to postpone the Conferences scheduled to take place in 1963 and 1991.

Finally, during the cold war, some National Societies would never have dared depart from their governments’ positions. The representatives of those Societies often merely repeated their government’s declarations. In some cases, the same person headed the government delegation and the delegation from the National Society of the country in question.

However, participation by the states has also played an important role, particularly in the following matters:

- the development of international humanitarian law: there is no doubt that the Conference has contributed to every stage of the development of international humanitarian law, by virtue of the fact that it is a key place of dialogue between the Movement and the states;
- respect for international humanitarian law: each conference enables a dialogue to take place between the Red Cross and Red Crescent institutions and the states on the subject of respect for humanitarian law;
- the development of humanitarian action and the co-ordination of action carried out by the components of the Movement and that of the states.<sup>120</sup>

The Movement attaches considerable importance to the states taking part in the International Conference. It sees this as a vital aspect of its specific nature, of its own status, and of the efficacy of its action.

A number of humanitarian organizations outside the Red Cross and Red Crescent Movement take part as observers in the International Conference because of the presence of government delegations, and experience shows that many of them envy the Movement for having this unique forum.

In fact, in 140 years, the International Conference has never debated a proposal to change its composition. Distance between National Societies and the

118 Statutes, Art. 8.

119 *Ibid.*, Art. 11, para. 4.

120 On the role of governments within the framework of the International Conference, see Thomas Kupfer and Georg Stein, ‘The role of governments at International Conferences of the Red Cross and Red Crescent’, in Lijnzaad, van Sambeek, and Tahzib-Lie, above note 12, pp. 107–118.

governments of their countries was demonstrated at the Twenty-ninth International Conference, held in Geneva in June 2006, when several delegations from National Societies distanced themselves from their governments' positions, particularly during roll-call voting.

### Towards establishing a body to deal with political crises

The Standing Commission is required to 'make arrangements for the next International Conference'<sup>121</sup> and, to that end, to draw up the list of participants.<sup>122</sup> A political issue obviously crops up each time a dispute arises over the right of a state or a non-state organization to participate in the Conference as a member or as an observer. However, as a body of the International Red Cross and Red Crescent Movement, the Standing Commission is bound by the principle of neutrality, which prohibits it from taking part in any political controversy. The Commission is therefore not in a position to settle a dispute of that kind. Thus, the composition of the Commission does not match the responsibilities assigned to it. Yves Sandoz, who spent many years as a Director of the ICRC and was a member of the Standing Commission, highlighted this discrepancy with an expressive image: 'Like a tight-rope walker and illusionist, the Standing Commission is required to juggle with politics without burning its fingers, the aim being to spirit away political issues before the Conference begins'.<sup>123</sup>

However, it is not possible to 'spirit away political issues before the Conference begins', as was shown by the debates on the representation of China, the suspension of the South African government delegation, and the participation of Palestine. In fact, politics ended up spiriting the Conference away. Although difficulties of this kind have not disrupted the work of the last five international conferences, they are bound to resurface at some point in the future.

Therefore, if the Movement wishes to guard against such difficulties, it would do well to introduce a procedure or a mechanism that will enable controversies relating to issues of participation to be settled.<sup>124</sup> It is clearly the role of the states to settle such a matter. Two solutions may be envisaged. The first would be the creation of a 'diplomatic commission' formed by a limited number of government representatives. That commission would be elected by the International Conference and mandated to support the Standing Commission in

121 Statutes, Art. 18, para. 1.

122 By a strange inconsistency, the Statutes stipulate that the Standing Commission shall establish 'by consensus the list of observers' (Art. 18, para. 1(d)) but make no mention of establishing the list of participants (states and National Societies). Since that question is not dealt with in any specific attribution of competence, it obviously forms part of the Standing Commission's general competence to 'make arrangements for the next International Conference' (Art. 18, para. 1).

123 'Funambule et illusionniste, la Commission permanente doit jongler avec la politique sans s'y brûler, dans le but de l'escamoter à l'aube des Conférences', Y. Sandoz, above note 41, p. 602.

124 It is obviously far easier to establish a mechanism or a procedure enabling possible issues of participation to be settled when no issue of that kind arises than when one does. Indeed, from the moment such a controversy emerges, the various players define their position in relation to it, with no regard for the general interest.

the preparation of the next conference. The Standing Commission could refer to that commission any controversy associated with the sending of invitations. The other option would be the creation of a genuine credential committee comprising government delegates with the task of settling any controversy relating to the participation or the representation of a state or a non-state entity.

Article 10, paragraph 8, of the Statutes undoubtedly allows the Conference to create such a credentials committee.<sup>125</sup> However, the creation of a diplomatic commission would, in my opinion, require a revision of the Statutes. Article 10, paragraph 8, allows the Conference to establish subsidiary bodies for the duration of the Conference itself but the Statutes do not authorize the International Conference to establish a subsidiary body that continues to function until the next conference.

In order to prepare recent conferences, the Standing Commission set up a group of ambassadors whom it consulted on matters of procedure and of substance. This group provided an excellent service. However, it was not elected by the Conference but established by the Commission. It was set up to support the Commission and did not have the authority that would have allowed it, on behalf of the Conference, to settle any controversy on a question of participation.

## Organizing the work

Sixteen National Societies and nine governments took part in the First International Conference of the Red Cross.<sup>126</sup> A total of fifty-six National Societies and forty-five government delegations took part in the Thirteenth International Conference, when the Statutes were adopted.<sup>127</sup> At the Thirtieth International Conference, held in Geneva in November 2007, there were nearly 1,800 delegates representing 178 National Societies, 166 States and 65 observers.<sup>128</sup>

Those figures speak for themselves: the International Conference has been a victim of its own success or, at least, of the interest that it has aroused. To give each delegation the opportunity to speak at least once, speaking time has to be limited. Plenary debates have therefore given way to a succession of short statements that are prepared in advance and are frequently repetitive. The conference has ceased to be a place of debate and many delegates leave Geneva without even once having taken the floor.

Moreover, experience has shown that no agreement can be reached on the drafts submitted to the International Conference unless those drafts have been addressed in in-depth discussions, not to mention a veritable preliminary negotiation phase before the conference opens. Delegates who did not participate in that preliminary work then feel as if the real negotiations have taken place before the

125 Statutes, Art. 10, para. 8 stipulates that 'The International Conference may establish for the duration of the Conference subsidiary bodies in accordance with the Rules of Procedure'.

126 P. Boissier, above note 3, p. 208.

127 *Treizième Conférence internationale de la Croix-Rouge*, above note 89, pp. 21–27.

128 Personal communication from the Secretariat of the Standing Commission, 3 June 2009.

conference and that the dice are loaded. Only the Drafting Committee, whose task it is to put the finishing touches to the draft resolutions submitted to the conference, remains a genuine forum of negotiation. However, many National Societies are reluctant to take part in the work of the Drafting Committee, which is dominated by diplomats with extensive experience of multilateral negotiations.

What solution can be found? One idea was to extend the length of the Conference, but that leads to a rapid decline in the delegations' interest. Many delegates leave Geneva before the work is finished, while others come only for the final round of negotiations. Another idea was to divide the Conference up into commissions that would meet simultaneously to give more delegations an opportunity to express their views. However, that solution has been rejected by delegations from developing countries far from Geneva, which cannot send a number of delegates to Geneva and cannot therefore follow the work of all the groups, whereas other delegations can take part in all the parallel groups. This therefore undermines the principle of equality of the delegations.

It must be acknowledged that the Movement has not really succeeded in finding a formula that would allow all the delegations to express their views and that would make genuine debates possible again. The workshop formula used at the Twenty-seventh, Twenty-eighth, and Thirtieth International Conferences certainly allowed a large number of delegations to take part in the deliberations but, by definition, no decisions were taken at those workshops. They were conducted separately from the work of the Drafting Committee, which remained the real place of negotiation.

Another solution – which seems more promising – would be to strengthen the role of the Council of Delegates, genuinely making it the supreme deliberative body for the Movement, and to debate points of substantive interest to the Movement within that framework, particularly when the Council meets in the period between two international conferences. The Movement could then present its decisions to the Conference itself. The ICRC, the National Societies, and the Federation could use the two years between the Council of Delegates and the Conference to share with the states the decisions taken by the Council, which would then be discussed with the states at the following conference.<sup>129</sup>

Restoring the Conference's function as a place of dialogue, where the key policies for the Movement and for the international community are worked out, is probably the biggest challenge facing the organizers of the next conferences.

## The election of the Standing Commission

Pursuant to Article 10, paragraph 4, of the Statutes, the International Conference elects in a personal capacity five members of the Standing Commission, 'taking into account personal qualities and the principle of fair geographical

<sup>129</sup> I am grateful to Mrs Marion Harroff-Tavel, Diplomatic Advisor at the ICRC, for a careful reading of this article and for suggesting this proposal.

distribution'.<sup>130</sup> However, the manner in which the members of the Commission are actually elected in no way reflects this concern for the principle of fair geographical distribution, since there is only one constituency. In practice, respect for this principle largely depends on the regional groups' ability to agree on one candidate. Thus no African member was elected by the Twenty-seventh or by the Twenty-eighth International Conferences because the African Group could not agree on a single candidate for the whole continent.<sup>131</sup>

When the time comes for the next review of the Statutes and the Rules of Procedure, the Movement might consider changing this system, for instance by creating separate constituencies based on the regional groups of the Federation. On the other hand, the number of members of the Standing Commission should not be enlarged because this would ruin the efficiency of that body.<sup>132</sup>

## The same conference in another environment

In 140 years, the International Conference has weathered countless storms, including two world wars, without any change to the basic aspects of its composition or its competences other than to increase the number of its members. However, the environment in which it now works has undergone a profound change, particularly in recent years. The centre of gravity of the debate on respect for international humanitarian law is tending to shift towards the United Nations bodies and particularly towards the Human Rights Council.

While it is reassuring to see the states showing more concern than in the past for compliance with the humanitarian conventions that they have undertaken to respect and to ensure respect for, the greater interest for those issues within the context of the United Nations should not lead to a devaluation of the International Conference. To preserve this quadrennial meeting with the states remains a major challenge for the ICRC, the National Societies, and the Federation, for which the International Conference is still a priority instrument of humanitarian diplomacy and a vital aspect of their specific nature.

## Conclusions

Despite vicissitudes that cannot be ignored, the International Conference of the Red Cross and Red Crescent has come through 140 years of history, including two

130 Statutes, Art. 10, para. 4.

131 *Twenty-seventh International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Report*, ICRC and Federation, Geneva, 2000, pp. 137–138. *Twenty-eighth International Conference of the Red Cross and Red Crescent*, above note 57, p. 277.

132 In recent years a number of persons, including members of the Standing Commission, have suggested enlarging the number of elected members of the Standing Commission in order to better represent the growing number of National Societies. However, representing the National Societies is the first and primary task of the Federation. There is no point in turning the Standing Commission into a second federation and then setting up a co-ordinating body between the two.

world wars and 40 years of cold war. This longevity – which is remarkable for an international institution – clearly testifies to the importance of the Conference. Moreover, through the impetus that it has given to the development of international humanitarian law and humanitarian action, the Conference has served humanity well: each stage in the development of international humanitarian law has been supported by a position adopted by the Conference.

As a forum of dialogue between the Red Cross and Red Crescent institutions and the states, the International Conference has made it possible to define the principles of humanitarian action and to clarify the co-ordination of humanitarian action by the components of the Movement and that carried out by the states. The Conference has also broadened the areas of activity of the Red Cross and Red Crescent institutions. It is sufficient to recall Resolution IV/3 of the Berlin Conference, relative to the creation of an information agency, Resolution VI of the Washington Conference, concerning the protection of prisoners of war, Resolution XIV of the Tenth Conference, concerning the work of the Red Cross in the event of civil war, and Resolution X of the Twentieth Conference, concerning the role of the Red Cross for the preservation of peace. Through its resolutions, the Conference has progressively extended the Movement's competences, but, above all, it has helped to give humanitarian action (which stems from civil society initiatives and the expectations of public opinion) its place among government priorities.

For the ICRC, the International Conference is a vital forum of dialogue with states, a forum for the development of humanitarian law and a preferred instrument of humanitarian diplomacy. The Conference has made it possible to enhance the importance given to humanitarian issues in the priorities of the states and constitutes a major vector of humanitarian mobilization.

In the future, the greatest challenge will perhaps be to find the means of assuming the consequences of that success and, in particular, of restoring the primary function of the International Conference as a place of debate between the states and the components of the Movement.



# The importance of the International Conference of the Red Cross and Red Crescent to National Societies: fundamental in theory and in practice

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## **Abstract**

*The International Conference is based in particular on the long-established National Society auxiliary role and partnership with States. The importance of the Conference is clear from the Movement's Statutes. In practice, not all National Societies have taken full advantage of the opportunities provided by the International Conference for interaction and relationship-building with their own authorities. Practical ways are suggested to help National Societies participate more actively in the Conference and to use it to good benefit before and afterwards. The International Conference itself could increase its relevance by making more of its specific function with respect to international humanitarian law.*



\* The views expressed in this article are those of the author and do not necessarily reflect those of the British Red Cross.

The fundamental importance of the International Conference of the Red Cross and Red Crescent to National Societies<sup>1</sup> is clear from any reading of the Statutes of the International Red Cross and Red Crescent Movement. The International Conference is ‘the supreme deliberative body for the Movement’. It includes delegations from the States Parties to the 1949 Geneva Conventions. National Societies are not only components of the Movement, but they are also full members of the International Conference, with equal rights to the State delegations (and to the delegations from the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies). The importance of the International Conference to National Societies should therefore be axiomatic.

However, as in other areas of human endeavour, legal theory is not always borne out in practice, and the attitudes of National Societies towards the International Conference, and the ways they have interacted with it, have differed significantly.

It is the aim of this article to show why the International Conference is important to National Societies. Some suggestions of practical ways in which a National Society could best make use of the Conference will be outlined, explaining why it is in the interests of a National Society to try to do so.

It would be presumptuous, and beyond the author’s knowledge and experience, to seek to represent the totality of National Societies. Each of the 186 recognized National Societies works in its own national context and has its own significant experiences. However, there are certain common features connected with the International Conference which are of relevance and of potential use to all National Societies. The author’s experience of working with the British Red Cross for over a quarter of a century will necessarily inform the views in this article, and where appropriate, this experience will be drawn upon directly in the subsequent discussions. The author also hopes to show that without the International Conference, the interests of his own National Society would not be best served.

## **Historic importance: addressing humanitarian concerns through public–private partnership**

The basic concept of the International Conference – namely, a meeting between State representatives and representatives of relevant private organizations to

1 References in this article to ‘National Societies’ refer to the recognized National Red Cross and National Red Crescent Societies, and the Israeli National Society, the Magen David Adom. There are presently 186 recognized National Societies, found in every region of the world. There are also a number of unrecognized National Societies, sometimes referred to as ‘National Societies in formation’. The International Conference will be relevant to them as well. As illustrations, the conditions for recognition of National Societies were approved by the International Conference, and as a requirement for recognition by the International Committee of the Red Cross and admission to the International Federation of Red Cross and Red Crescent Societies, a National Society must agree to abide by the policies, decisions and rules adopted by the International Conference (e.g. see the Constitution of the International Federation of Red Cross and Red Crescent Societies, Article 8(1)(B)(c), and the related Rules of Procedure, Rule 2.2.d).

consider and decide upon practical matters of mutual humanitarian concern – is at the origin of the International Red Cross and Red Crescent Movement. Indeed it was the vehicle used by the founders of what became the International Committee of the Red Cross to adopt the proposals contained in Henry Dunant's book *A Memory of Solferino*.<sup>2</sup> The International Conference held in Geneva in October 1863 was attended by representatives of 16 governments, as well as by representatives of four private philanthropic organizations and individuals attending in a private capacity.<sup>3</sup> It was the founding Conference of the Movement and its recommendations included, in effect, the holding of International Conferences of the Red Cross and Red Crescent.<sup>4</sup> The Geneva International Conference of 1863 also provided the momentum for the subsequent Diplomatic Conference, once again held in Geneva in August of the following year, which adopted the Convention for the amelioration of the condition of the wounded in armies in the field.

The mixture of public and private participation at the founding International Conference of the Movement was seen as quite logical.<sup>5</sup> The support of governments was required if the private relief societies were to be able to carry out their intended functions. This was primarily the supply of voluntary medical personnel to work with their country's military authorities on the battlefield. All subsequent International Conferences have had the same mixed or hybrid composition. All have been attended by representatives of both the private relief societies, now called National Societies, as well as by government representatives, that is, of the States Parties to the original Geneva Convention and its later elaborations.<sup>6</sup>

## Statutory importance: the International Conference in legal theory

### The general context

The composition of the International Conference of the Red Cross and Red Crescent is enshrined in the current Statutes of the International Red Cross and

2 For an account of the foundation of what has become the International Red Cross and Red Crescent Movement, see Pierre Boissier, *History of the International Committee of the Red Cross: From Solferino to Tsushima*, Henry Dunant Institute, Geneva, 1985, pp. 7–83.

3 *Ibid.*, p. 70. Exact numbers of representatives vary according to author.

4 Article 9 of the Resolutions of the Geneva International Conference might be interpreted in this way. The 1863 Conference was not itself an International Conference of the Red Cross and Red Crescent; the first such International Conference, then called the International Conference of the Red Cross, was held in Paris in 1867.

5 François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, Macmillan, Oxford, 2003, p. 16.

6 The International Committee of the Red Cross has also attended all these International Conferences and following its establishment in 1919, the then League of Red Cross Societies, now the International Federation of Red Cross and Red Crescent Societies, has been represented as well.

Red Crescent Movement.<sup>7</sup> The relationship between States and the components of the Movement (including National Societies)<sup>8</sup> is so fundamental, as is the role of the International Conference in this interplay, that both are included in the definition of the Movement in Article 1 of the Statutes. This states that: ‘The components of the Movement meet at the International Conference... with the States Parties to the Geneva Conventions ... of 12 August 1949’.<sup>9</sup> The linking of the States Parties to the Geneva Conventions with the Movement in the definition article illustrates the importance of the relationship both to States (which participated in the adoption of the Statutes) and to the Movement’s components; co-operation is essential to both. There is thus an institutional link between States and the Movement, and this is shown by States’ participation in the highest statutory body of the Movement, the International Conference.

This institutional link at the international level is replicated and strengthened at the national level where, as a condition for recognition, a National Society must be recognized by the legal government of its country as a voluntary aid society, auxiliary to the public authorities in the humanitarian field.<sup>10</sup> This may be done through a government decree or by legislation.<sup>11</sup>

Article 2 of the Statutes deals with relations between States and components of the Movement. It is relevant to our consideration of the importance of the International Conference for National Societies for two main reasons. First, it sets out the basis for States’ co-operation with components of the Movement, which includes resolutions of the International Conference.<sup>12</sup> More generally, Article 2 is referred to in Article 8 of the Statutes of the Movement, where it helps to define why States participate in the International Conference. The relevant part of Article 8 provides: ‘At the International Conference, representatives of the components of the Movement meet with representatives of the States Parties to the Geneva Conventions, the latter in exercise of their responsibilities under those Conventions and in support of the overall work of the Movement in terms of Article 2. ...’ In

7 Article 9. The most recent Statutes were adopted by the 25th International Conference of the Red Cross in 1986. These Statutes changed the name of the International Conference from ‘International Conference of the Red Cross’ to ‘International Conference of the Red Cross and Red Crescent’. The Statutes were subsequently amended by the 26th International Conference of the Red Cross and Red Crescent in 1995 and by the 29th International Conference in 2006. A copy is available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/statutes-movement-220506?opendocument> (visited 13 October 2009).

8 The International Red Cross and Red Crescent Movement consists of three components: the recognized National Societies, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies.

9 Article 1(3). All States are parties to the 1949 Geneva Conventions, which thus enjoy universal acceptance. It also means that all States are entitled to participate in the International Conference of the Red Cross and Red Crescent.

10 *Ibid.*, Article 4(3).

11 In States with a common law legal tradition, and also in some other States, a National Society is often established by legislation referred to as a Red Cross or Red Crescent Act, or Law of Recognition. Examples are the Brunei Red Crescent Society (Incorporation Act) 1983, the Jamaica Red Cross Society Act 1964, and the South African Red Cross Society and Legal Protection of Certain Emblems Act 2007.

12 Statutes of the International Red Cross and Red Crescent Movement, Article 2(1).

connection with the final part of the preceding quotation, that is, ‘in support of the overall work of the Movement in terms of Article 2’, it is worth noting – from a National Society perspective – that Article 2 enjoins each State to promote the establishment of a National Society on its territory and to encourage its development.<sup>13</sup> This means, for example, that a National Society can request the assistance of the State in its development, whether in terms of its operational capacity or in creating a climate conducive to developing its legal base, and such matters should inform States’ considerations when attending the International Conference.

States and National Societies, when participating in the International Conference, also need to keep in mind additional provisions of Article 2. Article 2(3) provides for mutual support between States and components of the Movement: ‘The States, in particular those which have recognized the National Society constituted on their territory, support, whenever possible, the work of the components of the Movement. The same components, in their turn and in accordance with their respective statutes, support as far as possible the humanitarian activities of the States.’ In practical terms, the support given by a State to the National Society constituted on its territory will be different from that provided to other National Societies, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies. It is a different relationship. Thus the National Society of the country, in its auxiliary role, supports the humanitarian activities of its State and the public authorities may assign the Society appropriate mandates. Support from a State to its National Society may include the granting of certain privileges or subsidies or other measures to help its work, both within the country and, resources permitting, internationally. Mutual support between a State and other components of the Movement will be less regular and may depend on events which require their services. It is also likely to be voluntary, on both sides. Such support may be said to include support for co-ordination of activities involving components of the Movement and those of the State. Finally, Article 2(4) stipulates: ‘The States shall at all times respect the adherence by all the components of the Movement to the Fundamental Principles.’

### Specific provisions

The Statutes of the Movement contain important provisions setting out the definition, composition, functions and procedure of the International Conference. From the perspective of National Societies, the following points may be of particular interest.

As noted initially, Article 8 defines the International Conference as ‘the supreme deliberative body for the Movement’. National Societies, being part of the Movement, have a logical interest in the Movement’s supreme body. At this

13 *Ibid.*, Article 2(2). This builds upon the Covenant of the League of Nations, Article 25, signed in 1919, and Resolution 55(1) of the United Nations General Assembly, adopted on 19 November 1946.

important statutory meeting, National Society representatives<sup>14</sup> have the opportunity to meet with State representatives to ‘examine and decide upon humanitarian matters of common concern and any other related matter.’ This is a privilege for National Societies. However, it should be stressed that not just any humanitarian matter may be decided upon in this forum: it needs to be of common concern both to States and to components of the Movement. This means that the matter cannot be of interest only to a limited number of States and National Societies, or of interest only to States or only to Societies. It must be of a significant degree of importance to both States and National Societies.

Matters considered relevant for consideration at International Conferences normally relate to improving the situation of victims in three broad areas – armed conflict, disaster and disease. Under these general areas, specific issues are addressed, always from a humanitarian perspective.<sup>15</sup> However, humanitarian issues outside these three areas may also be examined.<sup>16</sup> In practice, the reference to ‘any other related matter’ has often involved support for humanitarian work, notably financial or other assistance to National Societies.<sup>17</sup>

For many National Societies, the matters addressed at the International Conference may require raising their sights from day-to-day concerns, as important as these are likely to be, and considering humanitarian issues from a more global perspective, including some issues with which they may be less familiar. For States, because they participate in the International Conference ‘in the exercise of their responsibilities under [the Geneva] Conventions and in support of the overall work of the Movement in terms of Article 2’, it may also mean adopting a different approach to issues or adapting their usual approach to take account of the humanitarian character of the International Conference and for the duration of the proceedings of the Conference, respecting the Movement’s Fundamental Principles.

14 Representatives of the International Committee of the Red Cross and of the International Federation of Red Cross and Red Crescent Societies also participate in these deliberations.

15 As an example, at the 28th International Conference held in Geneva in 2003, an Agenda for Humanitarian Action was adopted which set out specific and measurable action-oriented goals with respect to four then topical issues: persons missing in connection with armed conflicts and other situations of violence; the human costs of the availability, use and misuse of weapons in armed conflicts; disaster risk reduction and improved disaster preparedness and response mechanisms; reduction in the risk and impact of HIV/AIDS and other infectious diseases with regard to vulnerable people. The text was published by the ICRC and the International Federation of Red Cross and Red Crescent Societies, Geneva, 2004, p. 11.

16 At the 30th International Conference, States and National Societies acknowledged the then current and still continuing humanitarian concerns generated by international migration and by violence, in particular in urban settings, and affirmed their commitment to work together and with other organizations to address them: Declaration ‘Together for humanity’, adopted in Resolution 1, also entitled ‘Together for humanity’, Geneva, 2007. The text was published by the ICRC and the International Federation of Red Cross and Red Crescent Societies, Geneva, 2008, p. 73.

17 As an illustration, see the 26th International Conference of the Red Cross and Red Crescent, Resolution 5, ‘Strengthening national capacity to provide humanitarian and development assistance and protection to the most vulnerable’.

Article 9 concerns the composition of the International Conference. As already noted, uniquely, the members of the Conference include delegations from the States Parties to the Geneva Conventions as well as delegations from National Societies and the other components of the Movement. Moreover, '[e]ach of these delegations shall have equal rights expressed by a single vote'.<sup>18</sup> Thus every National Society delegation has equal rights to all other delegations in the International Conference, be they States or other components of the Movement. A small delegation has the exact same voting rights as that of a large delegation representing a powerful country or a wealthy National Society. This is also unique and gives all National Societies an important influence. In terms of rights at the International Conference, there is a level playing field.

The uniqueness of the International Conference may be illustrated by reference to the constitutional structure of non-governmental organizations. The term non-governmental organisation ('NGO') covers a wide range of organizations with no participation or representation of any government, even if a number of NGOs obtain government funding. Some NGOs are large and have offices in different countries, e.g. Oxfam and Save the Children, whereas others are very small local bodies. Unlike National Red Cross and Red Crescent Societies, NGOs are not specifically established by the State, recognized as an auxiliary to the public authorities and entrusted with specific statutory tasks. Their legal form varies according to national laws and practices. Many NGOs wish to keep governments at arm's length. Some may welcome dialogue with the authorities, and from time to time they may agree on certain texts. However, there is no requirement for States to meet with NGOs on a regular basis and when they do meet, it is not normally on a basis of equality. In contrast, States and National Societies have a mutual commitment to meet on a regular basis, for both statutory and practical reasons. National Societies have the opportunity to interact with their own and with other States as equal partners.

For National Societies, it may be important to note the final provisions on representation at the International Conference. Article 9(3) states that '[a] delegate shall belong to only one delegation.' This helps to ensure respect for the Fundamental Principle of Independence, for example, by preventing a delegate from representing both the government and the National Society of the same country. It may also help to maintain a National Society's independence vis-à-vis other components of the Movement. Similarly, Article 9(4) prohibits one delegation being represented by another, or by a member of another delegation. Like Article 9(3), this seems essential in order to uphold the independence of delegations. However it may cause difficulty for smaller National Societies (and States).

18 Article 9(2), Statutes of the International Red Cross and Red Crescent Movement.

## Functions of particular note to National Societies

Article 10 sets out the functions of the International Conference. A number of these are matters of direct importance for National Societies. These include two general functions of the International Conference: to contribute to the unity of the Movement and to contribute to the achievement of the Movement's mission 'in full respect of the Fundamental Principles' (Article 10(1)). Both of these must be an abiding concern for National Societies as well as for the other components of the Movement. The fact that these matters – the unity of the Movement and the achievement of its mission – are considered to be of common interest to States as well as to components of the Movement again shows the value given by States to the Movement and to the International Conference.

The first specific function of the International Conference listed refers to international humanitarian law. Under Article 10(2), '[t]he International Conference contributes to the respect for and development of international humanitarian law and other international conventions of particular interest to the Movement.' This provision gives National Societies a special standing and opportunity equal with States to contribute to respect for and development of an important body of public international law. Many other organizations outside government would relish having such a privilege in their respective field of interest, from human rights to development to the environment, but none does so. National Societies have this advantage because their origin and continuing *raison d'être* are interlinked with international humanitarian law; this fact is one of the underlying and unique features of Societies.<sup>19</sup> International humanitarian law is fundamental to each National Society and critical to its humanitarian work. As will be mentioned later, this aspect of the International Conference could be studied and perhaps utilized more than it has been in recent decades, to the potential benefit of the victims of armed conflicts as well as to the potential benefit of National Societies, States and others concerned. It might also have the benefit of increasing the relevance of the International Conference itself.

19 As noted earlier in the text, the founding Conference of the Movement in 1863 led to the Diplomatic Conference held in 1864, which adopted what may be considered to be the first treaty of contemporary international humanitarian law, the original Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. National Societies have featured in subsequent international humanitarian law treaties and contributed to their promotion and negotiation. The conditions for recognition of National Societies contain a number of elements related to international humanitarian law. These include official recognition by the legal government of the National Society's country as a voluntary aid society, in the sense that this term is used in the Geneva Conventions, and the stipulation that the Society must be guided in its work by the principles of international humanitarian law (Statutes of the Movement, Article 4). In addition, National Societies have statutory commitments to provide assistance to victims of armed conflicts as provided in the 1949 Geneva Conventions as well as to assist their respective governments in disseminating and implementing international humanitarian law (*ibid.*, Article 3). Recent resolutions have expanded this auxiliary commitment of the Society to its State to include promotion of the law (e.g. see UN General Assembly Resolution 63/125, UN Doc. A/RES/63/125 (2009), preambular paragraph 17).



This article of the Statutes of the Movement also gives National Societies and the other components a standing to work with States on respect for and development of other international conventions (treaties) of particular interest to the Movement.<sup>20</sup> Although the mission of the Movement is very broad and the work of National Societies varies significantly according to the needs of the local population, nevertheless, there are core areas of work. The increase of international legislation touching many aspects of daily interactions, domestically as well as internationally, makes it inevitable that there will be international conventions outside the field of international humanitarian law which may be of particular interest to the Movement. This provision may ultimately be relevant, for example, to the work of the International Federation of Red Cross and Red Crescent Societies and of National Societies in the evolving area of international disaster response laws, rules and principles (IDRL).<sup>21</sup>

The International Conference has the sole competence in three important areas. Firstly, the Conference has the competence to amend the Movement's Statutes and Rules of Procedure.<sup>22</sup> Secondly, at the request of any member of the International Conference, it takes the final decision on any difference of opinion as to the interpretation and application of the Statutes and Rules of Procedure. Finally, the International Conference will decide on any question which may be submitted to it by the Standing Commission, the ICRC and the International Federation. In the specific terms of the relevant article (Article 10(3)(c)), this means deciding on differences between the ICRC and the International Federation.<sup>23</sup> All of the above will be of interest to National Societies. To differing extents, all illustrate the importance of the International Conference in contributing to the Movement's unity.

The International Conference elects the five National Society members of the Standing Commission. The Standing Commission is a very important body for National Societies. Not only does it have its statutory functions, notably as a trustee

20 The previous version of the Statutes of the Movement contained somewhat similar wording (Statutes of the International Red Cross, adopted by the 13th International Conference of the Red Cross at The Hague in 1928 and revised at the 18th International Conference at Toronto in 1952, Article 2(3), *International Red Cross Handbook*, 11th edition, ICRC/League of Red Cross Societies, Geneva, 1971, p. 274). The present text is wider since it includes respect for existing international law.

21 To date, the engagement of the International Conference on the topic of IDRL may be said to rest on its general function to contribute to the achievement of the mission of the Movement (Article 10(1) of the Statutes of the Movement). So far, States have resisted the notion of a need for a general convention on IDRL, and the International Federation is not calling for such a convention. The IDRL programme has shown the existence of legal, administrative and other barriers to effective international disaster relief and recovery assistance. These are barriers to achieving the mission of the Movement, and the 30th International Conference adopted Guidelines to help in addressing them: Resolution 4, 'Adoption of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance', ICRC/International Federation of Red Cross and Red Crescent Societies, Geneva, 2008, p. 88.

22 The amendment procedure is set out in Article 20 of the Statutes and Rule 32 of the Rules of Procedure.

23 In making such a ruling, the International Conference must respect the independence and statutes of the two institutions.

body between International Conferences,<sup>24</sup> but particularly in the past 13 years, it has provided a voice for National Societies in between the ICRC and the International Federation. The Standing Commission, through the use of working groups, has ensured that National Society views are represented in the preparation of the International Conference as well as of the Council of Delegates, also, in the consideration of specific issues or topics of importance to the Movement, such as the Strategy for the Movement, the co-ordination measures set out in the Seville Agreement and previously, on the long-standing question of an additional emblem.

In electing the five National Society members of the Standing Commission, the International Conference must take into account the personal qualities of the candidates and the principle of fair geographical distribution (Article 10(4)). These criteria are important for all members of the International Conference to bear in mind and should help to ensure wider representation of National Societies on the Standing Commission.

The other functions set out in Article 10 of the Statutes of the Movement are also significant for National Societies. However, they are more of a technical nature and will not be examined here.

## Procedure – aspects of note for National Societies

National Societies should also be aware of particular aspects of the procedure of the International Conference.

First, the International Conference is mandated to meet every four years (Article 11(1)).<sup>25</sup> It is an advantage that the International Conference is required to take place at regular intervals. This provides a permanent framework for contacts between National Societies and their governments. Further, the International Conference may mandate a National Society to host the next session of the Conference. This is normally on the basis of offers made during the previous session. Since 1986, for practical reasons (including costs), the International Conference has been held in Geneva, with the ICRC and the International Federation as co-hosts.

All participants at the International Conference – including National Societies and States – are required to respect the Fundamental Principles. All documents presented must equally comply with the Principles (Article 11(4)). States are not normally bound by the Movement's Fundamental Principles, but they must respect them when taking part in the International Conference. In order that the debates maintain the confidence of all, the presiding officer 'shall ensure that none of the speakers at any time engages in controversies of a political, racial, religious or ideological nature.' This wording reflects the Movement's Fundamental Principle of Neutrality.

24 Statutes of the Movement, Article 16.

25 A different interval may be decided by the International Conference (Article 11(1)) or by the Standing Commission (Article 11(2)).

Observers may attend meetings of the Conference, unless the Conference decides otherwise (Article 11(5)). These may and do include organizations with which National Societies have relations, including major non-governmental organizations (NGOs), UN agencies and regional organizations. The presence of these external partners at meetings of the International Conference may serve to increase their understanding of National Societies and of the Movement, and contribute to the smooth functioning of National Society operations.

The International Conference is required to make efforts to adopt its resolutions by consensus (Article 11(7)). This means that resolutions of the International Conference are normally adopted without a formal vote. Consensus reflects the nature of the Movement, which acts on the basis of co-operation, including between States and National Societies. Also, one of the Conference's general functions is to contribute to the unity of the Movement – consensus supports this aim by, for example, avoiding imposing the will of the majority on a significant minority and by encouraging compromise. Further, consensus enhances the impact of International Conference resolutions. Nevertheless, it is not always possible to reach a consensus, and the Rules of Procedure of the Movement provide a voting procedure which may be used if required.<sup>26</sup>

## **The International Conference – possible challenges for National Societies**

The above overview has illustrated that, from the formal perspective of the Statutes of the Movement, the importance of the International Conference to National Societies is beyond question. The fact that not all National Societies have regarded the International Conference in such a way may be for various reasons, some of which are suggested below.

First, and understandably, many National Societies have a domestic focus. International work is less relevant to their day-to-day concerns. The International Conference generally avoids dealing with domestic matters, as States are reluctant to involve the Movement or other States in their domestic affairs.

Second, the conduct of business at the International Conference is undertaken in ways which National Society delegates find new and even intimidating. In contrast, State representatives will be very accustomed to working in a drafting committee and large commissions; this is how they normally do business.

Third, the fact that Geneva has been the venue of recent International Conferences, although practical from some important perspectives, has had two main drawbacks. First, it has meant that the same diplomats who are engaged in negotiations in United Nations and other fora in Geneva often also attend the International Conference and may bring with them attitudes and behaviours from

26 Rules of Procedure of the International Red Cross and Red Crescent Movement, Rule 20. Rule 19 defines consensus.

those other meetings which are unhelpful at the International Conference, given its special composition, functions and neutral humanitarian character.

The venue of Geneva also means that it has been nearly 30 years since a National Society was last host to an International Conference. National Societies – and States – may now have forgotten the prestige and other benefits of acting as host to the International Conference. It provided a way for all Conference participants – government and Movement – to see the Movement in action in different regions of the world, thus promoting a sense of its universal character and providing a new or different environment for debates.

There are also a number of practical reasons why National Societies may regard the International Conference as a burden, rather than an opportunity. National Society delegations will often have already participated at previous international meetings held directly before the Conference, namely the General Assembly of the International Federation of Red Cross and Red Crescent Societies and the Movement's Council of Delegates. They will be both tired and accustomed to meetings held within the Red Cross and Red Crescent family. In contrast, State delegations will be arriving fresh; they will not have already had approximately one week of meetings before the International Conference starts.

Time and resource constraints are additional practical considerations. The agenda of the International Conference requires preparation.<sup>27</sup> Many National Societies will not have the staff support or other resources to consider the different items and come to a considered view in advance of the Conference. At the Conference itself, some National Society delegations – normally composed of the volunteer and salaried leadership of the Society – will be too small to be able to be represented at the different meetings. They may also not be accompanied by other senior volunteers and/or staff with specialist knowledge of the subject matters to be dealt with at the International Conference.<sup>28</sup>

There is also a great deal of turnover of personnel within the Movement, and National Societies may not have sufficient institutional memory of the benefits of the International Conference. More could also be done to make all National Societies aware of the Conference's potential benefits.

## **Essential link with the auxiliary status and role of National Societies**

A main reason why the International Conference has not been perceived as important by some National Societies is because, until recently, insufficient attention

27 The author estimates that 16–17 working days are required to prepare for the International Conference. This includes co-ordination and preparation of briefs and speaking notes, meetings and dealing with the administrative arrangements. However, it is also possible to devote less time to preparations and still contribute to and benefit from the Conference.

28 Such constraints may also affect a National Society's ability to follow up the decisions of International Conferences.

has been paid to the essential link between the Conference and the relationship between National Societies and States. As explained above, the International Conference, from its inception, was linked with the role of National Societies as auxiliaries to their respective country's public authorities in the humanitarian field. It is the glue that underpins the Conference. Originally the auxiliary or support function of National Societies was connected with Army Medical Services. Over time the auxiliary role has expanded and may now include, for example, peacetime disaster assistance, public health and/or social welfare services. In turn, National Societies' auxiliary status has grown to cover humanitarian assistance to the public authorities of their respective countries as a whole. Whatever the auxiliary role of a National Society – and this will vary according to country – the auxiliary status remains a permanent feature and commitment of all National Societies. Indeed, it is one of the conditions for recognition as a National Society.<sup>29</sup>

The auxiliary status of National Societies helps to give them a unique position. National Societies are private organizations with certain recognized public functions – therefore, they are neither part of government nor are they non-governmental organizations. Their legal status is genuinely *sui generis*.<sup>30</sup>

The auxiliary status and role are a National Society's standing invitation to participate in public humanitarian services; they provide an automatic relationship between a National Society and its government. However, a National Society still needs the appropriate capacity to be able to fulfil the auxiliary role in a meaningful way.

At the 30th International Conference in 2007, the Conference adopted a resolution which clarifies the specific role of National Societies as auxiliaries to their respective country's public authorities in the humanitarian field.<sup>31</sup> As with other International Conference resolutions, it is up to National Societies and to States to give effect to its terms. These include 'consolidate[ing] a balanced relationship with clear and reciprocal responsibilities, maintaining and enhancing a permanent dialogue at all levels within the agreed framework for humanitarian action' (operative paragraph 2).

## Ways to enhance the relevance of the International Conference to National Societies

The challenges posed in the preceding sections, notably that entitled 'The International Conference – possible challenges for National Societies', may suggest their own possible solutions.

29 Statutes of the International Red Cross and Red Crescent Movement, Article 4(3).

30 See, for example, Jean Pictet, *Fundamental Principles of the Red Cross: Commentary*, Henry Dunant Institute, Geneva, 1979, p. 63.

31 30th International Conference of the Red Cross and Red Crescent, Geneva, 26–30 November 2007, Resolution 2, 'Specific nature of the International Red Cross and Red Crescent Movement in action and partnerships and the role of National Societies as auxiliaries to the public authorities in the humanitarian field', ICRC/International Federation of Red Cross and Red Crescent Societies, Geneva, 2008, p. 78.

The first involves increasing awareness and understanding of the special nature of National Societies and of their place within the Movement, including the Statutes of the Movement and the International Conference. National Societies not only have domestic responsibilities, they also have international ones.<sup>32</sup> Such learning may be acquired in a variety of ways, including through the provision of training for National Society leaders, that is, those who are most likely to attend International Conferences.

Briefings may be undertaken at regional, sub-regional and country level to familiarize National Society personnel with the procedure of the International Conference and the specific agenda items. It is important to understand how the system operates: that, for example, the role of the Drafting Committee is to put the text into order, not to re-negotiate its terms. If useful, role plays may be undertaken, but the important thing is to inform the intended delegates as to what they can expect and as far as possible, to give them practical tools to enable them to make a meaningful contribution during the proceedings.

Financial and security considerations may make it very difficult to hold an International Conference outside Geneva. However, these factors are not insurmountable, particularly if a number of States and National Societies were willing to pool resources to enable the Conference to be held in different parts of the world.

There are both practical and statutory reasons why the International Conference must be held after sessions of the General Assembly of the International Federation and the Council of Delegates.<sup>33</sup> There is little one can do about natural fatigue, and there is normally a break before the International Conference starts to give delegates a chance to rest. However, the psychological ‘meeting fatigue’ may be helped by individuals’ viewing the International Conference as an exciting and important opportunity to participate in the Movement’s supreme deliberative body and, for example, to interact with one’s own government representatives and others, rather than as a quadrennial chore to be endured.

Each International Conference is a statutory and historic landmark. It sets the direction of the Movement for the next four-year period. It can and should be viewed as a process: what happens in between Conferences is often as important as what happens during their proceedings. This is particularly true for National Societies. They have a special opportunity to follow up the resolutions of each International Conference with their government. This can help give meaning to their auxiliary role, and there is real reason to do so on the part of both parties because both the State and the National Society will need to report upon the measures they have taken to give effect to resolutions in advance of the next International Conference.

Moreover, the preparations for the next International Conference can also be used to the advantage of National Societies. Whereas the dialogue on follow-up

32 See Richard Perruchoud, *International Responsibilities of National Red Cross and Red Crescent Societies*, Henry Dunant Institute, Geneva, 1982.

33 For example, see Statutes of the Movement, Article 15(1); Constitution of the International Federation of Red Cross and Red Crescent Societies 2007, Articles 18(2) and 18(4).

measures to International Conference resolutions will be quite specific, as will discussions between the National Societies and public authorities on day-to-day matters, the discussions between the Society and the government before the International Conference may be used to address strategic issues. Such discussions may be a tool for getting governments and National Societies on a similar progressive page.

Many of the above points are borne out in the author's own experience at the British Red Cross. The International Conference acts as an umbilical cord which maintains contact between the United Kingdom Foreign and Commonwealth Office and other government departments, and our National Society, before, during and after the proceedings. The pledges made by the United Kingdom are a standing item on the agenda of the UK National Committee on International Humanitarian Law.<sup>34</sup> Indeed, the United Kingdom decided to establish such a body in part because the International Conference endorsed the Intergovernmental Group of Experts' recommendation encouraging States to create such committees with the possible support of National Societies.<sup>35</sup> The completion of the quadrennial questionnaires on follow-up to the decisions of the previous International Conference, and agreement on joint pledges for the next International Conference, have necessarily involved much communication between the UK authorities and the British Red Cross. The International Conference provides more than an excuse for such contacts: it provides a significant reason for continuous access to officials because of the joint interest.

The International Conference has also had positive effects for the British Red Cross internally. It helps to set a policy direction in common with the remainder of the Movement, ensuring that the British Red Cross remains cognisant of issues that may not be of direct concern in its own national context. Where resources are available, the British Red Cross may also contribute to programmes or projects seeking to address these issues. Following each International Conference, the decisions are analysed with a view to noting the commitments incumbent on National Societies. These are then set out in a schedule, called an 'Action Sheet', which lists the decisions requiring follow-up action, explaining the required action in the simplest language possible. The schedule then notes the staff member responsible for follow-up, together with other staff members who might have an interest in the matter, and also indicates any time deadline. This process is a good discipline for the Society, and helps to keep it focused. It also makes it easier

34 As at 30 June 2009, 91 States had such Committees or other national bodies on international humanitarian law – see ICRC Advisory Service on International Humanitarian Law, *Table of National Committees and other National Bodies on International Humanitarian Law*, 30 June 2009, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/table-national-committees> (visited 13 October 2009). The formal name of the UK body is the Inter-departmental Committee on International Humanitarian Law. The British Red Cross is the only organization outside government represented on the Committee. This is because of its auxiliary role and its expertise in international humanitarian law.

35 26th International Conference of the Red Cross and Red Crescent, Geneva, 1995, Resolution 1, 'International humanitarian law: From law to action – Report on the follow-up to the International Conference for the Protection of War Victims', operative paragraph 4.

to include relevant International Conference decisions in planning and eventually, to complete the four-yearly reporting requirements.

At the root of much of this is the auxiliary relationship between a National Society and the State. This relationship should be based on a co-operative, partnership approach. Where it is, the public authorities will be more willing to spend the time to engage with the National Society. The International Conference may be said to represent the auxiliary relationship at the international level. Without it, there would be no need for the International Conference to exist at all. States would soon lose interest and begin to question why they should meet with National Societies when they do not have a similar commitment to meet with other organizations outside government.

## Ways to promote the relevance of the International Conference

The author wishes to conclude with the following remarks and suggestions.

Firstly, it is recommended that a study be undertaken of recent International Conferences, assessing them from different perspectives, including an assessment of their results.<sup>36</sup> To demonstrate briefly the value of the International Conference to National Societies, one recent Conference has been selected at random: the 27th International Conference held in Geneva in 1999. This Conference adopted a Plan of Action for the years 2000–2003. Similar to other International Conference texts, this Plan of Action gives National Societies a status and role in the development of national policies and a right to speak, suggest and influence.<sup>37</sup> It also commits States to helping their National Society, thus giving substance to the requirements set out in the Statutes of the Movement.<sup>38</sup> In this specific instance, the Plan of Action provides that States will help, as appropriate, National Societies in accessing international funding.<sup>39</sup> This is as important to the smaller National Societies as to others.

The ICRC's Study on Customary International Humanitarian Law was a major outcome of the International Conference which has affected the entire Movement.<sup>40</sup> All National Societies have an obligation to disseminate knowledge of

36 This could update the study by Richard Perruchoud, *Les Résolutions des Conférences internationales de la Croix-Rouge*, Henry Dunant Institute, Geneva, 1979, but also go beyond it to cover other matters, such as the harmony of the proceedings at each International Conference.

37 27th International Conference of the Red Cross and Red Crescent, Geneva, 1999, 'Plan of Action for the Years 2000–2003', Final Goal 2.1, paragraph 1(a). The Plan of Action is published in the *International Review of the Red Cross*, No. 836, 1999, pp. 880–895.

38 Article 2. See the earlier section of this paper, entitled 'Statutory importance: The International Conference in legal theory', 'The general context', for an explanation.

39 27th International Conference of the Red Cross and Red Crescent, 'Plan of Action for the Years 2000–2003', above note 37, Final Goal 2.1, paragraph 1(c).

40 26th International Conference of the Red Cross and Red Crescent, Geneva, 1995, Resolution 1, 'International humanitarian law: From law to action – Report on the follow-up to the International Conference for the Protection of War Victims', operative paragraph 4. Also see 30th International Conference of the Red Cross and Red Crescent, Geneva, 26–30 November 2007, Resolution 1, 'Together



international humanitarian law – this Study is a major tool, both in terms of the substance of the rules and particularly in the wealth of resource material contained in Volume 2.

Two functions of the Conference will now be commented on: namely, to contribute to the unity of the Movement, and to contribute to respect for and development of international humanitarian law.

The general function of the International Conference to contribute to the unity of the Movement has been tested over the years, most recently in matters related to the Middle East. It might be considered that, at the 25th International Conference of the Red Cross in 1986, the decision to suspend the participation of the government delegation of the Republic of South Africa neither contributed to the unity of the Movement (e.g. the ICRC and a number of National Societies did not participate in the vote) nor helped the Movement in the accomplishment of its mission (e.g. the South African authorities informed the ICRC that its delegates would need to leave South African territory – however, this decision was later reversed).<sup>41</sup> One of the effects of this unsettling experience may be said to have been that the next International Conference was unable to take place until almost 10 years later, in significant part because of concern regarding participation problems (although involving a different party, the Palestine Liberation Organisation). At the 29th International Conference of the Red Cross and Red Crescent in 2006, National Society delegations, by their interventions and by their votes, reaffirmed the need to put aside political considerations at the International Conference and to encourage the unity and the universal humanitarian mission of the Movement. Decisions were taken which ultimately led to the recognition of the Israeli and Palestinian National Societies.

At the 30th International Conference in 2007, the implementation of the Memorandum of Understanding between these two National Societies was a source of controversy but a way was found to deal with the matter in a constructive manner. This solution was based largely on a resolution adopted at the meeting of the Movement's Council of Delegates held immediately before the International Conference. This demonstrated the influence National Societies can and do have on the International Conference, its harmony and outcomes.<sup>42</sup> One must be careful not to underestimate the influence of State delegations at the International Conference. However, one might also see a trend of increasing National Society

for humanity', operative paragraph 8. The Study itself can be found at: Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, 2 Volumes, Volume I: Rules, Volume II: Practice (2 Parts), Cambridge University Press and ICRC, 2005.

41 For details, see Jacques Moreillon, 'Suspension of the government delegation of the Republic of South Africa at the Twenty-Fifth International Conference of the Red Cross (Geneva, 1986) – Different perceptions of the same event', *International Review of the Red Cross*, Vol. 257, March–April 1987, p. 133.

42 30th International Conference of the Red Cross and Red Crescent, Geneva, 2007, Resolution 5, 'Follow-up to the implementation of the Memorandum of Understanding of 28 November 2005 between the Palestine Red Crescent Society and the Magen David Adom in Israel', ICRC/International Federation of Red Cross and Red Crescent Societies, Geneva, 2008, p. 105.

participation in the proceedings, certainly on basic matters such as respect for the Fundamental Principles, which is heartening.

A not unrelated matter is that a fundamental strength of the Movement, and of the International Conference, is its consensual approach. Traditionally the formation of international humanitarian law itself has been on a consensual basis, although in recent years there have been notable exceptions.<sup>43</sup>

A review of the resolutions adopted at successive International Conferences over many decades illustrate the importance given to international humanitarian law in the work of the Conference. In recent years, emphasis has been given to contributing to respect for the law, often by referring to topical or general problems of application and recalling and reaffirming existing obligations.<sup>44</sup> Plans of action have followed this pattern, identifying specific issues of application (such as missing persons), referring to existing obligations, and specifying concrete measures to help fulfil these obligations.<sup>45</sup> This general approach to contributing to respect for international humanitarian law has been the only way to achieve consensus and to avoid engaging in political or other controversies. At the 24th International Conference in 1981, resolutions did refer to specific conflicts. However, these texts could be considered to look out of place and their adoption did not necessarily help achieve improved respect for the law or the work of the ICRC in the situations named.<sup>46</sup>

Before the negotiation of the 1977 Additional Protocols to the 1949 Geneva Conventions, the International Conference did play a role in the development of international humanitarian law.<sup>47</sup> Since then, although specific provisions

43 The processes for the adoption of the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, and for the adoption of the 2008 Oslo Convention on Cluster Munitions are examples of a different approach. The adoption of the Third Additional Protocol to the 1949 Geneva Conventions, relating to the red crystal emblem, was done by vote. However, the process sought to be consensual.

44 As examples, see 26th International Conference of the Red Cross and Red Crescent, Geneva, 1995, Resolution 2, 'Protection of the civilian population in period of armed conflict', and 30th International Conference of the Red Cross and Red Crescent, Geneva, 26–30 November 2007, Resolution 3, 'Reaffirmation and implementation of international humanitarian law: Preserving human life and dignity in armed conflict', ICRC/International Federation of Red Cross and Red Crescent Societies, Geneva, 2008, p. 81.

45 28th International Conference of the Red Cross and Red Crescent, Geneva, 2–6 December 2003, Agenda for Humanitarian Action, 'Enhancing Protection in Armed Conflicts and other situations of armed violence,' General objective 1, ICRC/International Federation of Red Cross and Red Crescent Societies, Geneva, 2004, pp. 12–15.

46 24th International Conference of the Red Cross, Manila, 1981, Resolution III, 'Application of the Fourth Geneva Convention of 12 August 1949', and Resolution IV, 'Humanitarian activities of the International Committee of the Red Cross for the benefit of victims of armed conflicts'.

47 20th International Conference of the Red Cross, Vienna, 1965, Resolution XXV, 'Application of the Geneva Conventions by the United Nations emergency forces', and Resolution XXVIII, 'Protection of the civilian population against the dangers of indiscriminate warfare'. Resolution III, 'The Geneva Conventions and the Additional Protocols', adopted at the 23rd International Conference held in Bucharest in 1977, indicates that the two previous International Conferences had adopted resolutions supporting the negotiations which led to the adoption of the 1977 Additional Protocols to the 1949 Geneva Conventions.

of resolutions and plans of action have encouraged or referred to developments, the International Conference has not had a significant role in that respect.

At present there seems to be a consensus in the international community that the biggest challenge to international humanitarian law is on how to make the existing law effective, that, with the possible exception of the field of weaponry, what is needed is greater compliance with the current rules rather than new law. At the same time, as we observe the 60th anniversary of the adoption of the Geneva Conventions, it is clear that there are certain matters that could benefit from an agreed modern interpretation of the 1949 treaty texts. Some examples are: use of defensive weapons on military ambulances<sup>48</sup> and on hospital ships;<sup>49</sup> use of cryptographic equipment on hospital ships,<sup>50</sup> the requirements to protect prisoners of war<sup>51</sup> and civilian security internees<sup>52</sup> against insults and public curiosity.

The International Conference of the Red Cross and Red Crescent, given its special composition, character and responsibility for international humanitarian law, could be used to help achieve an agreed up-to-date and practical interpretation of one or more such issues. This would be of real practical benefit to the victims of armed conflicts as well as to those who apply the law. It would reinforce the relevance and value of the International Conference as an appropriate decision-making body on international humanitarian law issues. It could also stimulate National Societies to reaffirm their special role and responsibility in the international humanitarian law field, both as auxiliaries to their respective public authorities and in their own right.

## Conclusion – *carpe diem*

The International Conference of the Red Cross and Red Crescent is nothing short of monumental. In an age of hype, it remains genuinely unique, as it has always been. It rests in particular on the auxiliary relationship between National Societies and their States. Without the National Societies' auxiliary status, the International Conference would not involve States, and without States, the International Conference would have less impact and be just another forum of a private association.

The character of the International Conference affects – and is affected by – the character of the Movement: it is based on co-operation and partnership. This will mean that it operates on the basis of consensus which will necessarily limit

48 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 22.

49 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked of Armed Forces at Sea, Article 35.

50 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked of Armed Forces at Sea, Article 34.

51 1949 Geneva Convention relative to the Treatment of Prisoners of War, Article 13.

52 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, Article 27.

what it is able to achieve; but what it has achieved – and can continue to achieve – remains of value. Although it is important to have realistic expectations, with creativity, careful planning and persistence, the International Conference could do more, for example, in the area of international humanitarian law.

National Societies need a greater understanding of the functioning and potential of the International Conference. The International Conference was conceived to be a forum for shared ideas and problem-solving between governments and National Societies. This it continues to be. The Conference could be seen as so intertwined in the relationship between States and the Movement that one cannot comment on the relevance of the International Conference to National Societies without considering and commenting upon the relevance of National Societies to States.

Many NGOs – whether or not they would say so publicly – would give their eye-teeth to have the possibility to meet with States as equal participants on a regular basis; to discuss matters of common concern, with a view to agreeing common texts to which both parties are committed.

It is up to National Societies, using the mechanisms of the Movement and their own interaction with States, to use the International Conference to best advantage, individually and collectively. They can seek to do so in three basic ways: by preparing for the Conference, by playing a part in its proceedings and by following-up afterwards. If they do not do so, they are not taking advantage of their special status and role; in practical terms, they are missing a trick.

# Participation of States in the International Conference of the Red Cross and Red Crescent and assemblies of other international organizations

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## **Abstract**

*The International Conference of the Red Cross and Red Crescent ('International Conference') is one of the few international fora in which governments take part on an equal footing with other entities. The origins of the International Conference, and its capacity to adopt decisions that are binding on both National Red Cross and Red Crescent Societies and on governments in their dealings with National Societies as their auxiliary partners, give rise to special considerations concerning state participation. This article provides an overview of the models for participation in the assemblies of other international organizations, and how problematic cases have been dealt with in various fora. The authors then examine the participation of states and other political entities in the International*

*Conference, as well as the controversial cases that have put the Conference to the test.*



In 2007, the 30th International Conference of the Red Cross and Red Crescent was held in Geneva. As with many of its predecessors, organizers had to cope with difficulties concerning participation entitlements for either states or National Societies. The reasons for their respective difficulties vary somewhat, owing to the character of National Societies within the International Red Cross and Red Crescent Movement ('the Movement') and their distinction from states as parties to the Geneva Conventions. This article will not address National Society issues, which are handled within the Movement itself. Instead, it will concentrate on problems of state participation, which have sometimes been of such political gravity that they have led to International Conferences being postponed or even cancelled.

Which entities are eligible to participate under the banner of statehood?<sup>1</sup> Who is entitled to represent an existing state where government authority (or its legitimacy) is in dispute? These questions have aroused controversy to an extent that few substantive issues have matched, and the Conference is certainly not alone in having to navigate them. Indeed, when disagreements regarding statehood or legitimacy arise, international fora frequently become a strategic platform for entities to assert a right to have their say in international relations, and for opponents to ensure that they do not receive recognition. Although the settings may vary, the storylines are essentially the same. In considering how these questions may be dealt with at the International Conference, it is therefore appropriate to examine the reaction of other comparable fora.

## **Participation in the assemblies of international organizations**

In order to draw a comparison, the fora considered here are the plenary decision-making assemblies of international organizations (be they intergovernmental or mixed, as in the case of the International Conference of the Red Cross and Red Crescent).

The special characteristic of the International Conference that needs to be taken into account in this examination is that it is not a conference of members of a body: it brings together, on an equal basis, the members of the International Red Cross and Red Crescent Movement<sup>2</sup> and the states parties to the 1949

1 It should be noted that, with regard to the International Conference of the Red Cross and Red Crescent, this article discusses only the participation of states (or state-like entities) in this forum. It does not deal with the representation and participation of National Societies, as there are very specific rules that govern the recognition and admission of National Societies into the Conference.

2 The Movement's members, termed 'components' in its statutes, are the National Red Cross and Red Crescent Societies, the International Committee of the Red Cross (ICRC), and the International

Geneva Conventions. Hence the issue of membership of an organization and accompanying rights and responsibilities does not arise – this article addresses instead the perhaps wider issue of representation at the Conference itself.

It should also be noted that the Movement's traditions and statutes require all participants in the International Conference to act in accordance with the Fundamental Principles of the Red Cross.<sup>3</sup> The principles of independence and neutrality provide an assurance that the Movement and the bodies created by it can and will work in such a way as to carry out its mission, which is above all to prevent and alleviate human suffering wherever it may be found. While this should enable the Movement's conferences to stand apart from the political disputes that disrupt other organizations, the reality of the modern international community is that no organization can steer free of them entirely.

The world's first global international organizations of the type now common were formed to achieve specific state objectives in specialized fields.<sup>4</sup> They were based on the responsibility of governments to take action to secure those objectives. The aim of the International Conference of the Red Cross, on the other hand, has from the very start been to support the ideals of the founders of the International Red Cross, which were enshrined in an agreement by states to respect the inviolability of the wounded on the battlefield. The origin of the International Conference is thus different from those of the assemblies of international organizations.

Many organizations now seek to unite states on the basis of certain regional, political, or technical characteristics and restrict membership accordingly. The participation of states in the International Conference of the Red Cross and Red Crescent, however, is universal, for it encompasses all states parties to the 1949 Geneva Conventions.<sup>5</sup> For purposes of comparison with the International Conference, this article will therefore first focus on the policies and practices of organizations that also aspire to be universal in nature, namely those that have a purpose of universal interest, are open to all states or state-like entities,<sup>6</sup> and seek to achieve universal membership.<sup>7</sup> Such organizations are primarily to be found in the United Nations (UN) system (i.e. the UN itself and its specialized agencies),

Federation of Red Cross and Red Crescent Societies ('International Federation'). Statutes of the International Red Cross Red Crescent Movement (Movement Statutes), Art. 1(1).

3 I.e. humanity, impartiality, neutrality, independence, voluntary service, unity, universality.

4 Such as the International Labour Organization (ILO), founded in 1919 on the premise that universal, lasting peace can only be established if it is based on decent treatment of working people; and the Permanent Court of Arbitration, established in 1899 to record 'the principles of equity and right on which are based the security of States and the welfare of peoples'. First Hague Convention for the Pacific Settlement of International Disputes, 29 July 1899, Preamble, available at [http://avalon.law.yale.edu/19th\\_century/hague01.asp](http://avalon.law.yale.edu/19th_century/hague01.asp) (last visited 19 February 2010).

5 A total of 194 states parties. See ICRC, 'State parties to the Geneva Conventions of 1949', available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited 28 October 2009).

6 Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organisations*, Cambridge University Press, Cambridge, 2005, p. 105.

7 Henry G. Schermers, 'International organisations', in Mohammed Bedjaoui and Federico Mayor, *International Law: Achievements and Prospects*, Martinus Nijhoff, The Hague, 1991, p. 69.

although other intergovernmental or similar organizations – such as the World Trade Organization (WTO), the International Organization for Migration (IOM), INTERPOL, and the Inter-Parliamentary Union (IPU) – may also come into this category. Some universal international non-governmental associations in which members or delegations represent a country (but not a government) may also serve as points of reference.<sup>8</sup>

## Who participates in the assemblies of international organizations?

Generally speaking, participation in international organizations is determined by their rules of membership (i.e. those governing accession to the organization's constitutive instrument).<sup>9</sup> Even within the category of organizations that aim to be universal in nature, there are some general minimum participation requirements that can be inferred, namely statehood, acceptance by a majority of the organization's members, and subscription to membership obligations. In addition, there is the procedural requirement of presentation of credentials by the delegation, in order to ensure its representation at a particular assembly or conference.

### *Statehood*

In intergovernmental organizations, formal statehood<sup>10</sup> is a prerequisite for full membership, which in turn entitles a state to full participation in the organization's plenary decision-making body. As for the UN, only 'states' may be admitted as members<sup>11</sup> – this membership then opens the way to participation as a member with full voting and procedural rights in the General Assembly.<sup>12</sup> The UN's specialized agencies generally take their lead from the UN itself,<sup>13</sup> but there can

8 For example, the International Olympic Committee (IOC), the International Association of Federation Football (FIFA), the International Organization for Standardization (ISO), and the International Union for Conservation of Nature (IUCN). Apart from the International Conference of the Red Cross and Red Crescent, the IUCN is a rare example of an organization that brings together governmental and non-governmental members on an equal basis – see IUCN Statutes, Art. 1, available at [http://cmsdata.iucn.org/downloads/statutes\\_en.pdf](http://cmsdata.iucn.org/downloads/statutes_en.pdf) (last visited 11 January 2010).

9 Daniel Dormoy, 'Recent developments regarding the law on participation in international organisations', in Karel Wellens (ed.), *International Law: Theory and Practice – Essays in Honour of Eric Suy*, Martinus Nijhoff, The Hague, 1998, p. 323.

10 I.e. a permanent population, a defined territory, a government, and the capacity to enter into relations with other states. See Montevideo Convention on the Rights and Duties of States, 1933, Art. 1, available at [http://avalon.law.yale.edu/20th\\_century/intam03.asp](http://avalon.law.yale.edu/20th_century/intam03.asp) (last visited 23 June 2009). See also Opinion No. 1 of the Badinter Arbitration Committee, which restates the requirement of 'government' as 'organised political authority', and adds that a state is characterized by sovereignty: Art. 1(b), reproduced in Alain Pellet, 'The opinions of the Badinter Arbitration Committee: a second breath for the self-determination of peoples', in *European Journal of International Law*, Vol. 3, No. 1, 1992, p. 182.

11 UN Charter, Art. 3(1) and 4(1).

12 *Ibid.*, Art. 9(1).

13 UN specialized agencies will automatically admit UN members that ratify the agency's founding statute and undertake the attendant obligations, without need for further approval by members of the agency. See e.g. Universal Postal Union (UPU) Constitution, Art. 11(1); International Atomic Energy Agency (IAEA) Statute, Art. 4(a); ILO Constitution, Art. 1(3); World Health Organization (WHO) Constitution,



be – and are – differences, especially when a state has chosen not to become a member of the UN but wishes to participate in specialized agency activities as a member.<sup>14</sup> Even in cases where the specialized agencies allow non-members of the UN to join and participate in their assemblies, this permission is usually still only accorded to states<sup>15</sup> or groups of states.<sup>16</sup> The World Meteorological Organization (WMO), on the other hand, allows for full membership (and thus full participation in the World Meteorological Congress)<sup>17</sup> by territories not responsible for the conduct of their international relations – but this does require the co-operation of the state responsible for the territory's foreign affairs.<sup>18</sup> This provision has allowed for full participation in the World Meteorological Congress by the British Caribbean Territories, French Polynesia, Hong Kong, Macau, the Netherlands Antilles, Aruba, and New Caledonia.<sup>19</sup> However, Niue is listed as a member state of WMO despite the fact that its foreign affairs concerns are managed by New Zealand.<sup>20</sup>

The UN Convention on the Law of the Sea (UNCLOS) also lists several types of territories without full statehood that may ratify the Convention, albeit subject to very detailed qualifications, *inter alia* the competence to enter into treaties on subject matters regulated by UNCLOS.<sup>21</sup> These territories may then participate fully in the Assembly of the International Seabed Authority.<sup>22</sup> Similar distinctions apply to the UN Framework Convention on Climate Change (UNFCCC).<sup>23</sup> Both

Art. 4; UN Educational, Scientific and Cultural Organization (UNESCO) Constitution, Art. 2(1); International Telecommunication Union (ITU) Constitution, Art. 2(b); Convention on the International Maritime Organization (IMO), Art. 6; World Meteorological Organization (WMO) Convention, Art. 3(b); UN Industrial Development Organization (UNIDO) Constitution, Art. 3(a). The Statutes of the UN World Tourism Organization (UNWTO), however, require even a UN member's candidature to be approved by a two-thirds majority in the General Assembly (which must also amount to a majority of UNWTO's full members) – see Art. 5(1)–(2).

14 Switzerland, for instance, was a member of all the UN's specialized agencies long before it became a member of the UN itself in 2002.

15 See e.g. Food and Agricultural Organization (FAO) Constitution, Art. 2(2); ITU Constitution, Art. 2(c) and 8(1); UNESCO Constitution, Art. 2(2) and 4(A)(1); World Intellectual Property Organization (WIPO) Convention, Art. 5 and 6; Chicago Convention on Civil Aviation, Art. 48(b) (in respect of the International Civil Aviation Authority – ICAO); Convention on the IMO, Art. 4; UNIDO Constitution, Art. 3(b); UPU Constitution, Art. 11(2) and 14(2).

16 Regional organizations made up of states that have delegated some decision-making authority (i.e. a part of the state's sovereignty in a particular domain) to the organization. See e.g. International Fund for Agricultural Development (IFAD) Constitution, Art. 3(1)(b); FAO Constitution, Art. 2(4).

17 WMO Convention, Art. 7(a).

18 Either by applying the WMO Convention in respect of that territory, or by lodging a membership application on the territory's behalf: see WMO Convention, Art. 3(d)–(e). UN Trust Territories were placed in a similar position, with the UN fulfilling the role of the responsible state (Art. 3(f)).

19 WMO, 'Members of the World Meteorological Organization with date of ratification or accession', 4 December 2009, available at [http://www.wmo.int/pages/members/membership/index\\_en.html](http://www.wmo.int/pages/members/membership/index_en.html) (last visited 11 January 2010).

20 *Ibid.*

21 UNCLOS, Art. 305 (b)–(e).

22 *Ibid.*, Art. 156(2), read with Art. 1.2(2) and 159(1).

23 See the list of Non-Annex I parties to this Convention at [http://unfccc.int/parties\\_and\\_observers/parties/non\\_annex\\_i/items/2833.php](http://unfccc.int/parties_and_observers/parties/non_annex_i/items/2833.php) (last visited 8 February 2010).

those global conventions include Niue as a party although New Zealand retains some responsibility for its foreign affairs.

Until 1947, the Universal Postal Union (UPU) also allowed quasi-sovereign entities to become members.<sup>24</sup> This was changed as a result of its transformation into a UN specialized agency, since at the time the UN did not consider the UPU's standards of admission to be clear enough;<sup>25</sup> the wording 'sovereign country' was consequently introduced into the UPU Constitution.<sup>26</sup> Quasi-sovereign entities that were granted membership before 1947 were allowed to retain their equal rights and duties – today, only the UK Overseas Territories, Netherlands Antilles, and Aruba still benefit from this arrangement.<sup>27</sup>

The practice that has developed over the years has seen different organizations frame different membership criteria according to their specific characteristics, as well as the impact of those characteristics on the universality necessary for the achievement of their objectives. This helps explain, for example, the membership of Niue in WMO, and of the Holy See's membership of a wide range of UN specialized agencies but not of the UN itself.

Notwithstanding the requirement of statehood, there have been exceptional cases in which entities that were not strictly states under customary international law were admitted to the UN and its specialized agencies. First, it should be noted that at least four founding states of the UN were not yet independent in 1945.<sup>28</sup> Second, there is Namibia's admission to the International Labour Organization (ILO) before it gained full independence.<sup>29</sup> According to Kirgis,<sup>30</sup> the latter decision was legally questionable because it ran counter to the ILO Legal Adviser's opinion, which was supported by earlier jurisprudence in the *Danzig* case.<sup>31</sup> However, Kirgis considers that Namibia was a distinguishable case, owing to its status, because in effect the UN Council for Namibia<sup>32</sup> was thus to be granted membership.<sup>33</sup> Osieke confirms that this exceptional move was a countermeasure to South Africa's occupation of Namibia, rather than a modification of the ILO's

24 International Bureau of the UPU, *UPU Constitution and General Regulations with Commentary*, Berne, 2005, p. A7.

25 Yirka Omeorogbe, 'Functionalism in the UPU and the ITU', in *Indian Journal of International Law*, Vol. 27, No. 1, 1987, p. 54.

26 International Bureau of the UPU, above note 24, p. A14.

27 *Ibid.*, p. A7.

28 India, the Philippines, Lebanon, and Syria. Questions also arose at the time concerning the Byelorussian and Ukrainian Soviet Socialist Republics: see John Dugard, *Recognition and the United Nations*, Cambridge University Press, Cambridge, 1987, p. 53. Kirgis notes that, at the time, the latter two were not even putative states, as they were part of the Soviet Union: see Frederic Kirgis, 'Admission of "Palestine" as a member of a specialized agency and withholding assessments in response', in *American Journal of International Law*, Vol. 84, 1990, p. 228.

29 ILO, 64th Session, Geneva, June 1978, Prov. Record No. 24, pp. 19–20.

30 F. Kirgis, above note 28, pp. 221–222.

31 Permanent Court of International Justice, *The Free City of Danzig and the ILO*, Advisory Opinion, PCIJ Series B, No. 18, 26 August 1930 (Danzig was not deemed capable of becoming an ILO member, as Poland was responsible for its foreign relations).

32 A body directly appointed by the Security Council in lieu of the trustee, South Africa, which had lost legitimacy – see F. Kirgis, above note 28.

33 *Ibid.*

traditional practice of seeking confirmation of the independence of prospective members who are not part of the UN.<sup>34</sup>

Kirgis holds that, even though each agency must interpret for itself the criterion of statehood in its statutes (which, he concedes, may lead to conclusions different from customary international law), the political entity that is to be admitted must at least have sufficient control over its territory and people to carry out the functions required of it by the agency – that is, to fulfil the ‘essential, ongoing obligations of membership’.<sup>35</sup> This conclusion does not sit happily with his own concession with regard to Namibia as a special case for the ILO, and it can also lead to confusion about the differences between a state as a member and the government that provides its representation: there are many cases in which the government does not have sufficient control of its territory to carry out the obligations of membership, but there has been no suggestion that this should lead to the state’s membership being terminated.<sup>36</sup>

Outside the UN system, universal intergovernmental organizations such as INTERPOL and the IOM share the approach of limiting full membership to states only.<sup>37</sup> The WTO, on the other hand, expressly also provides for the possibility of full membership by any ‘separate customs territory’ that autonomously conducts its external trade relations and the other matters provided for in the WTO Agreement.<sup>38</sup> Such a territory’s accession, like that of a state, is to take place ‘on terms to be agreed between it and the WTO’.<sup>39</sup> In this way it was possible for Chinese Taipei to be admitted to membership as the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu (shortened to Chinese Taipei).<sup>40</sup> Similarly, by virtue of this provision, Hong Kong and Macau were admitted while still under the control of the United Kingdom and Portugal respectively, and retain independent membership to this day, despite their reversion to China.<sup>41</sup>

The IPU is also distinct in that it not only offers membership to the parliaments of sovereign states<sup>42</sup> but also to the parliaments of ‘territorial entities’.

34 The ILO did so, for example, when admitting Japan, Germany, and Vietnam in 1951 (the former two were under Allied command, and the latter had only recently gained independence from France). Ebere Osieke, *Constitutional Law and Practice in the International Labour Organisation*, Martinus Nijhoff, Dordrecht, 1985, pp. 23–24.

35 F. Kirgis, above note 28, p. 221.

36 Somalia is a case in point – see Gerard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonisation of Sub-Saharan Africa*, Martinus Nijhoff, Leiden, 2004, p. 71. It should be noted that ‘failed states’ are a subject that merits examination on grounds different from those relevant here.

37 INTERPOL Constitution, Art. 4 (stipulating that a country’s membership application must be made by the appropriate government authorities); Constitution of the IOM, Art. 2 (limiting membership to ‘states’).

38 WTO Agreement, Art. XII(1).

39 *Ibid.*

40 See WTO General Council, *Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, Decision No. WT/L/433, 11 November 2001, available at <http://docsonline.wto.org/DDFDocuments/t/WT/L/433.doc> (last visited 30 June 2009).

41 Duncan B. Hollis, ‘Why state consent still matters: non-state actors, treaties and the changing sources of international law’, in *Berkeley Journal of International Law*, Vol. 23, No. 1, 2005, pp. 18–19.

42 IPU Statutes, Art. 3(1).

However, this is subject to the UN's recognition of the entity's statehood aspirations, and the entity's admission as an observer in the UN.<sup>43</sup> Indeed, as will be seen below, deferral to the UN's position is a common default practice in international organizations (both governmental and non-governmental), even where they are not affiliated to the UN.

### *Recognition by members*

Over and above the objective requirements of statehood, recognition by a majority of other member states is a necessity for purposes of membership in international organizations.<sup>44</sup> In most cases, the majority requirement is set at two-thirds.<sup>45</sup> Some organizations also require that an executive body make a recommendation to the plenary body on admission of a new member.<sup>46</sup> Recognition by a majority of members in the plenary body is perhaps the most important criterion for an aspiring participant, as majority approval in effect sets a working boundary determining which entities are considered states qualified to act as members and which are not. It also serves to circumvent a good many disputes in that regard, by at least ensuring that a large majority of fellow members agree to interact with an entity on an equal basis within the organization.

### *Subscription to obligations*

As membership in an international organization is usually based on accession to its founding instrument, acceptance of the obligations therein is evidently a *sine qua*

43 *Ibid.*, Art. 3(2).

44 See e.g. IAEA Statute, Art. 4(b); IFAD Constitution, Art. 3(2)(b); WHO Constitution, Art. 6. Although participation in the ICAO Assembly *prima facie* only requires ratification of the Chicago Convention on Civil Aviation and not a majority vote (thus putting it in a similar position to that of the International Conference (see Art. 48(b)), the Convention would not in fact allow ratification for a state that a majority of the UN General Assembly does not recognize (see Art. 93 *bis*).

45 See e.g. FAO Constitution, Art. 2(2); ILO Constitution, Art. 1(4); IMO Convention, Art. 7; UNESCO Constitution, Art. 2(2); UNIDO Constitution, Art. 3(b); IOM Constitution, Art. 2(b); INTERPOL Constitution, Art. 4; WIPO Convention, Art. 6(2)(viii), read with Art. 6(3)(d) (with regard to the WIPO General Assembly's exercise of the discretion to invite a non-member of the UN to participate – the WIPO Convention grants the organization's General Assembly discretion to invite states that are not members of the UN (or of various unions for the protection of intellectual property) to become members (Art. 5(2)(ii)); however, in such a case the Assembly must agree by a two-thirds majority). Usually, all members have equal voting rights. It should be noted that in the case of admission to the International Monetary Fund (IMF) and, by extension, the World Bank (see International Bank for Reconstruction and Development (IBRD) Articles of Agreement, Section 1), voting rights are weighted according to financial contribution (IMF Articles of Agreement, Art. XII(5)). This is a possible explanation for Kosovo's acceptance there, in contrast to other international fora, as many states that recognize Kosovo have greater voting rights on the basis of their contributions. See IMF, 'Kosovo becomes the International Monetary Fund's 186<sup>th</sup> member', Press Release No. 09/240, 29 June 2009, available at <http://www.imf.org/external/np/sec/pr/2009/pr09240.htm> (last visited 30 June 2009).

46 See e.g. UN Charter, Art. 4(2); IMF By-Laws, Section 21(b); UNIDO, Art. 3(b).

*non* for membership.<sup>47</sup> Besides acceptance of the treaty obligations in the founding document, a few organizations require members to adhere to certain principles: for example, the UN Charter allows membership to ‘peace-loving states’ that accept the Charter obligations;<sup>48</sup> the IOM Constitution requires a ‘demonstrated interest in the principle of freedom of movement’;<sup>49</sup> and the UNIDO Constitution specifies that membership is open to ‘states which associate themselves with the objectives and principles of the Organization’.<sup>50</sup>

In practice, inability to fulfil obligations is seldom a factor that is invoked in admissions processes,<sup>51</sup> except in financial and trade institutions.<sup>52</sup> However, fulfilment of obligations has a bearing on participation in decision-making bodies, as most organizations provide for restriction of a member’s participation if obligations are not fulfilled. In the case of substantive obligations, the sanction may be suspension<sup>53</sup> or expulsion,<sup>54</sup> while non-fulfilment of financial obligations may lead to a limitation of voting rights.<sup>55</sup> As suspension may preclude a state from exercising its rights as a member in general,<sup>56</sup> it can also affect the capacity to hold office in the organization.

This lenient position on actual ability to fulfil obligations is further illustrated by the situation of the failed state: that is, a *de jure* state that has lost its ability to exercise its sovereignty effectively<sup>57</sup> (although this question usually arises after a state has become a member of an organization). Such a loss of effective sovereignty has not been considered as affecting a state’s formal entitlement to participate in international fora. Even in the extreme case of Somalia, which for a long period had no national government and was unrepresented in international fora,<sup>58</sup> the country’s temporary lack of representation came about on procedural grounds, because it did not present its credentials from 1991 to 2000, and, as

47 See the membership clauses cited in notes 11 and 13 above. In particular, the membership clauses of UN specialized agencies show that even existing UN members must expressly accept the obligations of membership of the particular agency, usually by ratification of the agency’s founding instrument.

48 UN Charter, Art. 4(1).

49 IOM Constitution, Chapter II, Art. 2(b).

50 UNIDO Constitution, Art. 3.

51 For example, states that may have limited ability to fulfil the collective security obligations in the UN, e.g. micro-states and states following a permanent neutrality policy, have all been admitted to the UN – see C. F. Amerasinghe, above note 6, pp. 106 (n. 4), 108–109.

52 The World Bank, IMF, and WTO allow states to join on terms that are to be negotiated and agreed upon (IBRD Articles of Agreement, Art. II(1)(b); IMF Articles of Agreement, Art. II(2)); WTO Agreement, Art. XII(1).

53 E.g. UN Charter, Art. 5; WMO Convention, Art. 31.

54 E.g. UN Charter, Art. 6; UNESCO Constitution, Art. 2(4); IMO Constitution, Art. 11.

55 UN Charter, Art. 19; UNIDO Constitution, Art. 5(2); WHO Constitution, Art. 7.

56 E.g. UN Charter Art. 5; WMO Convention, Art. 31; UNESCO Constitution, Art. 2(4).

57 See Daniel Thürer, ‘The failed state and international law’, in *International Review of the Red Cross*, Vol. 81, No. 836, 1999, p. 734.

58 See *Report of the Secretary-General on the Situation in Somalia*, S/1999/882, 16 August 1999, para. 63. More generally, on the international relations of failed states, see Robin Geiss, ‘Armed violence in fragile states’, in *International Review of the Red Cross*, Vol. 91, No. 873, March 2009, pp. 132–133.

stipulated by Article 19 of the UN Charter, because its finances were in arrears it could not vote.<sup>59</sup>

This stands in contrast to the position of *de facto* states that merely lack recognition, highlighting the greater weight given to recognition in the eyes of fellow member states as opposed to a real ability to fulfil obligations.

### *Credentials*

Many organizations have a committee that examines the credentials of delegates who attend meetings of their plenary bodies.<sup>60</sup> These committees do not in principle examine whether a particular state is entitled to participate, but whether delegations are properly accredited to represent that state. In some cases, however, competing delegations seeking to represent the same state, with credentials signed by persons asserting the right to sign that document, can pose questions on which the credentials committee will be expected to make a recommendation to the plenary body. If a delegation's presence is challenged by another member, but not by a competitor from the same country, the disputed delegation is usually allowed to be seated provisionally with full participation rights, pending a decision by the plenary body.<sup>61</sup>

Rejection of credentials is therefore not an official means of limiting participation. It has, however, been used as a means of excluding or seeking to exclude South African delegations from the UN, as well as the delegations of some other governments. This process has seen credentials committees assume a political role not envisaged by the original constitutive instruments of the organizations; indeed, the UN Legal Counsel confirmed the view that using the rejection of credentials as an effective suspension of membership rights would result in the General Assembly's Rules of Procedure being used to circumvent the UN Charter itself.<sup>62</sup>

### *The position of international non-governmental associations with country-based representation*

In the decision-making assemblies of international non-governmental organizations (INGOs), the individual members are not organs of state. However, it can be seen that even those bodies – where the composition of membership is often country-based<sup>63</sup> – frequently adopt a position in specific admission cases analogous to that of intergovernmental assemblies, and even defer directly to the latter's position (primarily that of the UN). It is increasingly common for INGOs to use

59 G. Kreijen, above note 36, p. 71.

60 See e.g. WHO Rules of Procedure, Rule 23; UNIDO Rules of Procedure, Rule 29.

61 UN General Assembly Rules of Procedure, Rule 29 (read with UN Charter, Art. 18); WHO Rules of Procedure, Rule 23; UNIDO Rules of Procedure, Rule 29.

62 C. F. Amerasinghe, above note 6, p. 65, n. 100.

63 See e.g. FIFA Statutes, Art. 10; IOC Statute, Art. 2; Constitution of the International Chamber of Commerce (ICC), Art. 2(2); World Organization of the Scout Movement (WOSM) Constitution, Art. V(2).

the UN as the default standard when considering politically sensitive membership applications.

As for the requirement of statehood, FIFA's statutes are particularly explicit, requiring that the country represented at its assemblies be an 'independent State recognised by the international community'.<sup>64</sup> FIFA's admission regulations require an applicant to present documents demonstrating that it represents such a state, as well as reports on, *inter alia*, the political structures in its country.<sup>65</sup> It has been possible for FIFA to accept membership from such entities as Scotland, Hong Kong, and the Faroe Islands, as well as Palestine and Chinese Taipei.<sup>66</sup>

The statutes of the International Olympic Committee (IOC) require merely that delegations or national committees participating in the assembly represent a 'country'.<sup>67</sup> This apparently does not preclude the IOC from recognizing 'independent territories, commonwealths, protectorates and geographical areas'.<sup>68</sup> It is thus quite free to make its own decisions on admission, and has often taken decisions that do not necessarily reflect the general position of other organizations (including the UN). In sensitive cases, however, the IOC appears to have been careful to ensure that participation is arranged on terms accepted by those concerned, for example in ensuring that the National Committee of the People's Republic of China would be the sole representative of China, with Chinese Taipei able to be fully represented in the assemblies of the IOC and other sports federations.<sup>69</sup> Palestine, Macau, and Hong Kong are also permitted to participate independently in the IOC: an important consideration may be that they were admitted before 1996, when a new IOC rule requiring international recognition came into effect.<sup>70</sup> Perhaps because of this rule, the IOC now seems more likely to follow the UN's position in politically charged cases such as that of Kosovo.<sup>71</sup>

Many INGOs also use UN nomenclature to describe their members: for example, the World Organization of the Scout Movement (WOSM) uses the term 'The former Yugoslav Republic of Macedonia' to designate that country. Similar in

64 FIFA Statutes, Art. 10(1). FIFA invoked this article when rejecting the application of Kosovo: see FIFA, 'FIFA's finances solid', Media Release, 24 October 2008, available at <http://www.fifa.com/aboutfifa/federation/bodies/media/newsid=924258.html> (last visited 20 October 2009).

65 Regulations governing the Admission of Associations to FIFA, Art. 3(1)(a) and (g), available at [http://www.fifa.com/mm/document/tournament/competition/01/11/80/00/aufnahmefifa\\_inhalt.pdf](http://www.fifa.com/mm/document/tournament/competition/01/11/80/00/aufnahmefifa_inhalt.pdf) (last visited 20 October 2009).

66 FIFA, 'About FIFA: associations', available at <http://www.fifa.com/aboutfifa/federation/associations.html> (last visited 10 February 2010).

67 IOC Statute, Art. 2.

68 IOC, 'National Olympic committees', available at <http://www.olympic.org/en/content/The-IOC/Governance/National-Olympic-Committees/> (last visited 20 October 2009).

69 IOC Executive Board Resolution, Nagoya, Japan, 25 October 1979, reprinted in 'China and Olympism', in *Olympic Review*, No. 191/192, August/September 1983, p. 586.

70 Michel Filliau (senior IOC official), quoted in 'IOC rebuffs Tibetan request for own team at the 2008 Beijing Olympics', in *New York Times*, 10 November 2007, available at <http://www.nytimes.com/2007/12/10/sports/10iht-olytibet10.8670030.html> (last visited 20 October 2009).

71 See e.g. Emmanuelle Moireau (IOC spokesperson), quoted in Stephen Wilson, 'IOC: Kosovo Olympic team "unlikely"', in *Associated Press Online*, 18 February 2008, available at <http://www.encyclopedia.com/doc/1A1-D8USTEBG0.html> (last visited 20 October 2009).

structure to the sports federations discussed above, the WOSM is composed of National Scout Organizations on the basis that there can be only one organization in any one country.<sup>72</sup> Its constitution does not define ‘country’, but the membership lists include such designations as ‘China, Scouts of (headquartered in Taipei)’ and ‘Palestinian Authority’.<sup>73</sup>

The International Union for Conservation of Nature (IUCN), a rare example of another forum (besides the International Conference) where states and non-governmental entities interact on an equal basis,<sup>74</sup> has directly specified its alignment with the UN position in its statutes, despite not being a UN body. The IUCN requires states taking part in its Congress to be either members of the UN or one of its specialized agencies or the International Atomic Energy Agency, or parties to the Statute of the International Court of Justice.<sup>75</sup> This express *renvoi* to the UN position reflects the fact that states themselves (which would generally also be UN members) are also directly involved in the admission process.<sup>76</sup>

Members of assemblies of INGOs are also required to subscribe to certain obligations and principles<sup>77</sup> but, being free of state involvement in their decision-making, they are usually able to be much more flexible on questions such as membership.

## Treaties

Most treaties simply refer to ‘states’ as the entities capable of signing, ratifying, or acceding. Depositaries, when considering whether to accept an instrument lodged by an entity that is not a member of the UN or a specialized agency, usually refer the instrument to other states parties to obtain an opinion as to whether the instrument should be accepted.<sup>78</sup> Ratification of a treaty may then confer a right to participate in assemblies tasked with reviewing and implementing the treaty.<sup>79</sup>

A few more recent treaties, however, have looked towards the inclusion of entities other than states (albeit intergovernmental organizations). For example, the UNFCCC expressly extends the ability to ratify or accede to states and ‘regional economic integration organizations’.<sup>80</sup>

72 WOSM Constitution, Art. V(2).

73 For more details see WOSM, ‘National Scout organisations’, 15 February 2010, available at [http://www.scout.org/en/around\\_the\\_world/countries/national\\_scout\\_organisations](http://www.scout.org/en/around_the_world/countries/national_scout_organisations) (last visited 19 February 2010).

74 IUCN Statutes, Art. 1.

75 *Ibid.*, Art. 5.

76 *Ibid.*, Art. 6–11.

77 See e.g. Constitution of the ICC, Art. 1; IOC Statute, Art. 1(1).

78 See the example of the Palestine Liberation Organization (PLO)’s declaration of accession to the Geneva Conventions, below note 133.

79 E.g. the ICAO Assembly, Art 48(b).

80 UNFCCC, Art. 22.



## Alternative means of participation: bringing everyone to the table

One common trend is that the general members-only rule is not inflexible when it comes to participation in the broader sense. The need for flexibility has increased over the years, particularly as the growth of regional institutions with significant legislative or quasi-legislative functions has brought new players on to the international decision-making scene. Another factor has been the recognition on the part of some international organizations, particularly those concerned with environmental issues and trade, that it is not possible to achieve adequate international action without involving entities other than states in the assemblies that make the rules. This is also important with regard to reporting on action taken.

For instance, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal included the former European Community as a party, as this entity had decision-making powers relevant to the subject matter of the treaty. In addition, by an accommodation designed to ensure strong worldwide control of hazardous wastes, Taiwan is in effect represented in the deliberations through an NGO, the Institute of Environment and Resources.<sup>81</sup>

As the *de facto* affairs of states are seldom as clear-cut as the rules for membership, organizations have had to cope with situations not envisaged when the constitutions were written. They have done so by acting pragmatically as far as possible, and seeking agreement from the governments most directly concerned to advance the mission of the organization itself. This corresponds to the suggestion that since entities that take active part in certain areas of international relations have a duty to implement the relevant rules and regulations, they should somehow be accommodated in rule-negotiation processes and supervisory mechanisms.<sup>82</sup>

In recognition of this, it is now more and more common for constitutions of new international organizations to allow for non-states to become parties. It is less easy to find instruments that provide participation rights for entities that have not been recognized as sovereign states by a majority of members,<sup>83</sup> but various

81 See e.g. the list of participants at the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Ninth Meeting, Bali, 23–27 June 2008, UNEP/CHW.9/INF/45, p. 42, available at <http://www.basel.int/meetings/cop/cop9/docs/i45e.pdf> (last visited 9 February 2010).

82 Neri Sybesma-Knol, 'The United Nations framework for the participation of observers', in Jean-Marie Henckaerts (ed.), *The International Status of Taiwan in the New World Order: Legal and Political Considerations*, Kluwer Law International, The Hague, 1996, p. 167.

83 Sybesma-Knol draws the distinction between state sovereignty, derived sovereignty (e.g. intergovernmental organizations with certain supranational decision-making powers), shared sovereignty (e.g. components of federated states), and potential sovereignty (e.g. liberation movements), as well as groups such as minorities and indigenous peoples who claim a degree of internal autonomy; see Neri Sybesma-Knol, 'Non-state actors in international organisations: an attempt at classification', in Theo van Boven, Cees Flinterman, Fred Grünfeld, and Rita Hut (eds), *The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-state Actors*, Netherlands Institute of Human Rights (SIM) Special No. 19, Utrecht, 1997, pp. 23–24. In general, the present article focuses only on the participation of entities that either claim full sovereignty or at least have potential sovereignty – the participation of other entities such as NGOs and intergovernmental organizations in international assemblies raises much broader questions, which go beyond the scope of the present analysis.

forms of accommodation are usually possible through such mechanisms as observer status, associate membership, and technical/advisory co-operation.

### *Observer status*

Observer status is the principal means by which many international organizations (intergovernmental and non-governmental alike) permit a limited form of participation in their assemblies by entities that cannot – or do not wish to – become members, but nevertheless may have an interest in following the proceedings. Observer status generally entails limited participation rights in plenary assemblies<sup>84</sup> but a wider range of opportunities in committees and technical meetings. Observers do not enjoy the right to vote or to hold office,<sup>85</sup> although they can sometimes be elected to positions within the technical committees where their representation adds value.

The granting of observer status or the invitation of an observer usually requires the approval of a majority of the plenary conference or assembly itself,<sup>86</sup> except in cases where criteria are set upon which an executive committee or the chief executive of the organization can act.<sup>87</sup> Another option is offered by INTERPOL: police bodies that are not members of the organization may be invited as observers when nominated by the Executive Committee and invited by both the state hosting the conference and the Secretary-General.<sup>88</sup>

The types of entities that may be admitted as observers usually fall into the categories of non-member states,<sup>89</sup> groups of states,<sup>90</sup> and international governmental or non-governmental organizations.<sup>91</sup> The International Fund for Agricultural Development (IFAD) and UNIDO assemblies have considerable additional latitude, as they are also empowered to invite ‘any other entity’<sup>92</sup> or ‘other observers’<sup>93</sup> respectively. In practice, this discretion has only been used so far to invite non-member states eligible for membership, and the Holy

84 See e.g. WHO Rules of Procedure, Art. 45.

85 See e.g. the limitations on the participation rights of observers in the WHO, which are expressly stated in the WHO Constitution, Art. 18(h). Otherwise, most provisions regulating voting and office-bearing in organizations expressly mention that only ‘Members’ may do so.

86 WHO Constitution, Art. 18(h); UNIDO Constitution, Art. 4(2); IFAD Rules of Procedure, Rule 43(1). UNESCO and WIPO require a two-thirds majority (UNESCO Statute, Art. IV(E); WIPO Convention, Art. 6(2)(ix) and 7(2)(v), read with Art. 6(3)(d) and 7(3)(c) respectively). The UPU Constitution confers a right of observership upon Restricted Unions; however, such unions must consist of member states (Art. 8).

87 UNFCCC, Art. 7(6) describes how observers with expertise in matters covered in the Convention, and who have informed the Secretariat of their wish to be represented, may be admitted to the Conference of the Parties, unless one third of the states parties present at the meeting object.

88 INTERPOL General Regulations, Art. 8.

89 IFAD Rules of Procedure, Rule 43(1); WIPO Convention, Art. 6(2)(ix) and 7(2)(v); WHO Rules of Procedure, Rule 3.

90 E.g. UPU Constitution, Art. 8 (‘Restricted Unions’, comprising groups of existing member states).

91 UNESCO Statute, Art. IV(E)(13–14); WIPO Convention, Art. 6(2)(ix) and 7(2)(v); WHO Constitution, Art. 18(h) (which also allows national NGOs to be invited if the government concerned consents).

92 IFAD Rules of Procedure, Rule 43(1).

93 UNIDO Constitution, Art. 4(2).

See.<sup>94</sup> In contrast to the above predefined frameworks for admitting observers, the United Nations has evolved different practices for its various principal organs and for subsidiary bodies. It is not easy to compare these practices, but it can be said that the UN General Assembly has accorded observer status either to states that are not members of the UN (Switzerland was a case in point until 2002) or to organizations and other entities through the adoption of specific-purpose resolutions. Relatively few organizations have achieved this status, and it is largely restricted to intergovernmental organizations or to those that have a strong governmental relationship or treaty basis.<sup>95</sup>

NGOs are not normally granted observer status at the UN General Assembly. The Charter of the UN envisaged that their main contribution would be through the Economic and Social Council (ECOSOC).<sup>96</sup> This has meant that the granting of such status in the General Assembly is usually seen as connoting something much more than the consultation envisaged for NGOs with ECOSOC,<sup>97</sup> and has led to consideration being given to differentiated forms of observer status in other organizations. The trend, however, is to find ways to seek increased involvement in international debates by institutions beyond government, as shown by the 2004 Report of the Panel of Eminent Persons on UN–Civil Society Relations (the Cardoso Report).<sup>98</sup> By the end of 2009, over 13,000 civil society organizations were listed with the UN Department of Economic and Social Affairs under procedures established by ECOSOC.<sup>99</sup>

In the context of recognition of the right to self-determination and the UN's decolonization mission, observer status was also used as a means of affording national liberation movements a measure of participation in the UN General Assembly, despite the fact that they did not meet formal statehood criteria. These entities were granted such a status because they were regarded as 'states *in statu nascendi*',<sup>100</sup> that is, as representatives of future states, and also of their populations, that were not deemed to be truly represented by the power that controlled their territory.

94 See IFAD Rules of Procedure, n. 3.

95 The ICRC and the International Federation qualified for UN General Assembly observer status on this basis, in particular owing to the ICRC's special role and mandates under the Geneva Conventions and the International Federation's specific role in international humanitarian relations. See UN General Assembly (UNGA), Resolution 45/6, 16 October 1990 (ICRC); UNGA, Resolution 49/2, 19 October 1994 (International Federation). See also Christian Koenig, 'Observer status for the ICRC at the United Nations: a legal viewpoint', in *International Review of the Red Cross*, No. 280, 1991, pp. 37–48; Wilfried Remans, 'The granting of observer status by the General Assembly of the United Nations to the International Federation of Red Cross and Red Crescent Societies', in Wellens (ed.), above note 9, p. 348.

96 UN Charter, Art. 71.

97 On the 'degrees of sovereignty' of observers, see Neri Sybesma-Knol, 'The continuing relevance of the participation of observers in the work of the United Nations', in Wellens (ed.), above note 9, pp. 372f.

98 *We the Peoples: The UN, Civil Society, and Global Governance*, Report of the Panel of Eminent Persons on UN–Civil Society Relations (Cardoso Report), UN Doc. A/58/817, 11 June 2004.

99 See United Nations, 'UN and civil society', available at <http://un.org/en/civilsociety> (last visited 19 February 2010).

100 C. Koenig, above note 95, p. 44.

Koenig notes a ‘well-established cooperation’ between the United Nations and regional organizations with regard to the observer status of national liberation movements.<sup>101</sup> The General Assembly confirmed its practice of granting observer status to liberation movements recognized by the former Organization of African Unity (OAU).<sup>102</sup> It also called on states hosting other international conferences to afford to liberation movements recognized by the OAU and the League of Arab States (as well as holding observer status in the UN) ‘the facilities, privileges and immunities necessary for the performance of their functions’ contained in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.<sup>103</sup>

It was in this context that the African National Congress (ANC) and the Pan-African Congress (PAC) of South Africa, as well as the South West African People’s Organization (SWAPO), were invited as observers to the UN General Assembly.<sup>104</sup> Following recognition of the right of self-determination of the people of Palestine,<sup>105</sup> the Palestine Liberation Organization (PLO) was also granted the right to participate in plenary deliberations on the question of Palestine.<sup>106</sup> Since 1988, however, the term ‘Palestine’ has been used as the official designation in place of the name of the organization, but without prejudice to the observer status of the PLO itself.<sup>107</sup> Today, the delegation’s quaintly described status qualifies it as an ‘other entit[y] having received a standing invitation to participate as [an] observe[r] in the sessions and the work of the General Assembly and ... maintaining permanent offices at Headquarters’.<sup>108</sup> Yet, in protocol terms, this status comes immediately after the member and observer states, and outranks all other observer entities.

Recognition as an observer by the UN General Assembly has repercussions in other assemblies because it applies automatically to many other UN bodies (such as ECOSOC)<sup>109</sup> and specialized agencies (such as UNIDO),<sup>110</sup> as well as to international organizations that take their guidance from the UN (e.g. the IPU).<sup>111</sup> Some

101 *Ibid.*

102 UNGA, Resolution 3280 (XXIX), 10 December 1974.

103 UNGA, Resolution 35/167, 15 December 1980, operative para. 2; UNGA, Resolution 37/104 of 16 December 1982, operative para. 2. The additional proviso stating that such organizations must also have observer status in the UN means that the UN is nevertheless not bound to grant such status to movements recognized by these organizations.

104 SWAPO was formally invited as an observer to the General Assembly, as well as all other conferences convened by UN organs, by UNGA Resolution 31/152, 20 December 1976.

105 UNGA, Resolution 2649 (XXV), 30 November 1970, operative para. 5.

106 UNGA, Resolution 3210 (XXIX), 14 October 1974.

107 UNGA, Resolution 43/177, 15 December 1988.

108 UN Executive Office of the Secretary-General, *Permanent Missions to the United Nations*, United Nations, New York, March 2008, p. 293, available at <http://www.un.int/protocol/bluebook/bb298.pdf> (last visited 3 November 2009).

109 ECOSOC Rules of Procedure, Rule 73.

110 UNIDO Constitution, Art. 4(1).

111 See Inter-Parliamentary Council, ‘Practical modalities of the rights and responsibilities of observers at IPU meetings’, 164th session, Brussels, 11 April 1999 (as amended in April 2009), available at <http://www.ipu.org/strct-e/obsrv-new.htm> (last visited 1 November 2009).

older international organizations (e.g. the ILO) have constitutions and rules of procedure that were written before the evolution of the General Assembly observer process and do not easily make the same accommodations.

In the realm of INGO assemblies, a notable example of differentiated participation levels exists in the ISO. Participants in the ISO General Assembly – each of which is the body most representative of standardization activities in its country – are classified as member bodies, correspondent members, or subscriber members. While member bodies have full participation rights in the assembly, the latter two may attend as observers but do not participate in the development of standards. The differentiation is based on technical considerations (i.e. whether the country has a developed standardization activity).<sup>112</sup> Thus, observer status does not necessarily bring with it such political connotations as in some other organizations.

### *Associate membership*

Associate membership is a means of limited participation by territories that do not control their own international affairs. It ensures the representation of some population groups that may have concerns distinct from those of the rest of their state, as reflected in the WHO Constitution, which specifies that representatives of an associate member must come from the native population of the territory.<sup>113</sup> The fact that relevant territories are designated as not being responsible for their own international affairs seems to imply that eligible entities must have an elevated degree of independence in their domestic affairs (were this not the case, then any province or, indeed, municipality within a state would be eligible). Therefore, aside from ensuring representation, the status of associate membership is also a means of taking into account these entities' greater responsibility for their own populations. Similarly to observer status, associate membership normally entails all participation rights except for the rights to vote on decisions and to hold office.<sup>114</sup>

Admission as an associate member usually requires application (or consent) by the state responsible for the entity's international affairs<sup>115</sup> or the UN,<sup>116</sup> and/or the approval of the organization's members.<sup>117</sup> In practice, it is therefore not an option for territories whose sovereignty is disputed. Indeed, the desire of states

112 ISO, 'ISO members', available at [http://www.iso.org/iso/about/iso\\_members.htm](http://www.iso.org/iso/about/iso_members.htm) (last visited 28 December 2009).

113 WHO Constitution, Art. 8.

114 FAO Constitution, Art. 3(3); Convention on the IMO, Art. 9; UNWTO Statute, Art. 9(3), as amended by UNWTO General Assembly Resolution 511(XVI), 16th Session, Dakar, November–December 2005; World Health Assembly Rules of Procedure, Rule 44: World Health Assembly, 'Rights and obligations of associate members and other territories', 21 July 1948, Official Records of the WHO, 13, 100, 337, Section 1. However, in the WHO, associate members are permitted to vote and to hold office in certain committees and sub-committees not attached to the World Health Assembly (Section 1(1)(ii)).

115 FAO Constitution, Art. 2(11) (the responsible state is required to undertake the associate member's obligations on its behalf); UNWTO Statute, former Art. 6(1); UNESCO Constitution, Art. 2(3); Convention on the IMO, Art. 8; WHO Constitution, Art. 8.

116 Convention on the IMO, Art. 8.

117 UNESCO Constitution, Art. 2(3); UNWTO Statute, Art. 6(3).

to ensure that this does not serve as a way in for such entities is clearly reflected in the amendments to the UN World Tourism Organization (UNWTO) Statutes. These formerly permitted territories not responsible for their own external affairs to become associate members of UNWTO,<sup>118</sup> but in 2005 the statutes were amended so that associate membership by territories was confined to those which already had this status at 24 October 2003.<sup>119</sup> From then on, associate membership became limited to intergovernmental organizations, NGOs, and other associations.<sup>120</sup> An indication as to the reasons can be gathered from a further simultaneous amendment, which bars the Assembly from considering the candidature of any entity headquartered in a territory that is the subject of a dispute before the United Nations, or whose activity is related to such a territory, unless no member state objects.<sup>121</sup> Thus, states not only closed this door to disputed entities, but firmly shut the windows as well.

The United Nations Organization has developed its own way of handling associate membership differently in its regions. The Economic and Social Commission for Asia and the Pacific has nine associate members, including two countries that are states for treaty and full membership purposes in some other organizations, and others that are parts of another country.<sup>122</sup> A comparable pattern is in place in Latin America and the Caribbean, but not in the other regions.<sup>123</sup>

### *Technical/advisory co-operation*

Some organizations have made arrangements as they have seen fit for representatives of other entities to participate on purely technical matters, in such a manner that there is no elevation of status of that entity. For example, in the ILO a state responsible for a non-metropolitan territory's international relations may appoint advisers from the territory to their delegation to advise on matters relating either to that territory's self-governing powers or to non-self-governing territories.<sup>124</sup> Such advisers' participation rights are very limited – they may not vote and may only speak in very restricted circumstances;<sup>125</sup> furthermore, inclusion of

118 UNWTO Statutes, Art. 6(1).

119 UNWTO Statutes, Art. 5 (amendment adopted by UNWTO General Assembly Resolution 511(XVI), 16th Session, Dakar, November–December 2005).

120 I.e. 'tourism bodies without political competence subordinate to territorial entities, professional and labour organizations, academic, educational, vocation training and research institutions and to commercial enterprises and associations whose activities are related to the aims of the Organization or fall within its competence': UNWTO Statutes, Art. 6(5) (amendment adopted by UNWTO General Assembly Resolution 511(XVI), 16th Session, Dakar, November–December 2005).

121 *Ibid.*

122 The former are Niue and the Cook Islands; the latter include Hong Kong and Macau, The full list can be seen at <http://www.unescap.org/about/member.asp> (last visited 8 January 2010).

123 See the list of members and associate members of the Economic Commission for Latin America and the Caribbean, available at [http://www.eclac.org/cgi-bin/getprod.asp?xml=/noticias/paginas/7/21497/P21497.xml&xsl=/tpl-i/p18f-st.xsl&base=/tpl-i/top-bottom\\_acerca.xsl](http://www.eclac.org/cgi-bin/getprod.asp?xml=/noticias/paginas/7/21497/P21497.xml&xsl=/tpl-i/p18f-st.xsl&base=/tpl-i/top-bottom_acerca.xsl) (last visited 8 January 2010).

124 ILO Constitution, Art. 3(3).

125 At the request of the delegate they accompany and with special permission from the President of the Conference – ILO Constitution, Art. 3(6).

such advisers is entirely at the discretion of the responsible state. Nevertheless, it is a model of participation that demonstrates how internal representation of particular territories in a depoliticized, technical role is employed to ensure that their specific interests are taken into account on matters of universal concern.<sup>126</sup>

The WMO already has a broad approach to participation, allowing for full membership of territories not responsible for their own external affairs. However, owing to the technical nature of the organization, which requires coverage to be as wide as possible, the WMO President has the discretion to invite the director of any meteorological service (or any other individual) to attend and participate in the discussions of the Congress.<sup>127</sup> This is not limited to meteorological services of member states, meaning in effect that such an official from any territory at all could be invited.

Thus, the ILO and WMO have left open the possibility of participation by individuals representing an entity whose sovereignty is partial – or possibly even disputed, although it is unknown what the reaction would be if the relevant provisions were invoked to that effect. These arrangements seem to reflect the broader functionalist approach that has influenced the participation practices and policies of other technical bodies such as the UPU, the International Telecommunication Union, and the ISO. At the same time, the ILO and WMO provisions have seemingly aimed at minimizing the political impact of this representation by limiting the participation rights of the individuals concerned: in the former case, by effectively making them observers within a delegation; in the latter case, by allowing them only to participate in discussions without a vote.

## Participation in the International Conference of the Red Cross and Red Crescent

The Movement's components – that is, the International Committee of the Red Cross (ICRC), the International Federation, and the National Red Cross and Red Crescent Societies themselves – and the states parties to the Geneva Conventions, each represented by one delegation, may all participate in the International Conference, the supreme deliberative body for the Movement.<sup>128</sup> States participate 'in exercise of their responsibilities under those Conventions and in support of the overall work of the Movement'.<sup>129</sup> Each delegation has one vote,<sup>130</sup> thus placing states and components of the Movement on an equal footing.

126 While this is specifically addressed in the ILO Constitution, it is common for countries to include in their delegations to such meetings persons who are equipped to handle the issues in question from the perspective of the population affected.

127 WMO Convention, Art. 7(c).

128 Movement Statutes, Art. 9(1).

129 *Ibid.*, Art. 8. Again, it should be noted that separate requirements exist for the recognition and participation of National Societies, and that questions relating to participation of National Societies fall outside the scope of the present analysis.

130 *Ibid.*, Art. 9(2).

Unlike other organizations, the Movement's constitutive document (the Statutes of the Movement) is not a treaty with parties. It is a document adopted by the International Conference in a decision-making process involving states and National Societies, the ICRC, and the International Federation. Furthermore, as noted above, the Movement itself does not include states, and the recognition of National Societies (and thereby the process of their entry into the Movement) is assigned by the Statutes to the ICRC alone,<sup>131</sup> albeit on the recommendation of the Joint ICRC/International Federation Commission for National Society Statutes (the Joint Statutes Commission).<sup>132</sup> This creates a difference as to how participants are admitted into the Conference. Whereas the constitutive documents of organizations normally require a majority of members to accept a new participant in their assemblies, the Geneva Conventions – like most other multilateral treaties – may be ratified by states through a unilateral act of accession;<sup>133</sup> conversely, National Societies become participants through the separate process of being recognized as members of the Movement.

Usually, the fact of being a party to the Geneva Conventions is a clear-cut, objective criterion, which should avoid controversies over determining the status of an entity within the Conference. Nevertheless, there have been participation disputes, which can be roughly divided into situations where a delegation's entitlement to represent an existing state party is contested (disputed legitimacy) and those where the entitlement of the entity itself to participate as a state has been called into question (disputed status). Cases of disputed legitimacy have included the competing claims of the People's Republic of China (PRC) and the Republic of China (ROC) to represent China, as well as the minority apartheid government's representation of South Africa. Disputed status has been the crux of the matter in the case of Namibia (which was under South African control) and Palestine.<sup>134</sup> The frameworks and precedents for dealing with these two types of issue will now be examined.

## Disputed legitimacy

Disputes over admission to the International Conference of a delegation purporting to represent an existing state create fundamental problems for the Movement.

131 *Ibid.*, Art. 5(2)(b).

132 An information note on the Joint Statutes Commission is available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/council-delegates-2007-strategy-151007/\\$File/CD07\\_7-3\\_NSStatutesJointCom\\_Annex4\\_FINAL\\_ENG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/council-delegates-2007-strategy-151007/$File/CD07_7-3_NSStatutesJointCom_Annex4_FINAL_ENG.pdf) (last visited 8 January 2010).

133 Geneva Conventions of 1949, Common Article 60/59/139/155.

134 In 1989, the Permanent Observer of Palestine to the United Nations Office at Geneva sent a letter to the Swiss Federal Council (depository of the Conventions), signalling the intention of the PLO – 'entrusted with the functions of the Government of the State of Palestine' – to adhere to the Conventions and the two 1977 Additional Protocols. The Swiss Federal Council stated that it was not in a position to decide whether the letter constituted an instrument of accession, 'due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine'. See ICRC, 'State Parties to the Geneva Conventions of 12 August 1949', available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited 28 October 2009). For the full texts, see 'Law reports: for the record', in *Palestine Yearbook of International Law*, 1989, pp. 318–321.



Such situations raise issues that directly touch on the universality of the Movement, as well as on its neutrality. Should the Movement engage with *de facto* but unrecognized governments – or governments with inhumane policies – in this forum? Does inclusion or exclusion of an entity amount to taking a stance on the legitimacy of a government, thus possibly jeopardizing humanitarian operations? The highly volatile and divisive nature of such questions means that they can in turn easily threaten the unity of the Movement as participants polarize along political lines. Although such decisions may be taken mostly by state participants and thus not reflect the standpoint of the components of the Movement,<sup>135</sup> the Conference's decisions can certainly influence the perception of the Movement's neutrality, and thus its working relationship with certain authorities.

In practice, questions of which delegation should be invited to represent a country have first fallen to the Standing Commission (the Conference's trustee body, composed of ICRC, International Federation, and National Society representatives),<sup>136</sup> because it is charged with convoking delegations to the Conference.<sup>137</sup> In addition, it is capable of making interim decisions on such issues, because it has the broad mandate of interim settlement of disputes on interpretation of the Statutes of the Movement,<sup>138</sup> as well as to take 'any measures which circumstances demand' between Conferences.<sup>139</sup> It may also establish ad hoc bodies,<sup>140</sup> and hence could, for example, establish a body that could examine admission in more detail, such as a credentials committee. The Standing Commission's decisions are, however, subject to the final approval of the Conference. Disagreement with measures taken regarding admission has thus opened the way for heavily politicized debates that should have strictly no place in this humanitarian forum.

In the cases both of China/Taiwan and of South Africa under the apartheid system, it can be seen that the Standing Commission has leaned towards universality and to allowing participation of authorities that effectively have responsibility for implementing the Geneva Conventions in their territory, regardless of questions over the legitimacy of that authority. In the case of China, the Standing Commission initially took the same position as for other 'divided states' (e.g. North and South Vietnam, North and South Korea) and invited both the PRC and ROC delegations, each as the representative for the part of the territory that they controlled (i.e. effectively treating those parts as two states). This was initially

135 E.g. the suspension of South Africa, where the ICRC and a large number of National Societies refused to vote (i.e. rejecting the vote's legality), and the League of Red Cross and Red Crescent Societies abstained – see *Report of the 25th International Conference of the Red Cross and Red Crescent*, Geneva, 23–31 October 1986, p. 98.

136 Movement Statutes, Art. 16–17.

137 Rules of Procedure of the International Red Cross and Red Crescent Movement ('Movement Rules of Procedure'), Rule 5.

138 Movement Statutes, Art. 18(2)(a).

139 *Ibid.*, Art. 18(8).

140 *Ibid.*, Art. 18(7).

confirmed by the Conference after a heated dispute.<sup>141</sup> However, the controversy continued in light of the parties' claims to each represent China in its entirety, and the Conference was postponed on this basis. Eventually, the UN resolution recognizing the PRC as the sole representative of China<sup>142</sup> gave the Standing Commission grounds to decide not to invite the ROC delegation.<sup>143</sup>

The case of South Africa was distinct in that it did not involve rival delegations. Instead, the issue was the Standing Commission's decision to invite the delegation of a non-representative and oppressive government to represent the country. The debate for the first time questioned 'the representative character of the delegation of a government of a state which nobody denies is party to the Geneva Conventions'.<sup>144</sup> After a lengthy deliberation, the Conference voted in favour of suspension.<sup>145</sup> Nevertheless, critics were vocal, and fifty-one members of the Conference refused to take part in the vote, thus challenging its very legality.<sup>146</sup>

The official record of this debate, along with the subsequent statements on the various delegations' positions,<sup>147</sup> is a striking illustration of the Fundamental Principles being invoked by each side for or against the participation of a government that was almost universally viewed as illegitimate. Those wishing South Africa to be suspended referred frequently to 'humanitarian principles' or even humanitarian law.<sup>148</sup> Those who were against suspension, on the other hand, argued that universality was essential in order to maintain dialogue with governments that do not respect humanitarian principles, in the hope of advancing humanitarian objectives.<sup>149</sup> In addition, concern was expressed that the suspension would jeopardize the neutrality of the Red Cross, and hence its humanitarian mission.<sup>150</sup> Thus the participants' obligation to respect the Fundamental Principles, during the Conference as well as at other times,<sup>151</sup> did nothing to defuse the debate.

Tempted as supporters may have been to hold up the suspension of South Africa as a triumph of the principle of humanity, political factors almost certainly came into play as well.<sup>152</sup> To date, this suspension from the Conference has remained a unique case, despite any number of violations of humanitarian

141 See François Bugnion, 'The International Conference of the Red Cross and Red Crescent: challenges, key issues and achievements', in this issue, pp. 675–712.

142 UN General Assembly Resolution 2758 (XXVI), 25 October 1971.

143 See F. Bugnion, above note 141.

144 Mr. A. Hay (ICRC President), *Report of the 25<sup>th</sup> International Conference*, above note 135, p. 98.

145 *Ibid.*, pp. 79–97.

146 Mostly National Societies, and including the ICRC. The League of Red Cross and Red Crescent Societies abstained. See *ibid.*, p. 98.

147 *Ibid.*, pp. 98–109.

148 See e.g. the intervention of Ambassador D. D. Afande (Government of Kenya), who proposed the motion of suspension on behalf of the African delegations: *ibid.*, p. 80.

149 See e.g. the address of Brigadier B. Wallberg (Swedish Red Cross): *ibid.*, p. 91.

150 See e.g. the addresses of Mr. J. Mouton Brady (Government of France), and Admiral E. Zumwalt, Jr. (Government of the USA): *ibid.*, p. 85.

151 Movement Statutes, Art. 11(4).

152 Mr. L. Marin of the Spanish Red Cross, representing a group of seventeen National Societies that had refused to participate in the vote, stated that the group had done so because they 'considered that the

principles around the world. Thus it has not set a precedent, and for good reason: the International Conference *is* unique in its nature as a non-political forum for humanitarian discussion among states and humanitarian organizations, and this could be jeopardized if the Conference were to make a habit of excluding participants because of their violations of humanitarian principles. Other fora exist today for participants to take a stand on a specific government's actions, whereas no other can bring states and humanitarian organizations together to work on the implementation of humanitarian law.

These examples show that any invitation to the Conference that is opposed by another member will in any event lead to a debate, for the Standing Commission does not view itself as 'a direct instrument to settle disputes',<sup>153</sup> and the measures that it takes – including the invitation of certain entities – are subject to the final decision of the Conference.<sup>154</sup> The importance of the Chairman's task of curtailing any 'controversies of a political, racial, ideological or religious nature'<sup>155</sup> cannot therefore be understated.

## Disputed status

The Conference has also faced situations in which the question is not the legitimacy of the delegation but the eligibility of the entity itself to claim that it is a state party to the Geneva Conventions. Entities of this kind have generally been allowed to attend the Conference as observers to enable them to be present while issues concerning them are discussed, thereby also defusing the inevitable debates over their status. Past examples of such entities that have attended as observers include pre-independence Namibia (the UN Council for Namibia was present as an observer in 1986)<sup>156</sup> and Palestine (the PLO was granted observer status).

Practice since the China debates has gradually seen a *de facto* acceptance of UN ground rules for what is and what is not a state. This is also the net effect of the Swiss decision not to proceed with the PLO's purported adherence to the Geneva Conventions in 1989. But, because of its linkage to the UN headquarters, it is a practice that has not adapted to the realities now perceived by the specialized agencies and a growing number of other intergovernmental organizations dealing with technical issues.

This dilemma is also shown by the way in which the Movement handles the granting of observer status in the International Conference. As the Standing Commission's power to invite observers is not restricted<sup>157</sup> and little guidance is

vote was being taken from political positions': *Report of the 25th International Conference*, above note 135, p. 98.

153 Standing Commission of the Red Cross and Red Crescent, 'The birth of the Standing Commission', 2007, available at <http://www.rcstandcom.info/history2.shtml> (last visited 27 October 2009).

154 Movement Statutes, Art. 18(2)(a).

155 *Ibid.*

156 *Report of the 25th International Conference*, above note 135, p. 39.

157 Movement Statutes, Art. 18(1)(d).

available from the Rules of Procedure,<sup>158</sup> it has developed its own more explicit criteria in this regard.<sup>159</sup> It divides observers into three categories: National Societies awaiting recognition and admission; international organizations, NGOs, and academic institutions; and the category on which we will focus, namely ‘States not yet parties to the Geneva Conventions and other political entities’.<sup>160</sup>

The ghost of conferences past is manifest in the Standing Commission’s criteria: when considering an entity from the third category for observer status, the Commission is required ‘to give special consideration to political issues that might be detrimental to the neutrality of the Conference and divert attention from humanitarian matters’.<sup>161</sup> In this process, it has been recommended that the Commission ‘seek the opinion of the International Federation and the ICRC, as well as advice from the Group of Ambassadors and Switzerland’.<sup>162</sup>

It is also relevant to note the criteria for admitting observer NGOs and other organizations, as these are designed to prevent non-eligible political entities from gaining observer status through the back door of ‘government-operated NGOs’ (commonly known as GONGOs). A key requirement for admission is that their membership and activities must be of a ‘global, regional or international’ nature, thus excluding organizations that represent one ‘country’. Organizations that do not meet this criterion may, however, be invited as ‘guests’,<sup>163</sup> indicating that such entities would only be invited to such parts of the Conference as the Standing Commission or Bureau of the Conference decides that they may attend<sup>164</sup> and, unlike observers, are not granted any right to speak or to access documents.

One effect of these provisions and practices has arguably been to limit the ambition of universality. As we have observed, some other organizations have seen their own practices evolve so that entities such as GONGOs, whose participation might be essential to develop fully universal measures on the issues of concern to them, can be brought under their umbrella. Furthermore, the fact that the Movement does not have a system of associate membership also arguably limits its capacity to include the views of non-self-governing territories in regional and technical deliberations of relevance to them.

158 Movement Rules of Procedure, Rule 9(3). ‘Invited organizations’ usually include those that ‘have working relations with the Movement or a special interest in humanitarian law or related problems’: Philippe Abplanalp, ‘The International Conferences of the Red Cross as a factor for the development of international humanitarian law and the cohesion of the International Red Cross and Red Crescent Movement’, in *International Review of the Red Cross*, No. 308, 1995, pp. 567–599.

159 Standing Commission of the Red Cross and Red Crescent, ‘Guiding criteria: observers to the International Conference of the Red Cross and Red Crescent’, available at [http://www.rcstandcom.info/documents/Observers\\_30th\\_IC\\_Criteria\\_eng.pdf](http://www.rcstandcom.info/documents/Observers_30th_IC_Criteria_eng.pdf) (last visited 27 October 2009).

160 *Ibid.*, pp. 1–2.

161 *Ibid.*, p. 1.

162 *Ibid.*

163 *Ibid.*, p. 2.

164 Movement Rules of Procedure, Rule 10.

## Conclusion

Although full participation in the assemblies of international organizations remains very much a question of majority acceptance of an entity's statehood, it could be said that concessions and compromises are part and parcel of the normal business of any universal organization. As such organizations involve the majority of the world's states in dealing with matters of universal concern, it can reasonably be expected that decisions taken in these fora will have an impact on non-member entities.

The latter will accordingly have an interest in at least observing the proceedings. Use of subordinate participation statuses has shown that the real issue is often the standing in which the entity is placed vis-à-vis member states and the status that this may be seen to imply. This explains why member states may not approve an entity's full membership but be satisfied to allow it to take part with observer status. Given the universal importance of the topics negotiated in and regulated by many international organizations, the impact of multilateral co-operation in these areas on the wellbeing of populations, and the growing interdependence of states in a globalized world, the inclusive ethos of universal organizations is more important than ever. Opportunities for non-member entities to participate in an observer capacity provide a useful way to extend that ethos.

In the interests of ensuring that all populations are represented in international arenas where their fundamental interests are at issue, cognisance should be taken of who is *de facto* in charge of safeguarding those interests, and provision should then be made for the responsible party to participate in some way in the relevant forum. This could be done either through increased use of existing alternative participation mechanisms (observer status in particular, as it is the most flexible), or through the negotiation of new forms of participation that would allow for a wider range of stakeholders to participate, while at the same time tailoring the conditions and effects of this participation so as to make it acceptable to member states (most notably, the depoliticization of such participation mechanisms by expressly detaching them from notions of sovereignty and rather linking them to more objective criteria, for example *de facto* control of relevant infrastructures, or exercise of certain powers or capacities).

In the case of the International Conference of the Red Cross and Red Crescent, certain specificities of this unique forum need to be taken into account when addressing participation questions. First, there is the Conference's underlying commitment to the Fundamental Principles, which is incumbent upon all participants. Although the Principles should be the guide for any decision taken on participation, the appearance in previous debates of a tension between neutrality and universality shows that this is easier said than done. Further study on the meaning of the principles in the context of the Conference would certainly provide a valuable guide for the future.

Second, the Conference's role as a forum for decision-making on humanitarian matters should be kept in consideration. The Conference's material scope is, on the one hand, expanding to areas where it may be more important to

engage with a wide range of authorities, for example on matters such as epidemics and the management of natural disasters. On the other hand, the traditional and legal basis of the Conference remains international humanitarian law, which involves issues on which states have been resistant to engaging with entities whom they may regard as not having a base founded on adherence to the Geneva Conventions.

Third, and alongside the first two points, it follows that a minimum condition for the acquisition of observer status at the International Conference might need to be a form of written acceptance of the Geneva Conventions, at least insofar as they can apply to a non-party.

This thinking would have an impact on the existing arrangements for observers at the International Conference, namely international organizations and NGOs. This article does not canvass this point, but it is clear that new arrangements for non-member entities would need to address all such entities. Such new arrangements would need to take account of the importance that the Conference achieves through its unique ability to bring states and humanitarian actors (i.e. National Societies) together as equals, in order to discuss the humanitarian problems affecting the populations whom they represent.

The crux of the participation issue for the future lies in allowing a voice to those who do in fact have responsibility for populations, while at the same time taking care to maintain this unique line of communication between states and the humanitarian world.

# The emblem that cried wolf: ICRC study on the use of the emblems

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## **Abstract**

*The ICRC Study on Operational and Commercial and Other Non-operational Issues Involving the Use of the Emblems ('the Emblem Study') is an efficient and user-friendly tool to tackle issues regarding the use of the emblems of the red cross, red crescent, and red crystal. This article presents the Emblem Study's origin and objectives, and explains the structure and the methodology followed in its preparation. Recurrent questions regarding joint use of emblems and other signs are also examined, in order to demonstrate the Emblem Study's potential as an analytical and practical tool. Particular emphasis is placed on the need to avoid diluting the protective value of the emblems by maintaining a distinction between those entitled to use the emblems, their partners, and other players in the humanitarian field.*



\* This article is partly based on excerpts from the *ICRC Study on Operational and Commercial and Other Non-operational Issues Involving the Use of the Emblems* ('the Emblem Study') submitted for information to the Council of Delegates, Nairobi, 23–25 November 2009. The Emblem Study, which was welcomed by the 2009 Council of Delegates, is currently available in English, French, Spanish, and Arabic, and is to be published on the ICRC's website (<http://www.icrc.org>) under the section 'The emblems of the International Red Cross and Red Crescent Movement'.

The year 2009 marked the 150th anniversary of the Battle of Solferino. The horrifying aftermath of that battle inspired Henry Dunant, in his *Memory of Solferino*, to make two proposals for improving assistance to war victims. The first was to set up in peacetime, in every country, groups of volunteers ready to take care of casualties in wartime. The second was to persuade countries to accept the idea of protecting aid workers and the wounded on the battlefield. These proposals led to the gradual establishment of relief societies throughout the world (today's National Societies),<sup>1</sup> and paved the way for the drafting of the Geneva Convention of 1864, precursor of the four Geneva Conventions of 1949, which are now accepted by all states and form the core of international humanitarian law.

Adopting international conventions to protect the wounded and aid workers in war was only the first step; there was still a need to make them clearly distinguishable on the battlefield. The adoption of a single distinctive sign – which would be recognized by all and indicate the protection granted – was one of the main objectives of the five-member committee (which would later evolve into the International Committee of the Red Cross (ICRC)) that met on 17 February 1863 to study Dunant's proposals.

The need to distinguish aid workers providing relief to the wounded and sick on the battlefield, thereby facilitating their protection, had also been stressed by Inspector Lucien Baudens,

A doctor who witness[ed] the interminable siege of Sebastopol, [and who] noted on several occasions that doctors and stretcher-bearers trying to come to the aid of the wounded were caught in fire from one belligerent or the other. He was doubtless the first to propose a simple and practical means of avoiding such incidents, in an article published in the *Revue des Deux Mondes* in February 1857, recommending the adoption of a single distinctive sign for the medical personnel of all countries: 'Such mistakes would not be possible if, by common accord among nations, doctors and nursing staff wore a distinctive sign – the same for all armies and all countries – that made them easily recognizable by the two sides'.<sup>2</sup>

The emblem<sup>3</sup> has now existed for more than a century as the visible sign of the protection afforded under international humanitarian law to certain categories of people affected by armed conflicts and to those providing them with humanitarian aid. It also symbolizes the neutrality, independence, and impartiality of the International Red Cross and Red Crescent Movement ('the Movement') and its components. The emblem serves two very different purposes: first, it is 'meant to

1 As of August 2009, there were 186 National Societies recognized by the ICRC and thereby members of the International Red Cross and Red Crescent Movement.

2 Cited in François Bugnion, *Red Cross, Red Crescent, Red Crystal*, ICRC, Geneva, 2007, p. 111.

3 The term 'emblem' in this article refers to either the red cross, the red crescent, the red crystal, or the red lion and sun (the latter has not been used, however, since the Islamic Republic of Iran's declaration on 4 September 1980 expressing the wish to use the red crescent as its distinctive emblem instead of the red lion and sun).



mark medical and religious personnel and equipment which must be respected and protected in armed conflicts' and, second, it 'serves to show that persons or objects are linked to the Movement'.<sup>4</sup> It may therefore be used as either a protective device or an indicative device.

The idea of an emblem to protect people providing help to the wounded and sick is not new, but it has never been so widely and universally endorsed. As the emblem draws its power from its universal recognition, one may conclude that it has never been so strong. Unfortunately, it may also be a victim of its own success – the emblem is being misused and abused every day, whether in good faith or not. This practice is not new either. As explained in the *Commentary* on the First Geneva Convention of 1949:

The 1864 Convention has no provision dealing with the repression of infractions, and is silent too on the subject of abuses of the distinctive sign. Abuses occurred during the war of 1866, and still more so in 1870–71, but they affected the protective sign only. By 1880, however, the indicative sign was being unlawfully used in many ways. Chemists, manufacturers of medical apparatus, invalid nurses, and even barbers had adopted the red cross as their sign, and it was being used on boxes of pills and mineral water advertisements.<sup>5</sup>

Articles 23 and 27 of the 1906 Geneva Convention remedied this lack of express prohibition of emblem misuse. However, very soon after such misuse was prohibited, commercial companies started using imitations: that is, signs that could not be said to be the red cross but that gave the impression that they were. Such companies believed that they would thereby be able to claim with impunity some of the prestige attached to the emblem.

Why is this a problem? Naturally, the tragic damage done by perfidious abuse of the emblem in armed conflict clearly shows the need for regulation of its use in such a situation. Misuse in 'good faith' in armed conflict also has grave and easily imagined consequences, for it blurs the lines between those entitled by international humanitarian law to signify their protection by displaying the emblem, and those who are not entitled to do so. It consequently affects, in particular, the perception of neutrality and impartiality associated with the emblem. But what about 'softer' misuses of the emblem? If the abuse causes no physical harm, or if the misuse occurs in a country where no hostilities are taking place, does it really matter? Are the consequences too negligible to bother with it? The answer is simply no. Whether or not deadly consequences follow from abuses or misuses of the emblem, and whether or not they take place in an environment of armed conflict

4 Regulations on the Use of the Emblem of the Red Cross or the Red Crescent by the National Societies ('1991 Emblem Regulations'), 20th International Conference of the Red Cross and Red Crescent, Vienna, 1965, as revised by the Council of Delegates, Budapest, 1991, Art. 1.

5 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. I, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952 (hereafter *Commentary on GC I*), p. 380, Art. 53.

or other situation of violence, they all detract from the protective value of the emblem.

Improper use of the emblem creates confusion about its purpose in public opinion and in people's minds. This confusion diminishes the reputation of the emblem by the very fact of creating the belief that anyone can make use of it. It can thereby lose its value, in particular its connotation of neutrality and impartiality. Even if misuse occurs in a country that is not the scene of an armed conflict, it still impairs the emblem's image and reputation. That effect will be felt locally but will also transcend borders in today's globalized world. An accumulation of such abuses and misuses would make inappropriate use of the emblem commonplace, leading to a decline in respect for it and eroding its protective value. Put simply, the consequence of abuses and misuses of the emblem is illustrated by the moral of the well-known fable 'The little boy who cried wolf'.<sup>6</sup>

To strengthen protection of and respect for the emblem, and to reinforce its protective value, the ICRC – in consultation with the other components of the Movement and with the states parties to the Geneva Conventions – conducted a study on the use of the red cross, red crescent, and red crystal in light of the aforesaid considerations. In presenting the *ICRC Study on Operational and Commercial and Other Non-operational Issues Involving the Use of the Emblems* (hereafter 'Emblem Study' or 'Study'), this article aims to promote it as an efficient tool to tackle issues and difficulties involving their use. A brief account of the origin and objective of the Study will be followed by an explanation of the methodology followed in its preparation and an outline of its structure. Finally, the joint use of emblems and other signs – a subject developed in a number of questions in the Study – will be examined to demonstrate its potential as a tool and the type of analysis for which it can be used.

## Origin and objectives of the Study

### Origin

The International Red Cross and Red Crescent Movement is composed of the ICRC, the International Federation of Red Cross and Red Crescent Societies ('the Federation'), and the National Societies. Every second year, all components send representatives to 'meet to discuss matters which concern the Movement as a whole' at the Council of Delegates.<sup>7</sup> Its decisions, which take the form of resolutions, are binding on all components of the Movement.

6 In the fable, a little shepherd boy who was tired of watching the village sheep alone on the hill cried out 'Wolf! Wolf! There's a wolf!' All the villagers ran to help him but soon realized that it was just a trick. Though warned not to cry out if there was no wolf, the boy repeated his trick. Finally, when a wolf really did come to attack the sheep, the boy's cries were ignored, demonstrating that 'nobody believes a liar, even when he is telling the truth'.

In 2001, the Council of Delegates adopted an overall Strategy for the Movement,<sup>8</sup> which was updated at the 2005 Council of Delegates.<sup>9</sup> The Strategy aims to strengthen the cohesion of the Movement through a number of approaches influencing humanitarian action and access. The third strategic objective of the Strategy is entitled ‘Improving the Movement’s image and the components’ visibility and relations with governments and external partners’. Action 10, included under this heading, calls for harmonization of the components of the Movement in their approach to private sector relationships, in order to safeguard their integrity and strengthen their capacity to ensure respect for the emblem. To achieve this, the Strategy for the Movement requested ‘[t]he ICRC, in consultation with the International Federation Secretariat and National Societies, [to] initiate a comprehensive study of operational and commercial issues involving the use of the emblems’.

## Objectives

The ultimate objective of the Emblem Study was to ensure greater respect for the emblem at all times, and in particular to reinforce its protective value.<sup>10</sup> Improving understanding of and respect for the emblem and the rules governing its use will translate into greater protection for people affected by armed conflicts or disasters. There can be no doubt that misuse of the emblem, whenever committed, creates confusion and distrust in the public mind in general, and especially in the parties to an armed conflict. This undermines confidence in the entities entitled to use the emblem, such as the components of the Movement or the armed forces’ medical services, which in turn threatens their access to victims and even their own security. Greater respect for the rules will lead to greater confidence in the emblem among the public, the authorities, and the parties to conflicts or other situations of violence, as well as safer access to beneficiaries. Maintaining the trust of parties to a conflict is crucial for the users of the emblem, as it is the only form of protection offered to those who risk their lives to help save others. By adding to people’s understanding of the emblem and providing recommendations for tackling its misuse, the Study thus also serves the general mission of the Movement, which is to prevent and alleviate human suffering.

How does the Emblem Study seek to attain its objective? It addresses those specific questions on use of the emblem that are identified as being the most difficult and/or recur with the greatest regularity. Intended to harmonize current practice in light of existing rules, it aims in particular to strengthen the capacity of

7 Statutes of the Movement, adopted by the 25th International Conference of the Red Cross in Geneva in 1986, amended in 1995 and 2006, Art. 12.

8 Council of Delegates, Geneva, 2001, Resolution 3.

9 Council of Delegates, Seoul, 2005, Resolution 6.

10 It is important to bear in mind that international humanitarian law – and not the emblem itself – grants protection to the persons or objects displaying the emblem. Yet the emblem is the visible manifestation of such protection, which explains why the present article refers to its ‘protective value’.

the Movement's components to give their own members and employees, as well as private entities and the public, clear guidance on the proper use of the emblem. Indeed, to avoid misuse of the emblem, users must know and agree on what is or is not permissible. The Study likewise sets out to provide state authorities with a tool to enhance their understanding of the rules governing the use of the emblem and their obligations in this regard. It accordingly contains recommendations on the contents of those rules and the procedure to be followed when faced with misuse.

## Methodology of the Study

As mentioned above, the Emblem Study aims to promote a common and harmonized approach to issues concerning the use of the emblems within the Movement and by states. To achieve such harmonization, or at least a more unified approach, it was important to consult the components of the Movement in order to assess the differing interpretation, practices, and/or uses of the emblems. It was also important to include in the process the states parties to the 1949 Geneva Conventions, as numerous questions dealt with in the Study are directly concerned with use of the emblem by states. It is in fact states that define and adopt the rules governing the use of the emblem, and the medical services of their armed forces are its main users in armed conflict. Furthermore, states are primarily responsible for ensuring respect for the emblem, and have an obligation to disseminate international humanitarian law, including the aforesaid rules.

In March 2006, a group of experts from the Federation and from some thirty National Societies was formed. During 2006–2007, the group was able to provide very valuable and insightful comments and recommendations both on identifying the questions to be discussed and at subsequent stages of the drafting process. The experts themselves also drew up some of the preliminary analyses and recommendations contained in the Study. During the same period, further advantage was taken of every available channel and opportunity for obtaining feedback and input from National Societies.<sup>11</sup> Informal consultations with states were also carried out in 2007.<sup>12</sup>

A first version of the Emblem Study was submitted for information to the Council of Delegates in November 2007. In its Resolution 7 on the Strategy for the Movement, the Council *request[ed]* the ICRC to continue its work on the Study, taking into account feedback received from the components of the Movement and

11 E.g. the annual meeting of National Societies' legal advisers organized by the ICRC, meetings of the European Legal Support Group and of the European Public Support Group, etc.

12 E.g. through the national inter-ministerial committees for the implementation of international humanitarian law (IHL), which are competent to promote, advise on, and co-ordinate all matters relating to the implementation of IHL at national level and to compliance with and development of the law. Such bodies are usually composed of representatives of all government departments concerned with IHL, the judicial and legislative branches, and the National Societies.

further extending its consultations to States, and to inform the Council on progress made'.<sup>13</sup> On this basis, the ICRC conducted further consultations in 2008 and 2009. In particular, a consolidated version of the Emblem Study was circulated for comments to all states, to all National Societies, and to the Federation in May 2008.

The feedback received from National Societies touched upon a wide variety of issues and questions relating to the Study. However, the main comments received concerned the use of the emblem by them in their fundraising activities (e.g. use of a National Society's logo in partnerships with the private sector) and for promotional activities (e.g. use of a National Society's logo on materials or premises of the National Society). This prompted the ICRC to organize a workshop in Geneva in February 2009 to discuss these matters. Attended by high-level representatives of the National Societies, together with Federation and ICRC representatives, the workshop offered a very fruitful opportunity for dialogue on the Emblem Study, and on the promotion and fundraising carried out by the Movement's components – activities that are vital in enabling the latter to discharge their mandate efficiently.

Lastly, the Emblem Study benefited from the feedback on various aspects received from states. This was first discussed bilaterally with states and then presented in an information session that took place in Geneva in June 2009.

Through all these consultations, components of the Movement and the states had a chance to express their opinions and to work towards reaching a shared understanding of the rules governing the use of the emblem.

The finalised Emblem Study was submitted for information to the Council of Delegates in November 2009. In its Resolution 2, the Council welcomed the Study and 'call[ed] upon components of the Movement to implement and promote the recommendations of the Study to enhance the implementation of the rules governing the use of the emblems'.<sup>14</sup>

## Structure of the Study

The Emblem Study consists of fifty-one questions that represent the most recurrent issues as identified by the ICRC and the group of Movement experts. They include those faced by the ICRC both in the field and at headquarters, as well as common queries from National Societies. To make the Study user-friendly, each question has the same structure. First, the relevant legal or statutory basis is stated. Second, recommendations are made on how to answer the question or, when required, on how to deal with a particular misuse of the emblem. Third, the analysis underlying the recommendation(s) is described in detail.

13 Council of Delegates, Geneva, 2007, Resolution 7, para. 8, emphasis in original.

14 Council of Delegates, Nairobi, 2009, Resolution 2, preamble and para. 9.

The Study is divided into three main parts. The first part seeks to identify what is legal, permissible or recommended when using the emblem in operational contexts. The second part concentrates on commercial (and other non-operational) issues involving the use of the emblem. Each of the first two parts contains four chapters, each of which focuses on the specific questions raised according to the entity that is using the emblem – state authorities, National Societies, the ICRC, and others. The third part of the Study sets out the obligations and roles of the various entities mentioned above in preventing or stopping misuse of the emblem. Its chief aim is to provide some step-by-step guidelines on what to do when faced with misuses of the emblem and how to forestall them.

The Study, which is a large document, is not meant to be read from cover to cover but to be used as a reference tool. The Table of Contents serves as an index to search for the relevant questions that address the problem confronting the user. As the questions are all grouped thematically in the Table of Contents, the practice pertaining to a specific topic can easily be found. However, for an overview of the circumstances in which a particular practice is permitted, it is recommended that users read the relevant subsection pertaining to each entity.

### **Example: joint use of emblems**

To demonstrate the type of analysis and recommendation contained in the Emblem Study, the following section concentrates on one area that often leads to abuse or misuse: the joint use of emblems. Whether it is the joint use of two recognized emblems (e.g. a red cross and a red crescent) or the use of one recognized emblem next to another logo or sign (e.g. a red crescent and the letters ‘UN’ as the acronym identifying the United Nations), by a state or by a National Society, it is usually prohibited. When it is permitted, it must comply with a series of cumulative conditions. For efficient use of the Emblem Study, a previous qualification of the situation is necessary to determine whether the use of the emblem in such a situation is correct. This assessment is made by determining the context (whether the emblem is used in an operational situation or not) and the entity in question (by whom the emblem is being used).

The joint use of emblems in operational situations by states, international organizations, and National Societies will now be examined. Consideration will then be given to joint use in commercial situations, focusing on the emblem’s use on items sold or distributed by a National Society or its corporate partners, as well as on websites of National Societies or their corporate partners.

### **Use of the emblem in operational activities**

The following sub-sections deal with the use of the emblem by the medical services of states’ armed forces or by National Societies conducting operations in time of armed conflict or other operational situations. In the cases discussed, the emblem is consequently used most of the time as a protective device, which means that it

must ‘always retain its original form, i.e. nothing shall be added either to the cross, the crescent or the white ground’.<sup>15</sup>

### *Use of double emblem by a state*<sup>16</sup>

The terminology ‘double emblem’ designates the use of two recognized emblems – that is, a combination of a red cross, red crescent, or red crystal – side by side. Such a combination of emblems is inadmissible, as this would amount to using an altered form of the emblem, which is not permitted by the 1949 Geneva Conventions or their Additional Protocols. The *Commentary* on the First Geneva Convention states that ‘The protective sign, consisting of a red cross on a white ground, as prescribed by the Geneva Convention, should always be displayed in its original form, without alteration or addition’.<sup>17</sup>

On a more practical level, the use of two emblems side by side would reduce the emblem’s visual effectiveness. Indeed, the purpose of the emblem is to clearly mark persons and objects protected under the 1949 Geneva Conventions – the juxtaposition of two emblems decreases their visibility, which mostly comes from their simplicity of shape and colour. Thus, two emblems would transform what is usually instantly recognizable into something more complicated for the eye to distinguish. Furthermore, all emblems – whether the red cross, red crescent, or red crystal – provide equal protection and must be considered neutral. Accordingly, there should be no opposition to the use of any of them. In areas where either the red cross or red crescent is regarded unfavourably, use of both emblems together is unlikely to create greater acceptance and increased protection. This practice may even be perceived as evidence that the emblem has a religious connotation, and thus diminish respect for it.

### *Use of emblems by states acting in the same coalition*<sup>18</sup>

The use of two emblems on the same premises (e.g. hospitals) and/or means of transport (e.g. ambulances) shared by the medical services of the armed forces of different states participating in the same coalition should be avoided, because it may very well amount to – or appear to be – the use of a prohibited double emblem, as noted above. If two different emblems are nevertheless used on shared property of the coalition’s medical services, the emblems should be placed sufficiently far away from one another to avoid amounting to a ‘double emblem’.

States working under a coalition now have another option under Additional Protocol III to the 1949 Geneva Conventions to avoid any risk of

15 1991 Emblem Regulations, above note 4, Art. 5.

16 This topic is dealt with in Question 2 of the Emblem Study in particular.

17 *Commentary on GC I*, above note 5, p. 334, Art. 44. The same rule emphasized in this quotation applies, of course, to all recognized emblems.

18 This topic is dealt with in Question 3 of the Emblem Study in particular.

being perceived as using a double emblem. Article 2(4) of Protocol III provides that:

The medical services and religious personnel of armed forces of High Contracting Parties may, without prejudice to their current emblems, make temporary use of any distinctive emblem referred to in paragraph 1 of this Article where this may enhance protection.

States acting in a coalition may therefore temporarily display a different emblem from that which they normally use (e.g. a state normally using a red cross may use the crescent, or vice versa). As a compromise, states in a coalition could alternatively use the red crystal.<sup>19</sup> However, while Protocol III permits the emblem of medical services of states to be temporarily changed, Article 2(4) thereof does not permit use of the double emblem (e.g. the red cross displayed together with the red crescent).<sup>20</sup>

### *Joint use of emblems by international organizations*<sup>21</sup>

The ‘armed forces’ of an international organization<sup>22</sup> are composed of national military contingents, which merely function under the command and/or control of that organization. So as long as the ‘armed forces’ of the international organization are drawn from the national armed forces of member states, the applicable rights and obligations laid down in the Geneva Conventions and their Additional Protocols remain in force. Medical personnel, units, and means of transport of

19 The possibility of a temporary change of emblem must nevertheless be approached with the utmost seriousness. The competent military authority should always bear the following in mind:

1. The gain in terms of security (for the medical services that are considering temporarily changing emblems and for the other medical services and National Society present in the given situation) must be extremely carefully assessed.
2. The protection of those who are allowed to display the emblem should be the only appropriate motive for changing it temporarily.
3. The temporary change of emblem by foreign armed forces (or a coalition of such forces) and their use of the emblem customary in the state where they are operating might create confusion, in the minds of opposing combatants and the population, between the foreign/coalition forces, the ‘host’ state’s military medical services, and the host National Society.
4. Directly invoking the provisions of Protocol III may be legally difficult for states that have not ratified/acceded to it.
5. The decision to change the emblem may contravene the domestic legislation of the states taking that decision, and may have an effect on public opinion in those states.

This topic is dealt with in Question 1 of the Emblem Study in particular.

20 See Jean-François Quéguiner, ‘Commentary on the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)’, *International Review of the Red Cross*, Vol. 89, No. 865, March 2007, p. 190. The commentary on Article 2(4) of Protocol III states: ‘It remains to be said that this paragraph authorizes the replacement of the usual emblem by only one other; it does not permit the substitution of the usual emblem by a combination of several other emblems side by side’.

21 This topic is dealt with in Question 27 of the Emblem Study in particular.

22 The term ‘international organization’ also encompasses regional organizations (NATO, African Union, etc.).



the national military contingents placed at the disposal of an international organization may thus employ the emblem used by the medical services of their respective national armed forces within the framework of the said Conventions and Protocols.<sup>23</sup>

With specific reference to missions under UN auspices, Article 5 of Protocol III provides that:

The medical services and religious personnel participating in operations under the auspices of the United Nations may, with the agreement of participating States, use one of the distinctive emblems mentioned in Articles 1 and 2 [the red cross, red crescent, or red crystal; the red lion and sun is no longer in use].

Medical services of states' armed forces operating under an international organization's command and/or control should generally display the emblem chosen by their respective states, but always in a way that does not amount to the use of a double emblem. However, if an agreement is reached among the states taking part in such an operation, the international organization's command may decide, in accordance with Protocol III, that all the medical services and religious personnel under its authority shall use only one of the recognized emblems.

The armed forces acting under the command and/or control of an international organization, such as the UN or NATO, may display its logo or acronym. It is not generally advisable for such forces to display the emblem together with the logo of the organization on the latter's medical facilities and means of transport. If both are, however, displayed at the same time, the logo or name of the international organization (e.g. the acronym 'UN' or 'ISAF') would have to be displayed separately from the protective emblem so as not to constitute an alteration of or addition to it. The best way to avoid the problem would therefore be to avoid placing the emblem and the organization's sign on the same side of a vehicle or building.

On a practical level, juxtaposition of the emblem with the international organization's sign could also cause the Movement to be wrongly associated with other organizations and thereby affect the perception of its independence and neutrality. Such confusion could have repercussions for components of the Movement working in that particular context and beyond. Any resultant erosion of the emblem's protective value could jeopardize access by the Movement's components and the armed forces' medical services, and their own security. The clear distinction between the emblem and the international organization's logo or name is consequently of prime importance.

23 For instance, with regard to UN forces see UN Secretary-General (UNSG), *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, 6 August 1999, UN Doc. ST/SGB/1999/13, available at: <http://www.unhcr.org/refworld/docid/451bb5724.html> (last visited 16 March 2010). Article 9.7 of the Secretary-General's Bulletin states that: 'The United Nations force shall in all circumstances respect the Red Cross and the Red Crescent emblems. These emblems may not be employed except to indicate or to protect medical units and medical establishments, personnel and material. Any misuse of the Red Cross or Red Crescent emblems is prohibited'.

### *Joint use of emblems by National Societies for protective purposes*<sup>24</sup>

There are various situations in which National Societies may be authorized – subject to certain conditions<sup>25</sup> – to use the emblem for protective purposes (i.e. ‘to mark medical and religious personnel and equipment which must be respected and protected in armed conflicts’<sup>26</sup>). In an international armed conflict, the National Society may use the protective emblem when it acts as an auxiliary to the medical services of the armed forces of its own state,<sup>27</sup> or assists those of another state party to the conflict.<sup>28</sup> A National Society may also use the emblem as a protective device to identify its hospitals.<sup>29</sup> Lastly, National Society medical personnel, units, and transports may be entitled to display the emblem as a protective device in accordance with Additional Protocol I to the 1949 Geneva Conventions (in times of international armed conflict) and with Additional Protocol II thereto (in times of non-international armed conflict).<sup>30</sup>

In such situations, whether or not the National Society medical personnel, units, and transports are under the control of the military medical services, the conclusions on the use of the double emblem by states’ armed forces are applicable *mutatis mutandis*; that is, the emblems used in such manner must not give the

24 This topic is dealt with in Questions 12 and 13 of the Emblem Study in particular. The general question of the conditions under which a National Society may use the emblem as a protective device is dealt with in full detail in Question 4.

25 For an in-depth analysis, see the Emblem Study, Question 14.

26 1991 Emblem Regulations, above note 4, Art. 1.

27 Such use is in accordance with Articles 26 and 44 of the First Geneva Convention of 1949. It is subject to the following conditions: the National Society must have been recognized by its own government authorities and authorized by them to assist the medical services of the armed forces of its own state; the emblem is to be used only by those National Society personnel, units, and equipment that are assisting the medical services of the armed forces, and are employed exclusively for the same purposes as the latter; and such National Society personnel, units, and equipment must have been placed under the authority of their own armed forces and be subject to their military laws and regulations. For an in-depth analysis, see the Emblem Study, Question 14.

28 Such use is in accordance with Articles 27, 40, and 42–44 of the First Geneva Convention of 1949. It is subject to the following conditions: the National Society must have obtained authorization to do so from that particular party to the conflict; the adversary of the state accepting the assistance of the National Society must have been notified of the consent of the state of origin (the state not party to the conflict); and the party to the conflict that is accepting such assistance must have notified its adverse party that it is doing so. For an in-depth analysis, see the Emblem Study, Question 14.

29 Such use is in accordance with Article 18 of the Fourth Geneva Convention of 1949. It is subject to the following conditions: the hospital must have been recognized as a civilian hospital within the meaning of the Fourth Geneva Convention by the state party to the armed conflict in which the hospital is situated; and the hospital must have been authorized to use the emblem as a protective device by that state. For an in-depth analysis, see the Emblem Study, Question 14.

30 Such use is in accordance with Articles 8(c), (e), and (g), and 18 of Protocol I, and Articles 9, 11, and 12 of Protocol II. It is subject to the following conditions: the said personnel must be protected under international humanitarian law, i.e. they must correspond to the definition of ‘medical personnel’, ‘medical units’, or ‘medical transports’ contained in Article 8(c), (e), and (g) of Protocol I; they must be authorized to use the emblem as a protective device by the competent authority of a party to the conflict – in a non-international armed conflict, this may be the governmental authority (civilian or military) or the authority of the armed groups (civilian or military); and they must make use of the protective emblem under the control of the competent authority of a party to the conflict. For an in-depth analysis, see the Emblem Study, Question 14.

impression of a double emblem.<sup>31</sup> This includes operations where the medical personnel, units, and transports of two or more National Societies (Red Cross and Red Crescent) work together. These National Societies would not be allowed to make use of the protective emblems in a manner amounting to or giving the impression of a double emblem, for reasons stated above.

Lastly, it must be emphasized that the use by a National Society of the emblem in its protective form together with the logo of an external partner is prohibited at all times. The juxtaposition of the emblem with the sign of an international organization (such as ‘UN’) would constitute a prohibited alteration of or addition to the protective emblem. It might affect the perception of the independence and neutrality of the National Society and consequently of the Movement. This may result in an erosion of the protective value of the emblem.<sup>32</sup>

### Joint use of emblems for indicative purposes

The rules on joint use of emblems are quite different where the emblem is to serve as an indicative device – that is, ‘to show that persons or objects are linked to the Movement’.<sup>33</sup>

#### *Use of the double emblem by National Societies for indicative purposes*<sup>34</sup>

Article 3(1) of Protocol III gives National Societies the option of displaying a double emblem within the red crystal for indicative purposes.<sup>35</sup> Furthermore, under Article 3(2) of Protocol III, the emblem (or a combination of emblems) that a National Society has chosen to incorporate within the red crystal may, within the National Society national territory and in conformity with national legislation, be used without the red crystal. Thus, the double emblem may in principle be used by a National Society on its national territory, exclusively for indicative purposes, even if it is not incorporated into the red crystal. However, it must be emphasized that when used as an indicative device, the emblem must be relatively small in size and accompanied by the National Society name or initials.<sup>36</sup> The 1991 Regulations on

31 See the section ‘Use of double emblem by a state’ above.

32 See also the section ‘Joint use of emblems by international organizations’ above.

33 1991 Emblem Regulations, above note 4, Art. 1. The legal basis for the distinction between protective and indicative uses of the emblem is to be found in Article 44 of the First Geneva Convention. This distinction is further defined in the 1991 Emblem Regulations, Art. 1.

34 This topic is dealt with in Questions 12 and 13 of the Emblem Study in particular.

35 Article 3(1) of Protocol III provides that: ‘National Societies of those High Contracting Parties which decide to use the third Protocol emblem may, in using the emblem in conformity with relevant national legislation, choose to incorporate within it, for indicative purposes: a) a distinctive emblem recognized by the Geneva Conventions or a combination of these emblems’.

36 1991 Emblem Regulations, above note 4, Arts. 4 and 5.

the Use of the Emblem furthermore require that ‘Any confusion between the protective use and the indicative use of the emblem must be avoided’.<sup>37</sup>

Lastly, it is worth mentioning that National Societies working in coordination with the Federation under a service agreement establishing the terms and conditions for running the operations may, with the authorization of the Federation, use the Federation logo for indicative purposes. This logo is composed of a red cross and a red crescent side by side, set on a white ground within a red rectangle, and accompanied by the name of the Federation. The Federation logo cannot, however, be used for protective purposes.

*Joint use of National Society’s emblem (indicative device) and international organization’s logo (such as the ‘UN’ logo)*<sup>38</sup>

When a National Society enters into a partnership with an international organization, for example as the implementing partner of a special project with an international organization, the organization may want the National Society to acknowledge its contribution in some way. If this acknowledgement takes the form of joint use of emblems/logos – that is, the logo of the National Society (as an indicative device) jointly with the logo of the external partner – it must be included in the agreement between the National Society and the external partner. The joint use of logos is potentially hazardous for perception of the National Societies, as it may blur the distinction between the National Societies and the international organization. Given the wider risks for the entire Movement, the use of joint logos should be avoided as far as possible. In certain contexts, a National Society association with external organizations such as the UN could jeopardize the access of the National Society (and potentially that of the other components of the Movement present in those contexts) to people in need and endanger the security of the National Society and Movement staff and volunteers. Of course, the more violent and tense the situation, the more such a blurring of identities should be avoided.

When the National Society negotiates such an agreement, it must bear in mind that it is the equal of its external partner. This is very important. Both must know and understand their respective constraints and obligations, especially the obligations of the components of the Movement to abide by the rules governing the use of the emblem. To provide for agreements that respect the emblem, in 2003 the Council of Delegates adopted a number of ‘Minimum Elements to be included in operational agreements between Movement components and their external operational partners’. Read in conjunction with

<sup>37</sup> *Ibid.*, Art. 4.

<sup>38</sup> This topic is dealt with in Question 20 of the Emblem Study in particular. As already pointed out above (see the section ‘Joint use of emblems by National Societies for protective purposes’), the use of the protective emblem together with the logo or acronym of an international organization is prohibited.

the 1991 Emblem Regulations, in particular Article 25,<sup>39</sup> they set the following conditions for the joint use of logos. Such use may be possible only if all those conditions are met, thus:

- i. In exceptional circumstances, i.e., if no way of avoiding such joint use exists, in connection with humanitarian activities or dissemination campaigns;
- ii. For a specific undertaking, i.e., for a specific project of limited duration;
- iii. If the external partner is a humanitarian organization;
- iv. If the joint use is discreet and does not give rise to confusion in the public mind between the NS [National Society] and the external partner. In practice, the potential for confusion may often be avoided by a short written explanation of the relationship between the NS and its external partner;
- v. If it is not displayed on buildings and equipment, including vehicles and other means of transport; and
- vi. Where it does not compromise the NS identity as a neutral, impartial and independent actor.<sup>40</sup>

## Use of the emblem in commercial activities

Promotion and fundraising have an impact on the Movement's ability to accomplish its mandate, so the importance of all the Movement's components being able to carry out these activities in an efficient manner must not be underestimated. To help them in their promotion campaigns, National Societies often engage in partnership with corporations.

Whenever entering into partnership with the corporate sector, National Societies must respect the provisions of the 'Movement policy for corporate sector partnerships' adopted at the 2005 Council of Delegates. This applies with particular force to the selection criteria for the company with which the National Society enters into partnership and to the mandatory and recommended requirements for partnership contracts of Movement components.<sup>41</sup>

It is clear that in such circumstances the emblem would not be used for protective purposes. The use of the emblem on its own is therefore prohibited. Consequently, the analysis below will address only the use of the National Society

39 1991 Emblem Regulations, above note 4, Article 25 stipulates that: 'In addition to the cases mentioned in Articles 23 and 24, the National Society may in exceptional circumstances use the emblem jointly with that of another humanitarian organization, in the event of a specific undertaking and provided that such use is discreet and does not give rise to confusion in the public mind between the National Society and the other organization.'

40 Emblem Study, Recommendations of Question 20.

41 Council of Delegates, Seoul, 2005, Annex to Resolution 10, 'Substantive provisions of the International Red Cross and Red Crescent Movement policy for corporate sector partnerships', available at [http://www.icrc.ch/Web/eng/siteeng0.nsf/htmlall/council-of-delegates-resolutions-181105/\\$File/CoD-Resolutions\\_2005\\_EN.pdf](http://www.icrc.ch/Web/eng/siteeng0.nsf/htmlall/council-of-delegates-resolutions-181105/$File/CoD-Resolutions_2005_EN.pdf) (last visited 16 March 2010).

logo, that is, ‘the emblem ... accompanied by the name or initials of the National Society’.<sup>42</sup>

Articles 3 to 5 of the 1991 Emblem Regulations define the general restrictions on the use of the emblem that apply to all the following contexts. They are designed to safeguard the prestige of and respect for the emblem, and to avoid confusion between the two uses of the emblem by drawing a clear distinction between protective and indicative uses.

### *On items sold or distributed by the National Societies*<sup>43</sup>

The general principle is defined under Article 3 of the Regulations, which enjoins National Societies to ensure that nothing tarnishes the prestige of or the respect due to the emblem. Thus the National Society must be careful of what it sells.

In this connection the main specific stipulation, contained in Article 23, paragraph 2 of the 1991 Emblem Regulations, is that the emblem displayed on the items distributed or sold by the National Society to the public ‘shall in no way suggest the protection of international humanitarian law or membership of the Movement’. To avoid any suggestion of protective use of the emblem, the items sold shall be of ‘reduced dimensions’.<sup>44</sup> To avoid any suggestion of indicative use of the emblem, it is preferable that the National Society logo be accompanied by a text or a graphic design identifying the campaign,<sup>45</sup> unless the items are intended to be sold or distributed by the National Society to its staff, members, or volunteers only. The sale or distribution of items or services should not become more important than the humanitarian activities of the National Society. It should therefore not last for too long a period of time and should preferably take place within campaigns or events.

According to the commentary on Article 23, the items sold ‘can consist of printed matter and objects of all kinds: leaflets, publications, posters, philatelic souvenirs, films, pencils, etc.’.<sup>46</sup> Displaying a National Society logo on certain items (such as clothing) is very likely to suggest an association between the user of the items and the National Society and/or the Movement. Accordingly, it is recommended that the National Society logo not be displayed on items such as baseball caps, T-shirts, or bags.<sup>47</sup>

42 1991 Emblem Regulations, above note 4, Art. 5.

43 This topic is dealt with in Question 33 of the Emblem Study in particular.

44 1991 Emblem Regulations, above note 4, Art. 23, para. 2.

45 *Ibid.*, commentary on Art. 23, para. 2.

46 *Ibid.*

47 *Ibid.* The commentary indicates that ‘With regard to clothing, flags or banners – given the risk of confusion which such objects could create, in the event of armed conflict, with the emblem used as a protective device – it is essential to ensure that the emblem is accompanied by the name of the National Society, or a text or a publicity drawing’.

## *On items sold or distributed by the corporate partner of the National Society*<sup>48</sup>

The 1991 Emblem Regulations prohibit the National Society from authorizing its corporate partner to display the National Society logo on items sold or distributed by the partner ‘since they are often designed to last and the National Society has no control over their use’.<sup>49</sup> The packaging or label is to be considered as part of the item for sale (or distribution). Indeed, allowing corporate partners to display the emblem on an item’s label while prohibiting them from doing so on the item itself would defeat the purpose of the latter prohibition.

However, where the proceeds from an item’s sale are to be donated in full or in part to the National Society, the Society in question may authorize a company to mention its donation or other contribution to that Society’s work, for example, on the label of the item. In this case, in order to avoid any confusion between the company and its product on the one hand and the National Society on the other, and to avoid any potential abuses, compliance with Article 23, paragraph 3, sub-paragraphs (a), (c), (d), (e), (f), (g), and (h), of the 1991 Emblem Regulations is required.<sup>50</sup> For example, the company may mention that part of the price of a specific product will be donated to the National Society (or to one specific National Society programme), but always without any display in doing so of the emblem or the National Society logo. In addition, National Societies ‘must ensure that such mention remains discreet and not give rise to confusion’.<sup>51</sup>

The National Society may, however, authorize the display of its logo on advertising material of the corporate partner, but only ‘with the utmost restraint and on condition that the emblem be of small dimensions and accompanied by a

48 This topic is dealt with in Question 34 of the Emblem Study in particular. As indicated above (see the section ‘Use of the emblem in commercial activities’), whenever entering into partnership with the corporate sector, National Societies must respect the provisions of the ‘Movement policy for corporate sector partnerships’, which defines partnership selection criteria and contract requirements.

49 1991 Emblem Regulations, above note 4, Art. 23, para. 4, and commentary thereon.

50 The conditions defined under *ibid.*, Art. 23, para. 3 are as follows:

- (a) no confusion must be created in the mind of the public between the company’s activities or the quality of its products and the emblem or the National Society itself;
- (b) ...
- (c) the campaign must be linked to one particular activity and, as a general rule, be limited in time and geographical area;
- (d) the company concerned must in no way be engaged in activities running counter to the Movement’s objectives and Principles or which might be regarded by the public as controversial;
- (e) the National Society must reserve the right to cancel its contract with the company concerned at any time and to do so at very short notice, should the company’s activities undermine the respect for or the prestige of the emblem;
- (f) the material or financial advantage which the National Society gains from the campaign must be substantial without, however, jeopardizing the Society’s independence;
- (g) the contract between the National Society and its partner must be in writing;
- (h) the contract must be approved by the National Society’s central leadership.

For a more detailed explanation of these conditions, see *ibid.*, commentary on Art. 23, para. 3.

51 *Ibid.*, commentary on Art. 23, para. 4.

clear explanation of the assistance received by the Society'.<sup>52</sup> The advertising material must meet the conditions of the said sub-paragraphs of Article 23, paragraph 3, of the 1991 Emblem Regulations,<sup>53</sup> such as not being designed to be permanent, remaining discreet, and not giving rise to confusion about the relationship between the National Society and its partner.

### *On websites of the National Society or of its corporate partner*<sup>54</sup>

Because of the reach of electronic media, National Societies (and the components of the Movement in general) must be particularly careful when using the emblem/ National Society logo on websites and on the Internet in general, so as not to create confusion in the public mind about the Movement and its activities or give rise to misinterpretations of its principles. Yet the National Society should be able to acknowledge the assistance received from corporate supporters, since it could be difficult to find or retain donors if they are to remain totally anonymous. This is recognized in the 1991 Emblem Regulations that apply to the use by a National Society, whether on its website or on other media, of its logo together with the name/logo of a corporate supporter.<sup>55</sup>

With regard to use of the National Society logo together with that of a corporate supporter or partner organization, the Emblem Regulations applicable to advertising material and sale of items (detailed above) apply *mutatis mutandis*. Hence the company's 'trademark, logo or name' may be displayed on the National Society's 'advertising material' – including a website – for fundraising or dissemination purposes, provided that the National Society 'closely monitor[s] the manner in which the assistance is publicized so as to avoid any abuse or risk of confusion in the mind of the public'.<sup>56</sup> However, the possibility for a National Society to display its corporate supporters' names and logos on its website is subject to a series of cumulative conditions.<sup>57</sup> Adapted for the Internet, they are to be understood as follows:

1. No confusion must be created between the identities of the National Society and its corporate supporter (or the supporter's activities or products): it must be clear to a reasonable person why the name and logo of the corporate supporter are displayed on the National Society's website (e.g. the corporate supporter's logo could be accompanied by a descriptive statement such as 'the XYZ Company is proud to support the National Society's Measles Initiative').

52 *Ibid.*, Art. 23, para. 4.

53 See note 54 below.

54 This topic is dealt with in Question 35 of the Emblem Study in particular. As indicated above (see the section 'Use of the emblem in commercial activities'), whenever entering into partnership with the corporate sector, even through the Internet, National Societies must respect the provisions of the 'Movement policy for corporate sector partnerships', which defines partnership selection criteria and contract requirements.

55 See 1991 Emblem Regulations, above note 4, Art. 23, para. 3, and commentary.

56 *Ibid.*, Art. 23, para. 3. See also above note 53.

57 *Ibid.*



- The name/logo of the corporate supporter must not be perceived as a guarantee for the quality of the corporate supporter's products.
2. The National Society must retain control over the display of the logo and name of the corporate supporter on its website; in particular, the said name/logo must be of a reasonable size.
  3. The display of the corporate supporter's logo and name must be linked to one particular activity and be limited in duration.
  4. The corporate supporter must not be engaged in any way in activities running counter to the Movement's objectives and Fundamental Principles or in any activity that might be regarded by the public as controversial, such as the manufacture or sale of arms and ammunition; the manufacture or sale of products publicly recognized as deleterious to health; business practices materially contributing to armed conflicts or natural disasters; or activities that would undermine the reputation, image or emblems of the Movement.<sup>58</sup>
  5. The material or financial advantage that the National Society gains from the support must be substantial; however, the independence of the National Society must not be jeopardized due to the high level of support from the corporate supporter.
  6. The display of the logo and name of the corporate supporter must be included in a written contract/agreement with the National Society, which must have the formal approval of the National Society's central leadership. The National Society must reserve the right to cancel such a contract or agreement at any time and at very short notice, should the supporter's activities undermine respect for or the prestige of the emblem.<sup>59</sup>

Authorizing a corporate partner to display the National Society logo/name on its own website is more delicate. Given the worldwide reach of the Internet and the 'considerable risk of abuse',<sup>60</sup> a high level of caution is certainly required. This means that a National Society should authorize such display of its logo/name only with the utmost restraint. The authorization must be clearly for the corporate supporter's advertising purposes (as opposed to the sale of items)<sup>61</sup> and must be subject to strict compliance with conditions similar to those defined for use of the corporate supporter's logo or name on the National Society website. As it may be hard for the National Society to retain control over the display of its logo and name, and as an additional safeguard against abuse by the corporate supporter, the

58 See in particular the examples given in *ibid.*, commentary on Art. 23, para. 3, such as serious pollution by the company concerned, and the criteria defined under section 3.3 of the 'Movement's policy for corporate sector partnerships', above note 46, p. 75.

59 1991 Emblem Regulations, above note 4, commentary on Art. 23, para. 3(e) gives the example of an activity of the corporate supporter that could prove embarrassing for reasons not known to the National Society when signing the agreement, such as serious pollution caused by the company concerned.

60 As stated in *ibid.*, commentary on Art. 23, para. 4.

61 If most of what is included on a website is of an advertising nature, there could conceivably be web pages dedicated to the online sale of products that would come close, for our purposes, to being regarded as 'items for sale'.

following two conditions must be added: first, a statement on the corporate supporter's website must make clear the nature of the assistance received by the National Society. This is to ensure that the display of the National Society logo cannot be understood to mean that the National Society endorses the corporate supporter, its products, services, opinions, or political positions.<sup>62</sup> Second, the written contract/agreement between the National Society and the corporate supporter must stipulate that the corporate supporter must obtain the approval of the National Society before any and every use of the National Society logo on the corporate supporter's website, and that the National Society logo must be removed immediately from the corporate website at the request of the National Society.

## Conclusion

The use of the emblem is subject to many rules and conditions, depending on the context and purpose of its display. In situations of armed conflict, the protective emblem (a red cross, red crescent, or red crystal on a white ground) must be used without alteration or addition: a 'double red cross/red crescent emblem' is therefore prohibited, as is use of the emblem jointly with the logo of another organization, regardless of the user of the emblem. The adoption and entry into force of Protocol III provides for new opportunities, such as temporary change of a protective emblem, 'where this may enhance protection'.

The situation is more complex with regard to the use of the emblem for indicative purposes: the use of a double emblem by National Societies is possible, in accordance with the provisions of Protocol III; use of the emblem together with the logo of another organization in an operational context, or use of the National Society logo together with the logo of a corporate partner in commercial activities, is not entirely excluded by the rules governing the use of the emblem. These uses are, however, strictly subject to the obligation to avoid creating confusion in the mind of the public. This is essential to preserve the image of the Movement's components as neutral and impartial humanitarian actors, and the ability of those entitled to use the emblem to safely access people in need.

By giving guidance and answers to a number of possible issues, by making the logic of the rules on the use of the emblem more accessible, and by emphasizing the responsibilities of all concerned, the Emblem Study seeks to facilitate compliance with that obligation and serve its underlying purpose.

62 This condition derives from the 'Mandatory elements for Movement components' partnership contracts', Council of Delegates, Seoul, 2005, Annex to Resolution 10, para. 5.3.6.

## SELECTED ARTICLE ON INTERNATIONAL HUMANITARIAN LAW

# Humanitarians and their moral stance in war: the underlying values

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### **Abstract**

*In this article, the moral values underlying humanitarian principles are analysed. What were these original moral values? Have they changed? To what extent are they in danger today? Has humanity itself become an instrumental value? To answer these questions, the author examines the humanitarian discourse: firstly, how these values have been described by humanitarians themselves, and secondly, how they are used by humanitarians in specific contexts.*



‘At the end of January 1864 Prussia and Austria attacked the duchies of Schleswig and Holstein, thereby invading Danish territory. ... Faced with the overwhelming force of the combined Austrians and Prussians, the Danes ... quickly fell back. ... In Geneva, [the Red Cross Movement decided] to send delegates to the war, one to each side, to monitor the conduct of soldiers and officers ... and to try to implement the concept of neutrality of medical services on the battlefield.’

The Dutch delegate, Captain van de Velde, did not fare very well. The Danes were not only suspicious of his motives, but ‘Danish newspapers ... protested

loudly that the Red Cross Movement was failing its duty to condemn the brutality of the Prussian aggressors'.<sup>1</sup>

History shows that the moral dilemma of humanity versus justice is not new. On the one hand, it is difficult to remain silent in the face of acts of injustice; while on the other hand, the condemnation of these acts could have a negative impact on the trust of authorities and consequently lead to humanitarian access being blocked. This has been identified as one of the most fundamental dilemmas faced by the Red Cross Movement, and has evolved as an important discussion within the humanitarian community.<sup>2</sup>

While humanitarians were dealing with this moral dilemma as early as 1864, the context of humanitarian work has become even more complex. Today at least part of the humanitarian community seems to be suffering from an identity crisis. At the first World Conference on Humanitarian Studies (Groningen, 4–7 February 2009), Eva von Oelreich,<sup>3</sup> one of the keynote speakers, stated during a plenary session on 'Humanitarianism in the 21st century' that 'humanitarian values are eroded left and right'. She went on to argue that 'we [the humanitarian community] should ask ourselves what principles we are acting on – what are our key values?'

This article will analyse the values at stake for humanitarians: what were the original humanitarian values, have they changed, and to what extent are they in danger today?

In order to discuss the question of which values are at stake, this article will examine the humanitarian discourse.<sup>4</sup> It will then consider those values as they are described by humanitarians themselves, and how they are used in specific contexts. This analysis will focus in particular on the dilemma of humanity versus justice.

The first part will examine *A Memory of Solferino* by Henri Dunant<sup>5</sup> and *Red Cross Principles* by Jean Pictet<sup>6</sup> as two major narratives of the humanitarian

1 Caroline Moorehead, *Dunant's Dream: War, Switzerland and the History of the Red Cross*, Harper Collins, London, 1998, pp. 41–42.

2 See for example Fiona Terry, *Condemned to Repeat: The Paradox of Humanitarian Action*, Cornell University Press, Ithaca, New York, 2002; Hugo Slim, 'Relief agencies and moral standing in war: Principles of humanity, neutrality, impartiality and solidarity', in *Development in Practice*, Vol. 7, No. 4, 1997, pp. 342–353; Larry Minear, *The Humanitarian Enterprise: Dilemmas and Discoveries*, Kumarian Press, Bloomfield, 2002; Thomas G. Weiss, 'Principles, politics and humanitarian action', in *Ethics and International Affairs*, Vol. 13, 1999, pp. 50–69.

3 Eva von Oelreich is Executive Secretary of the Steering Committee for Humanitarian Response (SCHR), an alliance for voluntary action of major international humanitarian organizations and networks.

4 The author understands discourse as 'both a specific form of language use, and a specific form of social interaction, interpreted as complete communicative event in a social situation' – Teun van Dijk, 'Social Cognition and Discourse', in H. Giles and R. P. Robinson (eds.), *Handbook of Language and Social Psychology*, John Wiley and Sons, Chichester, 1990, p. 163.

5 Henri Dunant, *A Memory of Solferino*, ICRC, Geneva, 1986, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/p0361> (visited 20 November 2009).

6 Jean Pictet, *Red Cross Principles*, ICRC, Geneva, 1956. This was one of the first attempts to codify some of the principles of the Red Cross and the humanitarian community.

community in which the basic dilemma between humanity and justice can already be identified. Both texts play an important role in the broader humanitarian discourse as well. In a way, they have produced ‘its founding past, its identity and its projections for the future’.<sup>7</sup>

In the second part of this article, the moral values identified in those narratives will be discussed in the light of specific contexts. For instance, the moral value of humanity<sup>8</sup> as presented in the texts of Dunant and Pictet has proved hard to uphold in the face of injustice, and can lead to moral dilemmas. To understand these dilemmas and the current usage of the humanitarian values, rules and principles, four central events will be discussed: the Second World War; the Nigerian Civil War in Biafra; the aftermath of the Rwandan genocide in Zaire; and the current wars in Iraq and Afghanistan. These events all had a major impact on humanitarian action, and therefore on the humanitarian identity.

## What is a moral value?

The concept of value is used broadly, and usually refers to ideals or things that we consider valuable. Moral values are qualities people deem important because they contribute to a good and meaningful life. They usually indicate that there is a deep motivation to act on this value. A principle, on the other hand, is typically described as a (general) guiding rule for behaviour which can be based on an (underlying) moral value.

When something is valued for the sake of something else, it is referred to as an instrumental value. Moral values are also referred to as intrinsic values, i.e. they are valuable *per se*. Intrinsic values traditionally lie at the heart of moral philosophy and ethics.

The difference between instrumental and intrinsic values can be illustrated by looking at how the dilemma of humanity versus justice has been described. Beat Schweizer characterizes it as a ‘moral dilemma between neutrality and political activism’.<sup>9</sup> A moral dilemma can be explained as a clash between two (or more) moral values, both (or all) of which cannot be respected at the same time in a specific situation. In the texts of Jean Pictet,<sup>10</sup> neutrality is not seen as a moral value but as a means of actualizing humanity. Neutrality would therefore be an instrumental value. In addition, political activism does not seem to be a value in itself for

7 Bobby Sayyid and Lilian Zac, ‘Political analysis in a world without foundations’, in E. Scarbrough and E. Tanenbaum (eds.), *Research Strategies in the Social Sciences*, Oxford University Press, Oxford, 1998, p. 261.

8 Humanity is described as the Red Cross Movement’s essential (moral) principle, although the same word is also commonly used to denote human nature or even the human species as a whole (J. Pictet, above note 6, p. 15).

9 Beat Schweizer, ‘Moral dilemmas for humanitarians in the era of “humanitarian interventions”’, in *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 547–564.

10 J. Pictet, above note 6.

humanitarians, but a means of creating justice. In the author's view, the dilemma should be described as one between humanity and justice.

Intrinsic values can also be distinguished from virtues. For instance, justice can be an intrinsic value, but it can be a virtue as well. The value of justice can be an ideal and motivation for action, but when one speaks of justice as a virtue, it refers to the idea that a person has fully internalized a moral value by repetition and by actually putting it into practice in specific contexts.

## Humanitarian heritage

While the first organized group efforts to care for the wounded and the sick on an international basis can be traced back to the Christian orders of the Middle Ages, the creation in 1863, at the initiative of Henri Dunant, of what later became known as the Red Cross is widely viewed as the origin of the development of humanitarian values.<sup>11</sup> For this reason, the International Red Cross and Red Crescent Movement and, more specifically, the International Committee of the Red Cross (ICRC), will be taken as a starting point.

## A Memory of Solferino

The experience of the Battle of Solferino impelled Dunant, who came from a devout and charitable Calvinist family, to find a way in which such suffering could be prevented or at least attenuated in future wars.

Dunant was on a business trip in northern Italy in 1859 when the Battle of Solferino was in progress nearby between the Austrian army and the French and allied forces. More than 200,000 soldiers fought in the battle. It resulted in more than 6000 soldiers being killed, over 20,000 wounded and 5000 captured or missing. When the towns and villages in the vicinity filled with casualties and the army medical services proved inadequate, Dunant strove to organize care for the wounded and to alleviate their suffering.

Dunant thought highly of the French and Austrian soldiers, stressing their character, courage and humanity. In his book *A Memory of Solferino* he wrote that French officers deserved the praise of (the Austrian) General von Salm, who said: 'What a nation you are! You fight like lions, and once you have beaten your enemies you treat them as though they were your best friends!'<sup>12</sup> Both courage and humanity and, more generally, the character of these soldiers can be identified as important values for Dunant. The Croats and Hungarians, on the other hand, are described as savages and barbarians who 'always killed the wounded'.<sup>13</sup>

11 Yves Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations: The Right and Duty to Humanitarian Assistance*, Martinus Nijhoff Publishers, Dordrecht, 1991, p. 9.

12 H. Dunant, above note 5, p. 13.

13 *Ibid.*, p. 13.

Nevertheless – and this was new – Dunant made no distinction between nationalities: ‘How many young men ... had come reluctantly, here, from the depths of Germany or from the Eastern Provinces of the immense Austrian empire – and some of them, perhaps, under rude compulsion – were forced to suffer not only physical pain, but also the griefs of captivity. And now they must endure the ill-will of the Milanese who have a profound hatred for their race ...’<sup>14</sup>

Inspired by his understanding of Christianity, which the text indicates as being a major source of values, Dunant has a moral sense of the importance of human life. He clearly acts on an emotional impulse and not after having reasoned the matter out. From a moral philosophical point of view, this emotional impulse seems closest to a form of Christian virtue ethics: traits of character that are manifested in habitual actions. In *A Memory of Solferino*, humanity appears to be a key ideal and value, and also a theological code of conduct. Dunant does not seem to act on a categorical imperative as described by the philosopher Immanuel Kant, for whom a categorical imperative is an obligation not dependent on contingent situations or desires, but an absolute moral rule to which there cannot be any exceptions. Nor does Dunant act on the basis of (rule) utilitarianism, looking specifically for the effects of humanitarian aid in accordance with the principle of utility. Instead, his actions seem to derive from a sincere concern for the lives of those people. This concern is so strong that he even overcomes his own prejudices: he assists the ‘barbarians’ as well.

Dunant’s opinion of the situation in Denmark in 1864 is a further example which shows that although he speaks in terms of duties, he did not think of humanity as a categorical imperative. He wrote in 1864: ‘The duty of the International Committee ... whose opinion has so much significance and influence, is to know and then to utter the whole truth, to publish this truth in all its good or evil, to set the facts straight and to stigmatize every kind of hateful occurrence’<sup>15</sup>. Even then, most of the founders disagreed; they held that the main duty lay in helping the wounded: no-one could be both Good Samaritan and arbiter at once.<sup>16</sup>

## Towards a firm doctrinal basis

Based on humanity, Christianity and civilization, Dunant’s book puts forward two proposals: first, to set up volunteer groups in peacetime to take care of casualties in wartime; and second, to convince countries to allow and support first-aid volunteers on the battlefield. Whereas the International Red Cross Movement came into being under the influence of Christianity, the Movement developed its doctrine in the name of universal (secular) human reason.

14 *Ibid.*, p. 17.

15 C. Moorehead, above note 1, pp. 42–43.

16 *Ibid.*, p. 43.

In 1863, a year after Dunant's book was published, a private committee – consisting of General Guillaume-Henri Dufour, Gustave Moynier, Théodore Maunoir, Louis Appia and Henri Dunant himself – organized a conference in Geneva to which 16 countries sent representatives. The conference recommended that national relief societies be set up and asked the governments to protect and support them. In addition, it expressed the wish for belligerent parties to declare field hospitals neutral in wartime, for similar protection to be extended to army medical staff, voluntary helpers and the wounded themselves, and finally for the governments to choose a common distinctive sign indicating persons and objects to be protected.

From the resolutions of that preparatory conference, and on the basis of the original Geneva Convention adopted by the following Diplomatic Conference in 1864, the International Red Cross Movement and the substantial body of universally recognized rules which now make up the Geneva Conventions were developed. The original convention constituted the first attempt in modern times to codify the values described by Dunant into an organizational ethos.

During the First World War, the activities of the Movement developed considerably and it became vital for the Movement to have a firm doctrinal basis. Charity and universality, together with independence and impartiality, were identified as the essential and distinctive features of the Red Cross. These fundamental principles first found expression in 1920.<sup>17</sup>

The Movement has always claimed that it does not raise its working principles, such as the principle of neutrality, to the status of absolute values.<sup>18</sup> Later, the author will argue that some of these 'principles' are in fact treated as being unconditional and that they are, in that sense, used as absolute moral values.

According to Jean Pictet, the first principle – humanity – is the greatest principle, the motivating force and ideal of the Movement. All other principles represent the means of achieving this aim.<sup>19</sup> While the principles of voluntary service, unity and universality are relevant mainly for the internal functioning of the Movement, the other principles – humanity, impartiality, neutrality and independence – still provide the basis for discussion of the ethical framework of humanitarian action in general.<sup>20</sup> The following section will therefore focus on these four principles.

17 J. Pictet, above note 6, p. ii.

18 Denise Plattner, 'ICRC neutrality and neutrality in humanitarian assistance', in *International Review of the Red Cross*, No. 311, March–April 1996, p. 1; J. Pictet, above note 6, p. 14.

19 J. Pictet, above note 6, p. 12.

20 B. Schweizer, above note 9, p. 548; Hugo Slim, 'Humanitarian ethics in disaster and war', in *World Disasters Report 2003: Focus on Ethics in Aid*, 2003, Chapter 1 – Summary, available online at: <http://www.ifrc.org/publicat/wdr2003/chapter1.asp> (visited 20 November 2009).



### Humanitarian principles

**Humanity:** The International Red Cross and the Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace among all peoples.

**Impartiality:** It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

**Neutrality:** In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.

**Independence:** The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.

**Voluntary service:** It is a voluntary relief movement not prompted in any manner by desire for gain.

**Unity:** There can be only one Red Cross or one Red Crescent Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.

**Universality:** The International Red Cross and Red Crescent Movement, in which all Societies have equal status and share equal responsibilities and duties in helping each other, is worldwide.

Source: *Compendium of Reference Texts on the International Red Cross and Red Crescent Movement*, ICRC/League, Geneva, 1990, p. 8. This text was adopted by the 25th International Conference of the Red Cross, Geneva, 1986.

### Four key principles: humanity, impartiality, neutrality and independence

These principles will be analysed first by looking at what Pictet wrote about them in his *Red Cross Principles*;<sup>21</sup> the analysis will be followed by a brief reflection on them.

21 J. Pictet, above note 6.

In the following section, it will be seen whether they should be understood as principles, values or virtues.

## Humanity

The principle of humanity stands on its own in the doctrine of the Red Cross and all other principles flow from it; 'it is ... its ideal, the reason for its existence and its object'.<sup>22</sup>

For Pictet, this principle of humanity is a synonym for charity: 'loving one's neighbour'. It is a true altruistic love; the person who gives it is not considering his own happiness. Pictet explains that in ancient Greek, love was translated as both *eros* and *agape*. *Eros* is the desire to appropriate something for oneself, whereas *agape* is altruistic, disinterested love. Humanity should be understood as *agape*.<sup>23</sup> Pictet describes it as a feeling which 'demands a certain amount of self-control; it may result from an effort [we are] required to make; its object may even be the enemy or a criminal'.<sup>24</sup> Looking into the origin and development of *agape*, there is an obvious link with virtue ethics.

While Pictet argues that he refers to a Greek tradition, he is more likely referring to Christian thinkers; Greek philosophers such as Plato and Aristotle were mostly interested in *eros* and *philia*.<sup>25</sup> *Agape* received much broader usage among later Christian writers. In *The Good Samaritan*, Max Huber also argues that *agape* is developed within Christian virtue ethics: '*Agape*, Christian love, seeks nothing for itself, for though bestowed by men on men, it is only the response to the love of God, which has stooped to make its dwelling in human hearts'.<sup>26</sup> Charity, he writes, is 'the entire attitude of a soul towards the other members of creation, after it has been taken possession of and made new by faith'.<sup>27</sup>

In his *Summa Theologica*, Thomas of Aquinas, influenced by Aristotle, argues that charity, or *agape*, is divinely infused practical wisdom. According to Aquinas, a man is virtuous because his actions correspond to an objective norm. For Aristotle this was reason and for Aquinas, reason and faith.

Virtue ethics was the prevailing approach to ethics in the ancient and medieval periods, which strongly influenced many Christian writers. It emphasized character, rather than rules or consequences, as the key element of ethical thinking. *Agape* was one of the theological virtues mentioned by the Apostle Paul in I Corinthians 13: faith, hope and love (charity or *agape*).

22 *Ibid.*, p. 14.

23 *Ibid.*, p. 16.

24 *Ibid.*, p. 16.

25 In *Ethica Nicomachea*, Aristotle describes *philia* as a genuine friend, someone who loves or likes another person for the sake of that other person. Wanting what is good for the sake of another he calls 'good will' (*eunoia*), and friendship is reciprocal good will, provided that each recognizes the presence of this attitude in the other.

26 Max Huber, *The Good Samaritan: Reflections on the Gospel and Work in the Red Cross*, Victor Gollancz Ltd, London, 1945, p. 44.

27 *Ibid.*, p. 46.

It is interesting that Pictet describes humanity, in the sense of charity, as a (universal) encounter.<sup>28</sup> It is worthwhile comparing this to what the German philosopher Martin Buber argues about an encounter in *I and Thou*: that in a genuine encounter, the receiver must also be viewed as worthy by the giver.<sup>29</sup> If not, the encounter is fundamentally instrumental in nature: such 'I-it' relations are oriented toward domination because they are relations in which the subject (the 'I') takes its partner (the 'it') as an object.

If this is what is implied, it should be impossible to speak of humanitarian aid, and the value of humanity, in instrumental terms. In fact, in this encounter with the Other it is very likely that one becomes concerned and involved with the situation of the Other. As a result, if injustice is being done, the urge is to act for the 'good' of one's fellow human beings.<sup>30</sup>

What exactly this 'good' for one's fellow man consists of is a question that, for Pictet, was one that 'hardly arises ... in connection with the Red Cross'<sup>31</sup> and, according to him, was not relevant.<sup>32</sup> However, from the events discussed below it is obvious that this has become an elementary question: what exactly was the 'good' for Jews in Nazi Germany, Ibos in Nigeria or Rwandan Hutu refugees in Zaire? In these cases, for many humanitarians the 'good' is related to the ideal, or value, of justice.

When this value of justice implies that some deserve aid more than others, there could be a tension within the definition of humanity itself.

### *Impartiality*

The second principle is impartiality: no discrimination should be made with regard to nationality, race, religious beliefs, class or political opinions. In order to relieve the suffering of individuals, one should be guided solely by their needs and give priority to the most urgent cases of distress.

According to Pictet, impartiality implies that one does make a choice in accordance with pre-established rules. These rules are humanity, equality and due proportion – people who suffer must be helped; an equal degree of distress calls for equal aid; and the assistance given, in cases where the distress is not equal, aid must depend on the degree of the respective needs and their urgency.<sup>33</sup>

Interestingly, rather than defining impartiality as a rule or guideline, Pictet determines it to be a virtue or a competence: 'an inward quality, an intrinsic virtue of the agent [who must endeavour] to free himself from prejudices':<sup>34</sup> it demands that 'a prolonged and intense effort be made to free charitable action from the

28 J. Pictet, above note 6, p. 17.

29 Martin Buber, *I and Thou*, translated by W. Kaufman, T. & T. Clark, New York, 1970.

30 J. Pictet, above note 6, p. 17.

31 *Ibid.*, p. 16.

32 *Ibid.*, p. 16.

33 *Ibid.*, p. 54.

34 *Ibid.*, pp. 54–55.

influence of the personal factor'.<sup>35</sup> Pictet realizes the difficulty of prohibiting what he refers to as 'subjective distinctions between people, which spring from factors peculiar to the relationship existing between the agent and the person concerned ... for example ... a spontaneous feeling of sympathy'.<sup>36</sup>

### *Neutrality*

'The International Committee has refrained from making public protests about specific acts of which the belligerents are accused. ... charity has been regarded as more important than man's justice. For experience has shown that demonstrations of this kind may well, for an illusory result, jeopardize the work of relief which the Committee is in a position to carry out.'<sup>37</sup>

According to Pictet, neutrality seeks to underpin the value of humanity. Humanitarian aid should not be used for political purposes or to meet political agendas; it should be delivered without taking sides or engaging in controversies. Pictet emphasizes that neutrality is not a moral value, but simply a form of outward behaviour which demands a self-imposed restraint; it means refusing to express an opinion concerning the qualities of the men or the theories in question.<sup>38</sup> Humanitarian neutrality, therefore, is not equal to indifference or unprincipled relief workers; on the contrary, at least for the Red Cross Movement, the underlying value is humanity, and neutrality is only the operational means of achieving this ideal in an environment that is essentially hostile to it.<sup>39</sup>

Médecins sans Frontières (initially) called the means of neutrality into question. Bernard Kouchner, one of the founders of MSF, argued that neutrality imposes silence, and that if one's core value is justice, silence is reprehensible.<sup>40</sup> In the words of Jean Pictet: 'For while justice gives to each according to his rights, charity apportions its gifts on the basis of the suffering endured in each case ... It refuses to weight the merits and faults of the individual'.<sup>41</sup>

In the author's view, it is useful to make a distinction between instrumental (operational) and moral neutrality.<sup>42</sup> Neutrality as defined by the Red Cross Movement is similar to instrumental neutrality: it is the refusal to take a position on the conflict so as not to take sides in hostilities – and thus not to antagonize one of the parties to the conflict – in order to continue to relieve the suffering of

35 *Ibid.*, p. 56.

36 *Ibid.*, p. 56.

37 *Ibid.*, p. 74.

38 *Ibid.*, pp. 59–61.

39 Hugo Slim, 'Relief agencies and moral standing in war: Principles of humanity, neutrality, impartiality and solidarity', *Development in Practice*, Vol. 7, No. 4, 1997, p. 347.

40 D. Plattner, above note 18, part 2B.

41 J. Pictet, above note 6, p. 48.

42 Fred van Iersel, 'De krijgsmacht: een voorbeeld voor de samenleving', in *Militaire Spectator*, Vol. 165, No. 11, 1996, pp. 516–524; Ted van Baarda and Fred van Iersel, 'The uneasy relationship between conscience and military law: The Brahimi Report's unresolved dilemma', in *International Peacekeeping*, Vol. 9, No. 3, 2002, pp. 25–50.

victims on both sides. Moral neutrality, on the other hand, would imply indifference; in the parable of the Good Samaritan, the (morally) neutral figure is the Levite who passes by indifferent to the dramatic scene. Moral neutrality implies that the distinction between right and wrong loses its practical significance. The difficulty is that it seems impossible to separate operational and moral neutrality completely. It is clear, however, that one cannot remain silent when being faced with the most heinous crimes. When confronted with such crimes, human beings cannot remain operationally neutral without losing their personal moral integrity. If neutrality were to become an absolute, a 'dogma',<sup>43</sup> the ability to choose not to be morally neutral and to take the side of humanity would be ruled out.

### *Independence*

Independence with respect to political and economic powers (both donors and recipients) and the media is important because the Red Cross Movement must be 'free to base its actions on purely humanitarian motives, applying its own principles on all occasions and treating all men with equal consideration; it must be free to remain universal. ... It is, moreover, essential for the Red Cross to inspire the confidence of everyone it may be called upon to assist, even, and especially, if they do not belong to the ruling circles'.<sup>44</sup>

Pictet argues in favour of full independence: 'The fact that its work depends entirely on donations, may make this condition a very hard one: but no concession can be made. Even if its resources dry up as a result, the Red Cross must refuse any financial contribution which would affect its independence to even a very slight extent'.<sup>45</sup>

As Etxeberria states, 'a limited ceding of independence is difficult because an organization may be falling into the temptation to be unable to say no to donations from political, economic and media powers, while the real motivation is not the good of the victims but merely the self-interest of the ... organization'.<sup>46</sup>

Interestingly, Pictet does put forward a more liberal attitude towards co-operation with outside bodies: 'To be in the Red Cross does not merely mean bearing a name and wearing a badge; it means possessing a certain attitude of mind and respecting an ideal. And under that heading, there are sometimes others from whom we have to learn'.<sup>47</sup>

43 Y. Beigbeder, above note 11, p. 147.

44 J. Pictet, above note 6, p. 79.

45 *Ibid.*, p. 82.

46 Xavier Etxeberria, 'The ethical framework of humanitarian action', in Humanitarian Studies Unit (ed), in *Reflections on Humanitarian Action: Principles, Ethics and Contradiction*, Pluto Press, London, 2001, p. 89.

47 J. Pictet, above note 6, p. 82.

## Principles, moral values or virtues?

Pictet uses the rather ambiguous notion of principles for humanity, neutrality, impartiality and independence. A principle can be used as a synonym for a moral value but by no means has to be one. This can easily lead to confusion. When it remains unclear whether these principles are principles, values or even attitudes or virtues, the discussion easily becomes unfocused.

Peter Walker (quoting Pictet) does regard neutrality as a value in his text ‘What does it mean to be a professional humanitarian?’. Walker states that a ‘value often voiced but much less certain in its universality is the value of neutrality’, and goes on to say that ‘The problem with neutrality is that it is a relative, not an absolute, value’.<sup>48</sup> The terminology is rather puzzling. If all principles are also values, are they also moral values? What exactly defines the difference between an absolute and relative value?

From Pictet’s text, it is clear that neutrality has a rather different status to the other principles. Neutrality, while also defined as a principle, is merely a ‘means for accomplishing humanity’; it is an operational or an intrinsic value and not a moral value in itself.

Humanity is defined as a principle, as well as being the ideal and reason for the existence of the ICRC, and is referred to as the sentiment of humanity which is the moral idea underlying the Geneva Conventions.<sup>49</sup> These descriptions are very similar to the concept of a moral value.

What is the exact status of impartiality? Should we consider impartiality to be a principle or also a value; a moral value or a virtue? If impartiality assumes that one frees oneself from prejudices and sympathies with respect to persons or ideals involved, it seems to be an attitude, or competence, rather than a rule or principle.

If the humanitarian principles are also intended as virtues, capturing these virtues in a doctrine is, in my view, inadequate and perhaps even impossible. In Aristotle’s language, a moral virtue is a certain habit of the faculty of choice, consisting of a means suitable to our nature and fixed by reason in the manner in which a prudent man would act. This implies by definition that one always has to consider the context. It might be possible to inculcate virtues through training and education, but it seems impossible to prescribe them in a doctrine.

48 Peter Walker, ‘What does it mean to be a professional humanitarian?’, in *Journal of Humanitarian Assistance*, 2004, available at <http://www.jha.ac/articles/a127.htm> (visited 20 November 2009).

49 J. Pictet, above note 6, p. 30.

## The Code of Conduct

### The Code of Conduct (1994)

Principal commitments:

1. The Humanitarian imperative comes first.
  2. Aid is given regardless of the race, creed or nationality of the recipients and without adverse distinction of any kind. Aid priorities are calculated on the basis of need alone.
  3. Aid will not be used to further a particular political or religious standpoint.
  4. We shall endeavour not to act as instruments of government foreign policy.
  5. We shall respect culture and custom.
  6. We shall attempt to build disaster response on local capacities.
  7. Ways shall be found to involve programme beneficiaries in the management of relief aid.
  8. Relief aid must strive to reduce future vulnerabilities to disaster as well as meeting basic needs.
  9. We hold ourselves accountable to both those we seek to assist and those from whom we accept resources.
  10. In our information, publicity and advertising activities, we shall recognize disaster victims as dignified human beings, not hopeless objects.
- <http://www.ifrc.org/publicat/conduct/>

The Code of Conduct was the first document to emerge from the international NGO community in the 1990s. It was prepared jointly by the International Federation of Red Cross and Red Crescent Societies and the ICRC, in consultation with the members of the Steering Committee for Humanitarian Response (SCHR). Although the Code of Conduct was primarily related to relief in natural disasters, it has always been seen as applicable to NGOs' humanitarian work in armed conflicts too.<sup>50</sup>

With the explicit claim that the principle of humanity 'stands on its own in the doctrine of the Red Cross',<sup>51</sup> the original moral value (and perhaps virtue) as defined by Dunant became a norm – as such, it can be interpreted as an absolute duty or an obligation.<sup>52</sup> In fact, in an effort to give the principle of humanity an 'imperative gloss' by making it a moral absolute, the term 'humanitarian imperative' was adopted in the first principle of the Code of Conduct.

Philosophers and many others will immediately relate this term to a Kantian 'categorical imperative' – an absolute rule that admits no exceptions and

50 Hugo Slim, *Claiming a humanitarian imperative: NGOs and the cultivation of humanitarian duty*, International Council on Human Rights Policy Working Paper, presented at the Seventh Annual Conference of Webster University on Humanitarian Values for the Twenty-First Century, Geneva, 21–22 February 2002, p. 3.

51 J. Pictet, above note 6, p. 14.

52 X. Etxeberria, above note 46, p. 79.

imposes an obligation. Hugo Slim argues that: ‘Those choosing the phrase “humanitarian imperative” were obviously determined to reinstate emphatically the principle of humanity that they saw as being so undermined in practice around the world – first by the perpetrators of its violation, secondly by reluctant donor governments, and finally, perhaps, by more consequentialist observers emphasizing the potentially harmful effects of humanitarian aid in certain situations’.<sup>53</sup>

While there are more nuances in Kant’s theory, and one might even doubt if humanity can actually be a categorical imperative, it is interesting to see what this term means for practitioners and how they use it. If humanitarians do align themselves with absolute rules, there is an obvious danger, which is also characteristic of deontology (Kant’s theory), that they may not take the consequences sufficiently into account. Of course, there are many authors – Mary Anderson in particular – who have stressed that when assistance is given in a certain context, it is important to consider the consequences of the assistance and to try to do no harm.<sup>54</sup>

Nevertheless, when viewed as an absolute duty, a humanitarian imperative can easily be used as an excuse for not taking the consequences into account. For example, a local representative of one major humanitarian organization in the eastern Democratic Republic of Congo (DRC) claimed that he did not recognize any moral dilemma in providing food and medicine to a village, even though he was aware that bandits would come at night to take all the food and medicine, as well as hostages for whom exorbitant ransoms would be demanded.

He argued, ‘We simply have a humanitarian imperative, so there is no dilemma’. Obeying a universal obligation or rule without being able to recognize the moral dimension of a specific situation and identify the values at stake is very risky, and could lead to moral blindness.

Part of the problem is that in stating that the ‘humanitarian imperative’ comes first, it is important to understand exactly what humanity (as a moral value) and the humanitarian imperative mean. In the author’s view, this issue has not been sufficiently addressed by the humanitarian community.

The above interpretation means that aid should always be provided, regardless of the circumstances. As such, it obviously comes into conflict with, for instance, Principle 8 of the Code of Conduct: ‘Relief aid must strive to reduce future vulnerabilities to disaster as well as meeting basic needs’, and Principle 9: ‘We hold ourselves accountable to those we seek to assist’, which requires taking into account the context and consequences of relief aid.

The Code of Conduct itself also consists of principles that are commonly understood as prescribed rules of practice and professional obligations. As a result, the context in which aid is delivered – be it historical, legal or political – is not taken sufficiently into account.

53 H. Slim, above note 50, p. 4.

54 Mary B. Anderson, *Do No Harm: How Aid can Support Peace or War*, Lynne Rienner Publishers, Colorado, 1999.



## The context

### Second World War

On Wednesday, 14 October 1942, the ICRC decided not to issue a public appeal on behalf of the Jews of occupied Europe, who at the time were being systematically deported to the Nazi concentration camps.<sup>55</sup> The dilemma of publicly condemning injustice versus Red Cross access and aid to prisoners of war was an issue the ICRC had previously faced. As before, the ICRC chose to uphold its neutrality in order to retain that access. In the Second World War, neutrality indeed became a ‘dogma’,<sup>56</sup> which obviously has a much stronger connotation than that of a working principle.

As mentioned above, Dunant was inspired mainly by a sense of empathy with the victims and a moral sense of the importance of human life, which can be described as virtue of character rather than calculated action based on rules, dogmas or categorical imperatives. However, because a character or virtue cannot be based on principles or rules that give an agent the ability to decide how to act in any given situation, it is impossible to capture this attitude in a doctrine. Since the ICRC needed a doctrine in order to uphold the value of humanity and charity for all, the working principle of neutrality was hard to avoid.

During the war, while the ICRC failed to obtain an agreement with Nazi Germany on the treatment of detainees in concentration camps, it was able to assist the prisoners of war with parcels of food and medicine, inspect the conditions in the camps, trace missing soldiers, transmit messages between POWs and their families, and monitor compliance with the articles of the Geneva Conventions (which had been ratified by all the countries at war except for Russia and Japan).

It is possible to argue that by keeping silent, knowing of Nazi Germany’s mass murder of Jews, Roma, homosexuals, political opponents, mentally ill persons, Jehovah’s Witnesses and members of other minority religious groups, the ICRC was not only operationally neutral but morally as well. Since the end of the war, it has been severely criticized for its stance. As defined by Pictet, humanity should be understood as charity, but at the same time it is an encounter with the Other, in which there is an urge to act for the ‘good’ of the Other. In considering the moral dilemma of humanity versus justice, one can wonder whether the ICRC also failed to take sides with its most central value: humanity.

### Nigerian war: old and new humanitarianism

Amid rising ethnic tensions, the Ibos of eastern Nigeria – which had oil and was mostly Ibo territory – felt themselves to be increasingly under threat. The decision was taken to set up the independent state of Biafra. This attempted secession triggered the 1967–1970 Nigerian Civil War, which not only brought new players

55 C. Moorehead, above note 1.

56 Y. Beigbeder, above note 11, p. 167.

into the field of humanitarian aid, but also changed forever the way the ICRC thought about itself and how it operated.

The war lasted much longer than initially expected, and the Nigerian military set up a food blockade around the nation's self-proclaimed and newly independent south-eastern region. Biafra was the first famine disaster of modern times to be reported on television. Pictures reached the West of children with distended bellies and stick-like arms.

It was in Biafra that the International Committee recognized that assistance to prisoners of war and to the civilian population must go hand in hand (particularly during civil conflicts), and that relief to victims is a crucial component of modern wars. Since civil wars are the most complex intra-state situations, the way in which outsiders enter and assume important roles in these circumstances, including assistance to prisoners of war, are some of the most complex moral challenges confronting aid workers.<sup>57</sup>

The resulting war was ugly, and Nigerian commanders were open about their objectives. 'Starvation is a legitimate weapon of war', one said.<sup>58</sup> President Nyerere of Tanzania declared that, 'If I had been a Jew in Nazi Germany, ... I'd feel the same as an Ibo in Nigeria'.<sup>59</sup> The war was a severe test of the ICRC's neutrality: can a humanitarian organization be deemed to be neutral when it gives relief assistance to a rebellious and secessionist region on a sovereign state's territory?

The Biafrans and Nigerians alike had one main objective in mind: to win the war. The Biafrans had quickly perceived that the surest road to victory was to draw in international support, and that pictures of dying children would help them to do so. While it was known that foreign aid could prolong the war, most relief agencies decided to continue either raising or spending money to save lives. Even though the ICRC wanted to save lives, it was bound by law to its mandate: under the Geneva Conventions it had to seek permission from the government in Lagos for all its deliveries to Biafra. In June, the Nigerian government announced its decision that the Nigerian rehabilitation commission, rather than the Red Cross, would co-ordinate the relief operation. Flights were suspended, and the Red Cross decided to adhere to its traditional role of acting only with the consent of both parties.

Bernard Kouchner was one of the volunteer doctors flown by the ICRC to Biafra. He was frustrated by delays in receiving permission to assist the starving Biafrans and by the ban on speaking out that had been imposed by the ICRC. Having had members of his family murdered during the Nazi regime, Kouchner announced that he was not prepared to condone a second complicity in silence.<sup>60</sup> He publicly criticized the Nigerian government and the Red Cross for their behaviour. The fundamental idea was that concern for the victims should transcend

57 M. B. Anderson, above note 54.

58 Samantha Power, *A Problem from Hell*, Basic Books, New York, 2002, p. 82.

59 C. Moorehead, above note 1, p. 616.

60 Tim Allan and David Styan, 'A right to interfere? Bernard Kouchner and the new humanitarianism', in *Journal of International Development*, Vol. 13, Issue 6, 2000, p. 300; C. Moorehead, above note 1, p. 625.

state sovereignty and neutrality of humanitarian action. A new form of humanitarianism was born, and Médecins Sans Frontières (MSF) was created. MSF's example of a politically activist humanitarianism, openly denouncing oppression and injustice, was soon followed by other NGOs such as Oxfam in the UK.<sup>61</sup>

This 'new humanitarianism'<sup>62</sup> was based on the view that the old humanitarianism, which demanded operational neutrality in order to guarantee humanity as *agape*, posed a huge dilemma when faced with a situation where it was obvious that crimes against humanity were being committed with intent to destroy, wholly or in part, a national, ethnic, racial or religious group.

Concern for the victims, and hence for the ideal or value of justice, was essential for these new humanitarians. To keep silent and not to judge, in order to uphold humanity as *agape* – maintaining that even the worst criminal has a right to charity – was regarded as naive and unjust. The concept of humanity was consequently broadened and became more political.

The ICRC continued to argue that the price of denouncing injustice is usually expulsion from the scene of suffering, which in turn deprives victims of possible assistance and protection, and thus is likely to cause even greater suffering.<sup>63</sup>

## Post-Cold War world

After the Cold War, there was an enormous growth of institutions (not all of them equally principled) who tried to assert themselves as humanitarian. Neutrality and impartiality were the key concepts they used to do so.<sup>64</sup> As a direct result, these concepts have become rather unclear and are often misunderstood.<sup>65</sup>

Since the Iraqi occupation of Kuwait, which roughly coincided with the end of the Cold War, there has also been a substantial increase in the number of United Nations Security Council resolutions on the humanitarian aspects of armed conflict. Several UN peacekeeping missions have been authorized under Chapter VI and later under Chapter VII of the UN Charter.<sup>66</sup> The (mis)use of the concept of humanitarianism was, again, widened to a significant extent.

For the first 35 years of its existence, the Security Council had not engaged in humanitarian assistance. This was traditionally taken care of by humanitarian organizations. By the time of the 1991 operation in northern Iraq, however, the use of military forces for human protection purposes was considered a feasible option.<sup>67</sup> Even though these UN peacekeeping missions were accompanied by strict mandates aimed at guaranteeing the neutrality of the peacekeepers, the fact that

61 B. Schweizer, above note 9, p. 552.

62 Peter J. Hoffman and Thomas G. Weiss, *Sword and Salve: Confronting New Wars and Humanitarian Crises*, Rowman & Littlefield Publishers, Oxford, 2006.

63 B. Schweizer, above note 9, p. 552.

64 H. Slim, above note 39, p. 344.

65 African Rights, *Humanitarianism Unbound*, African Rights, London, 1994.

66 Ted van Baarda, 'The involvement of the Security Council in maintaining international humanitarian law', in *Netherlands Quarterly for Human Rights*, Vol. 12, No. 2, 1994, pp. 157–152.

67 P. J. Hoffman and T. G. Weiss, above note 62.

they were appointed by the UN means a case can be made that they were not politically neutral.<sup>68</sup>

One of the major dilemmas for humanitarians then involved the pros and cons of working side by side with military personnel who were also providing humanitarian aid. For reasons of space, only two events will be discussed here. The situation of the refugee camps in Zaire has shown that humanitarian aid, as *agape*, can have adverse effects when the recipient manipulates the aid, and ultimately that in Zaire, aid without security is meaningless. The experience of the wars in Iraq and Afghanistan shows that working alongside military forces may also have harmful effects on civilians and humanitarian operations.

## Refugee camps in Zaire

Up to one million lives were lost during the Rwandan genocide, which started in April 1994. It was a planned campaign to exterminate anyone who was perceived to support the Tutsi-dominated Rwandan Patriotic Front (RPF). It ended with the defeat of the government three months later.<sup>69</sup> In the aftermath of the Rwandan genocide, 200,000 Hutu refugees lost their lives in Zaire.<sup>70</sup>

The Hutu refugees sought asylum in Zaire (now the Democratic Republic of Congo), Tanzania and Burundi. The conditions in the refugee camps were appalling; thousands died of cholera, dysentery and exhaustion. Tensions concerning humanitarian roles and responsibilities were highlighted by humanitarian agencies. International military contingents engaged directly in the traditional activities of humanitarian agencies, seemingly encroaching on their 'turf'.<sup>71</sup> Military forces took on roles in the provision of water, shelter and health care.

For humanitarian agencies, the situation raised questions of quality and competition, as well as questions regarding collaboration. Some humanitarian organizations viewed collaboration with military troops from the US and France (Opération Turquoise had an operating base in Goma) as undermining their ability to deal with all the victims of the conflict and the new authorities.<sup>72</sup> France in particular is a country with strong political interests in the region and had a history of supporting the previous Hutu regime in Kigali.

68 T. Van Baarda, above note 66.

69 Philippe Mahoux and Guy Verhofstadt, *Parlementaire Commissie van Onderzoek Betreffende de Gebeurtenissen in Rwanda*, 1997, available at <http://www.senate.be/www/?Mlval=/Registers/ViewReg.html&COLL=S&POS=1&PUID=16778222&TID=16778570&LANG=nl> (last visited 20 November 2009).

70 Filip Reyntjens, *De Grote Afrikaanse Oorlog: Congo in de Regionale Geopolitiek 1996–2006*, Meulenhof/Manteau, Antwerp, 2009, p. 91.

71 Hugo Slim, 'Military intervention to protect human rights: The humanitarian agency perspective', Background paper for the International Council on Human Rights' Meeting on *Humanitarian intervention: Responses and dilemmas for human rights organisations*, Geneva, 31 March–1 April 2001, available at <http://www.jha.ac/articles/a084.htm> (visited 20 November 2009).

72 Larry Minear and Philippe Guillot, *Soldiers to the Rescue: Humanitarian Lessons from Rwanda*, Organisation for Economic Co-operation and Development (OECD), Paris, 1996, p. 148.

Between 1994 and 1996, a ‘refugee-warriors’ community was established in the refugee camps.<sup>73</sup> In the Great Lakes context, it is obvious that good intentions and *agape* are simply not enough: Terry points out that the analysis of the situation was – at times – clouded by strong emotions: ‘Everyone in the team felt deep discomfort about assisting people who had murdered others, particularly since few of the killers expressed remorse. The genocide against the Tutsis and those who were seen as supporting them continued in the camps...’<sup>74</sup> Strong emotions are usually indicators of an important value at stake. Again, the moral dilemma for humanitarians was between justice and humanity. For Terry, ‘refusing to make a judgment about who is right and who is wrong in many ways assumes a legal and moral equality between oppressors and their victims’.<sup>75</sup>

Many of the advocacy-based organizations called for international forces to separate Interahamwe<sup>76</sup> combatants and other *génocidaires* from civilians in the refugee camps. This can be considered as signalling a wider movement in the humanitarian agencies concerned to see individuals brought to justice.

At the time, there was no justice, and for MSF in 1995, the dilemma implied that they would have to leave. The dilemma was even more complex since security conditions for the staff were also risky, if not downright dangerous. CARE staff members, for instance, received various death threats. Self-protection can therefore be regarded as a relevant value as well.

The President of Rwanda, Paul Kagame, argued that the camps had been used as a base from which the former extremist (Hutu) government, army and Interahamwe militias had launched raids on Rwanda (as well as in Zaire) to continue the killing that had started in April 1994.<sup>77</sup> In 1996, across hundreds of sites in Zaire, Hutu refugees – men, women and children – were rounded up in camps, in the forest or on the road and either taken away, shot, or slaughtered with machetes where they stood. The licence to kill was premised on their ‘guilt by association’ with the perpetrators of the 1994 Rwandan genocide, who had been ensconced in Zairian refugee camps for the past two years.

While the Biafra context raised questions of whether aid could also prolong wars, in the aftermath of the Rwandan genocide it became clear that humanitarian assistance itself can be manipulated as a powerful contributor to the destruction of a society.<sup>78</sup>

Filip Reyntjens argues that rebels and their Rwandan counterparts made it (deliberately) impossible in many cases for humanitarian organizations to reach the sick and hungry refugees, and that furthermore, when humanitarians were allowed access, the humanitarian aid was used as bait to attract refugees who were

73 Fiona Terry, *Condemned to Repeat: The Paradox of Humanitarian Action*, Cornell University Press, Ithaca, New York, 2002, p. 6.

74 *Ibid.*, p. 2.

75 *Ibid.*, p. 22.

76 Interahamwe is a Hutu paramilitary organization. In Kinyarwanda the name means ‘those who stand/work/fight/attack together’.

77 F. Terry, above note 73, p. 1.

78 Kevin M. Cahill, *Traditions, Values and Humanitarian Action*, Fordham University Press, 2003.

hiding in the forest. After a while, the area would be declared a ‘military area’ and no humanitarian agencies or journalists would be allowed to enter.<sup>79</sup>

At first sight it may seem easy to identify the innocent as being the orphaned, the widowed and the murdered; but in all its complexity, the situation in Rwanda and Zaire shows that a neat distinction cannot be drawn, either historically or contextually, between the good and the evil, the innocent and the victimizers. Precisely in these most intricate cases, where the dividing line between victim and perpetrator is not clear, where the people who are suffering may not be entirely helpless but are defined as threatening and dangerous, it is hard to identify who exactly is the victim or the innocent person. Those same Hutus who were perpetrators in 1994 were attacked and murdered in 1996. Without denying the responsibility of the murderers, who may be victims themselves in another situation, ‘these relationships expose the ethical water as fundamentally murky, and there is a difficulty in assigning an ethical position to the belligerent violence of a group that is at the same time disenfranchised and victimized’.<sup>80</sup>

It is impossible to give the morally right answer to these dilemmas, in which every decision is likely to have a negative consequence. At least by being aware of the dilemmas and of the values at stake, organizations can try to make an informed decision which they can communicate and above all justify for themselves and to others. As Terry observes, ‘by ignoring ethical issues and emphasizing technical standards, some ... NGOs undermined efforts of agencies that were striving to minimize the abuse of aid’.<sup>81</sup>

## Afghanistan and Iraq

The terrorist attacks against the United States on 11 September 2001 and the subsequent ‘war on terror’ conducted in Afghanistan and Iraq made it clear that the provision of humanitarian aid by military forces not only raised the question of who should take part in the business of humanitarianism. With US forces engaging in humanitarianism in Afghanistan and in Iraq it became difficult, if not impossible, to see humanitarian activities as non-political and independent of political and partisan considerations. Humanitarian agencies found that they would have to deal with the military, and that at least some of the recipients would perceive their aid as the guise under which political manipulation takes place.<sup>82</sup>

For humanitarians, this created another complex moral dilemma. Should they uphold the working principle of neutrality and the principle of impartiality and not co-operate with military forces, therefore perhaps not being able to reach people in need? Should they reach out to people in need while individual aid

79 F. Reyntjens, above note 70, p. 94.

80 Elizabeth Dauphinée, *The Ethics of Researching War: Looking for Bosnia*, Manchester University Press, Manchester, 2007, p. 33.

81 F. Terry, above note 73, p. 202.

82 T. Van Baarda, above note 66, p. 138.

workers become a soft target for belligerents who do not, or do not want, to view them as neutral and impartial? Or should they co-operate with the UN in these violent areas in order to get their aid through and at the same time accept blending into military and political agendas?

Both in Afghanistan and Iraq, humanitarian aid is also part of the US-led intervention. Military forces rebuild schools, dig wells, and give food and medical aid, as well as ‘removing’ insurgents, upholding peace agreements and providing security for civilian organizations. This aid is referred to as civil-military co-operation (CIMIC). The North Atlantic Treaty Organization (NATO) defines it as: ‘The co-ordination and co-operation, in support of the mission, between the NATO Commander and civil actors, including national population and local authorities, as well as international, national and non-governmental organisations and agencies’.<sup>83</sup>

In Afghanistan, the Provincial Reconstruction Teams (PRTs) work according to this official NATO doctrine, which by definition uses humanitarian reconstruction projects as a means for achieving military objectives by gathering intelligence and ‘winning hearts and minds’ in order to increase the permissive environment.<sup>84</sup> What is new here is the explicit politicization of humanitarian action. Humanitarian aid, including food aid, is used as a weapon of war. Pentagon officials claim that, ‘If they see us giving aid they are less likely to shoot us’.<sup>85</sup> As a result, the concept of humanity is being used for aid delivery in which neutrality and impartiality are no longer relevant. Military intervention, even in the field of humanitarian assistance, is politically determined and is always secondary to political and military tasks.<sup>86</sup> As Hoffman and Weiss state, ‘Politicization has not just seeped into humanitarianism; it has flooded it’.<sup>87</sup> If it is flooded, humanitarianism undoubtedly is in danger.

The problem is unlikely to go away. One of the direct consequences of that intervention has been that humanitarian workers are being perceived – at least by some – as part of Western-dominated military and political securitization agendas, and more broadly, as part of the failings of peace and reconstruction processes. This has led to serious security problems for humanitarian workers in both Afghanistan and Iraq.<sup>88</sup>

While the Red Cross Movement is strict about its doctrine and advocates maintaining a clear distinction between humanitarianism and military

83 NATO, *AJP-9 NATO Civil-Military Cooperation (CIMIC) Doctrine 2003*, available at <http://www.nato.int/ims/docu/AJP-9.pdf> (last visited 20 November 2009).

84 Eva Wortel and Desiree Verweij, ‘Inquiry, criticism and reasonableness: The Socratic dialogue as a research method?’, in *Practical Philosophy*, July 2008, p. 64.

85 Dennis Dijkzeul (ed.), ‘Between Force and Mercy; Military Action and Humanitarian Aid’, in *Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht*, Berliner Wissenschafts-Verlag, Berlin, 2004, p. 322.

86 *Ibid.*, p. 331.

87 P. J. Hoffman and T. G. Weiss, above note 62, p. 145.

88 B. Schweizer, above note 9, p. 555.

interventions,<sup>89</sup> a Cordaid study<sup>90</sup> found that most other agencies take the pragmatic approach; they feel that a principled stance is a luxury only the rich organizations can afford.

Rietjens and Bollen argue that in Kosovo ‘... some humanitarian organizations considered their neutral and impartial relation to the local population compromised by co-operation with ... troops. However, most organizations take a more pragmatic view and co-operate with the military preferring the (temporal) use of ... additional resources’.<sup>91</sup> The same held true in the contexts of Pakistan,<sup>92</sup> Liberia and Afghanistan.<sup>93</sup>

It seems that in a spirit of getting things done, many humanitarian agencies are not asking themselves essential moral questions about their identity: should they diverge from their humanitarian principles and become part of the ultimate objective of a political design, or should they adhere to their initial principles and thereby hinder the effective delivery of (most) aid?

## Conclusion

What are the values at stake for humanitarians? If we examine the original humanitarian values, Christianity and civilization were important in the work of Dunant, but especially the value of humanity, of which there is no exact definition. Rather, humanity seems to be an emotional impulse or a virtue. With the development of an organizational code of ethics in *Red Cross Principles*, Pictet tends towards a more absolute, unconditional interpretation of humanity.

As a result, on the one hand there is the value of humanity as *agape*, as charity which demands unconditional neutrality. On the other hand, as numerous events testify, there is the value of justice and the immorality of silence in the face of injustice.

It seems that both the absolute and the relative are in play here. In my view, within the value of humanity there is a contradictory logic similar to that identified by Jacques Derrida within the concept of forgiveness.<sup>94</sup> There is the

89 D. Dijkzeul, above note 85; Jane Barry and Anna Jefferys, ‘A bridge too far: Aid agencies and the military in humanitarian response’, in *Humanitarian Practice Network Paper*, No. 37, 2002, available at: [http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5FKHH5/\\$file/odi-bridge-jan02.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5FKHH5/$file/odi-bridge-jan02.pdf?openelement) (visited 20 November 2009).

90 Georg Frerks, Bart Klem, Stevan van Laar and Marleen van Klingeren, *Principles and Pragmatism: Civil-Military Action in Afghanistan and Liberia*, Bart Klem Research/Universiteit Utrecht, May 2006, available at <http://www.cordaid.nl/Upload/publicatie/RAPPORT%20CMR.pdf> (last visited 30 November 2009).

91 Sebastiaan J. H. Rietjens, ‘Providing relief: The case of the Dutch engineers in Kosovo’, in S. J. H. Rietjens and M. T. I. B. Bollen (eds.), *Managing Civil-Military Cooperation*, Ashgate Publishing Ltd, Hampshire, 2008, p. 99.

92 Johan de Graaf, ‘Shaky grounds: Civil-military response to the Pakistani earthquake’, in *Managing Civil-Military Cooperation*, in Rietjens and Bollen (eds.), *ibid.*, p. 83.

93 Bart Klem and Stefan van Laar, ‘Pride and prejudice: An Afghan and Liberian case study’, in Rietjens and Bollen (eds.), *ibid.*, p. 139.

94 Jacques Derrida, *On Cosmopolitanism and Forgiveness (Thinking in Action)*, translated by M. Dooley and M. Hughes, Routledge, London, 2001, p. 44.



unconditional value of charity as *agape*; at the same time, there is the pragmatic imperative of historical, legal or political conditions which demand the opposite (i.e. taking sides). These two remain irreducible: humanitarian action thus 'has to be related to a moment of unconditionality ... if it is not going to be reduced to the prudential demands of the moment'.<sup>95</sup> On the other hand, such unconditionality can hardly be permitted to programme action, as decisions would be deduced from incontestable ethical precepts or principles.<sup>96</sup>

True humanitarianism requires respect for both poles of this tension. Thus it presents an immense difficulty, even for the ICRC. Humanitarians continue to be predisposed to choose where to help, where to judge and where to condemn, as well as to where to pronounce innocence.

Since Biafra, humanitarianism has become more associated with the defence and support of the underprivileged and the oppressed. The Western perception, like that of the ICRC, is that the Biafrans were the victims in the Nigerian Civil War – they were the ones who needed food and medicine. To uphold humanity as *agape* was regarded as naive and unjust. Since Biafra, humanitarian values have undoubtedly changed, not only because of the circumstances but also through the actions of humanitarians themselves.

In the post-Cold War era, military forces also engage actively in humanitarianism. In the aftermath of the Rwandan genocide, in the camps in Zaire and after the regimes were overthrown in Iraq and Afghanistan, this military involvement caused and continues to cause moral dilemmas for humanitarians. One of the main questions is whether humanitarians should work side by side with military personnel who claim to be providing humanitarian aid. As humanitarian action is used in such a broad sense, particularly since Iraq and Afghanistan, it could be argued that the original moral values are at risk. While different humanitarian organizations make very different choices, most of these organizations use the same notions of humanity, impartiality, neutrality and independence to describe their identity.

There are codes of conduct and principles, but it is disappointing to see that very little literature is to be found which discusses in depth the moral value of humanity underlying these principles. If what humanity consists of and why it should be an end in itself is not very clear, there is a real danger of humanity itself becoming an instrumental value for political or military players who use the humanitarian message (based on humanity) for their own purposes.

The moral dilemma between humanity and justice is unlikely to disappear, but this must not be an excuse for inaction. Rather, it requires well-trained professional humanitarians who are conscious of their own most fundamental moral values, so that they can make their position clear and are willing to stand up for these values. This can be regarded as a competence or virtue (practical wisdom) rather than as an obligation. Such a competence is vital not only for the suffering

95 Simon Critchley and Richard Kearney, *Preface*, in Derrida, *ibid.*, p. xii.

96 *Ibid.*

community in question but also, as Hugo Slim has already pointed out, for the individual relief workers operating in the field: ‘their impact is usually only palliative, at best they become some small beacon of alternative humane values in the midst of inhumanity. In such a context, their own personal contribution must make sense as a moral and active one within the violence around them, and the activity must be clearly explained in terms of the core moral values their organization has chosen to pursue’.<sup>97</sup>

97 H. Slim, above note 39, p. 350.

## SELECTED ARTICLE ON INTERNATIONAL HUMANITARIAN LAW

# Military intervention for humanitarian purposes: does the Responsibility to Protect doctrine advance the legality of the use of force for humanitarian ends?

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### **Abstract**

*The Responsibility to Protect is being touted as a new approach to protecting populations from mass atrocities. Certainly it would be encouraging to believe that an end to genocides, large scale ethnic cleansing and large scale loss of life were within humanity's reach. However, whilst the holistic approach of the doctrine is to be commended, the legality of the proposal requires further analysis. This paper specifically addresses the evolution of the legality of humanitarian intervention and looks at whether the Responsibility to Protect doctrine advances the legality of the use of force for humanitarian ends.*



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Military intervention for humanitarian purposes has a controversial past. As the International Commission on Intervention and State Sovereignty report recognizes, this is the case ‘both when it has happened – as in Somalia, Bosnia and Kosovo – and when it has failed to happen, as in Rwanda’.<sup>1</sup> Since the then United Nations Secretary-General Kofi Annan posed his much cited question at the United Nations Millennium Summit,

‘(...) if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?’<sup>2</sup>

many have sought to discuss and debate humanitarian intervention and the emerging Responsibility to Protect (R2P) doctrine. Unfortunately, now is not the time to stop the debate. Mass atrocities are not confined to the past. The importance of finding international agreement on the legality of humanitarian intervention has never been more apparent. The recent tragedy that is Darfur bears this out.

The R2P is being touted as a new approach to protecting populations from mass atrocities. This developing doctrine, reference to which was included in the 2005 United Nations World Summit Outcome Document, dictates that when a state is unwilling or unable to protect its citizens from actual or apprehended large scale loss of life (with or without genocidal intent) or large scale ‘ethnic cleansing’, the principle of non-intervention in the internal affairs of other states yields to the international responsibility to protect.<sup>3</sup> This responsibility includes three elements: the responsibility to prevent, the responsibility to react and the responsibility to rebuild. Military intervention for humanitarian purposes is a crucial part (although last resort measure) of the responsibility to react. The R2P is premised on the understanding that international order is best maintained by non-intervention in the internal affairs of other states. However, it also challenges this principle in so far as it recognizes that ‘to respect sovereignty all the time is to risk being complicit in humanitarian tragedies sometimes’.<sup>4</sup> That is, the R2P adopts a view of sovereignty which emphasizes as its defining characteristic the capacity to provide protection, rather than territorial control.<sup>5</sup> Weiss describes the R2P as adding a fourth characteristic, namely ‘respect for human rights’, to the three Peace of Westphalia

1 International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, International Development Research Centre, Ottawa, 2001, p. VII, available at <http://www.iciss.ca/pdf/Commission-Report.pdf> (last visited 1 December 2009).

2 *Ibid.*, p. VII.

3 *Ibid.*, pp. XI, XII.

4 Ramesh Thakur, ‘Outlook: Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS’, *Security Dialogue*, Vol. 33, No. 3, 2002, pp. 323–340, at p. 324, available at <http://sdi.sagepub.com/cgi/content/abstract/33/3/323> (last visited 15 March 2008).

5 See further Anne Orford, ‘Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect’, *Michigan Journal of International Law*, Vol. 30, No. 3, 2009, pp. 984–1015, at p. 990.

characteristics of a sovereign state – territory, authority and population.<sup>6</sup> Unsurprisingly, this creates tensions between what Chesterman labels ‘the belief in the justice of a war waged against an immoral enemy and the emerging principle of non-intervention as the corollary of state sovereignty’.<sup>7</sup> It is this tension that makes analysis of the R2P both intellectually interesting and practically necessary.

Today, this tension is well illustrated by the contrast between the pre- and post-September 11 worlds. International relations in the 1990s – featuring the proliferation of failed states, terrorism, the targeting of civilians in conflict and the ‘CNN effect’ – were said to have created a ‘climate of heightened expectations for action’<sup>8</sup> and less tolerance for the principle of non-intervention. Yet as Michael Ignatieff writes:

‘When [R2P] appeared in late September, 2001, as the ruins of the World Trade Center were still smoldering, it was already irrelevant to American and European policymakers. Their overriding concern had shifted from protecting other country’s civilians to protecting their own.’<sup>9</sup>

Indeed, the increased allocation of military resources to the ‘War on Terror’ and the *ex post facto* ‘humanitarian’ arguments for the war in Iraq have arguably undermined the notion of humanitarian intervention.<sup>10</sup> Despite this, the R2P continues to be discussed at the United Nations as well as in academic literature. MacFarlane, Thielking and Weiss divide the ‘humanitarian intervention’ debate into ‘three distinct clusters of opinion’. The *opponents* are those who view the idea as a return to semi-colonial practices dividing the world into the civilized and the uncivilized. The *agnostics* and *sceptics* do not see the debate resolving the ‘fundamental problems of insufficient political will’. The *optimists* view the R2P as ‘a realistic and substantial step’ towards a ‘workable consensus’.<sup>11</sup> Many are hopeful that the R2P is indeed a new solution. The R2P effectively makes a promise to the world’s most vulnerable people: a promise that when their own governments fail them, the international community will intervene to protect them. The question that therefore needs answering is whether the R2P can deliver on this promise.

This is not the first attempt to articulate how the R2P distinguishes itself. However, such discussions have tended to focus on the holistic approach that the

6 Thomas G. Weiss, ‘The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era’, *Security Dialogue*, Vol. 35, No. 2, 2004, pp. 135–153, at p. 138, available at <http://sdi.sagepub.com/cgi/content/abstract/32/2/135> (last visited 15 December 2008).

7 Simon Chesterman, *Just War or Just Peace?*, Oxford University Press, Oxford, 2001, p. 7.

8 Jennifer Welsh, Carolin Thielking and S. Neil MacFarlane, ‘The Responsibility to Protect: Assessing the report of the International Commission on Intervention and State Sovereignty’, *International Law Journal*, 2001–2002, p. 490.

9 Michael Ignatieff, ‘Whatever happened to “responsibility to protect”?’, *National Post*, 10 December 2008, <http://www.nationalpost.com/story.html?id=1054758> (last visited 12 December 2008).

10 S. Neil MacFarlane, Carolin J. Thielking and Thomas G. Weiss, ‘The Responsibility to Protect: is anyone interested in humanitarian intervention?’, *Third World Quarterly*, Vol. 25, 2004, pp. 977–992.

11 *Ibid.*, pp. 979–981.

R2P takes by asserting a responsibility to prevent mass atrocities.<sup>12</sup> This paper specifically addresses the evolution of the legality of military intervention for humanitarian purposes in the expectation of forming conclusions regarding legality of the R2P's 'responsibility to react'. The paper discusses the various schools of thought in the history of humanitarian intervention and various views regarding the legality of humanitarian intervention. It also contains an assessment of how the R2P differs from or remains similar to previous approaches, and finally an analysis of whether the R2P advances the legality of the use of force for humanitarian ends. The aim is to establish whether the R2P is a distinct and innovative approach to the problem of mass atrocities or whether it merely rephrases a concept that has failed on many occasions.

## The Responsibility to Protect

### Background

The International Commission on Intervention and State Sovereignty (hereinafter the Commission) was established by the Government of Canada, in September 2000, in the wake of the controversy surrounding the North Atlantic Treaty Organisation's bombing campaign in Kosovo. The catalyst was Kofi Annan's question asking how the international community should respond to 'gross and systematic violations of human rights that affect every precept of our common humanity'.<sup>13</sup> Specifically the Commission described their mandate as being:

'generally to build a broader understanding of the problem of reconciling intervention for human protection purposes and sovereignty; more specifically, it was to try to develop a global political consensus on how to move from polemics – and often paralysis – towards action within the international system, particularly through the United Nations'.<sup>14</sup>

In December 2001, the Commission produced a report of their consultations and findings. They called for the acceptance of a responsibility by the international community to protect populations experiencing large scale loss of life and ethnic cleansing. The Commission consisted of twelve members. It was chaired by Former Australian Foreign Minister and Chief Executive of the International Crisis Group, Gareth Evans, and Algerian diplomat and Special Advisor to the United Nations Secretary-General, Mahoamed Sahnoun. The Commissioners were drawn from a number of disciplines (including the military, law, academia, politics, governance, business and development) and countries (Russia, Germany,

12 See for example Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Brookings Institution Press, 2008, pp. 44 and 56, and R. Thakur, above note 4, p. 324.

13 ICISS, above note 1, p. VII.

14 *Ibid.*, p. 2.

Canada, South Africa, America, Switzerland and Guatemala).<sup>15</sup> The Commissioners, who met five times and attended national and regional roundtable consultations, had their work supported by an international research team led by Thomas Weiss, an American Professor, and Stanlake Samkange, a Zimbabwean lawyer.<sup>16</sup>

## The responsibilities to prevent, react and rebuild

The R2P seeks to bring an end to gross and systematic violations of human rights. It proposes the authorization of ‘action taken against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective’.<sup>17</sup> The R2P embraces three specific responsibilities: the responsibility to prevent, the responsibility to react and the responsibility to rebuild. It is said that ‘[p]revention is the single most important dimension of the responsibility to protect’.<sup>18</sup> The Commission considers that effective conflict prevention requires ‘knowledge of the fragility of the situation and the risks associated with it’, ‘understanding of the policy measures available that are capable of making a difference’ and ‘willingness to apply those measures’. More succinctly it labels these three criteria ‘early warning’, ‘preventive toolbox’ and ‘political will’.<sup>19</sup> Although the report stresses prevention as the most important priority, it is perhaps not surprising that some argue this is ‘preposterous’<sup>20</sup> or at the least a smokescreen for the reality that the controversial aspect of the doctrine is the responsibility to react. Significant attention is devoted in the report to setting out the criteria for military intervention. The Commission utilizes six headings of ‘decision making criteria’ for military intervention. The Commission is not of the view that there can or should be a universally accepted list of criteria for intervention, but rather that their six proposed criteria may go some way to bridging the gap between the ‘rhetoric and the reality’<sup>21</sup> when it comes to the responsibility to react.

The first of the criteria is referred to as the ‘threshold criteria: just cause’. The R2P dictates that military intervention must be limited to situations of:

- ‘A. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- B. large scale “ethnic cleansing”, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape’.

15 *Ibid.*, Appendix A.

16 *Ibid.*, p. 84.

17 *Ibid.*, p. 8.

18 *Ibid.*, p. XI.

19 *Ibid.*, p. 20.

20 Thomas G. Weiss, *Military–Civilian Interactions: Humanitarian Crises and the Responsibility to Protect*, Rowman and Littlefield Publishers Inc., USA, 2005, p. 199.

21 ICISS, above note 1, p. 32.

The second criterion is ‘right authority’. This refers to the question of who should be the body to authorize any such intervention. The Commission devotes an entire chapter to this controversial and crucial criterion. In sum, three ‘right authorities’ are suggested: the Security Council, the General Assembly and Regional Organizations. The Commission notes that the Security Council should be the ‘first point of call’. However, in view of the Council’s past inability or unwillingness to fulfil the role expected of it, military intervention authorized by the General Assembly or Regional Organizations would have a ‘high degree of legitimacy’.<sup>22</sup>

The third criterion is ‘right intention’. This means that the ‘primary purpose of the intervention must be to halt or avert human suffering and that regime overthrow is not a legitimate reason for invoking the doctrine.’<sup>23</sup>

The fourth criterion is ‘last resort’: meaning that resort to force should only be used when ‘every diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crises’ has been explored. This is further qualified by the statement that this does not mean that the international community must have first tried every single possible option, but rather ‘that there must be reasonable grounds for believing that, in all the circumstances, if the measure had been attempted it would not have succeeded’.<sup>24</sup>

The fifth criterion is ‘proportional means’. Proportionality is a fundamental principle of *jus ad bellum*; its inclusion in the list is uncontroversial.

The last criterion is ‘reasonable prospects’. This dictates that military action can only be justified if it stands a reasonable chance of success. The Commission notes ‘military intervention is not justified if actual protection cannot be achieved or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all’.<sup>25</sup>

The final responsibility of R2P is the responsibility to rebuild. A post-intervention strategy is regarded as being of ‘paramount importance’.

## Subsequent developments

In international law terms, the R2P has had what could be described as a meteoric rise to mainstream debate.<sup>26</sup> In 2003, the United Nations High-level Panel on Threats, Challenges and Change was created by Kofi Annan to ‘generate new ideas about the kinds of policies and institutions required for the United Nations to be

22 *Ibid.*, pp. 53–54.

23 *Ibid.*, p. 35.

24 *Ibid.*, p. 36.

25 *Ibid.*, p. 37.

26 To give some perspective, the International Criminal Court was established in 1998 after the concept had first been proposed over 120 years earlier – see Christopher Keith Hall, ‘The first proposal for a permanent international criminal court’, *International Review of the Red Cross*, No. 322, 1998, pp. 57–74.



effective in the 21st century'.<sup>27</sup> This report made reference to the R2P by stating 'we endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort'.<sup>28</sup> Significantly, the High-level Panel's report stated that:

'[t]here is a growing recognition that the issue is not the "right to intervene" of any State, but the "responsibility to protect" of every State when it comes to people suffering from avoidable catastrophe – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease'.

Kofi Annan's 2005 report 'In Larger Freedom: Towards Development, Security and Human Rights for All', also endorsed the R2P.<sup>29</sup> The idea was then taken up by the wider international community. The General Assembly, in the 2005 World Summit Outcome Document<sup>30</sup>, stated:

'138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity (...) The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, (...) *we are prepared to take collective action, in a timely and decisive manner, through the Security Council*, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in co-operation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity (...)'

On 28 April 2006, the Security Council unanimously adopted Resolution 1674 on the Protection of Civilians in Armed Conflict. Resolution 1674 contains the first official Security Council reference to the R2P. The resolution reaffirms the provisions of paragraphs 138 and 139 of the World Summit Outcome Document and notes the Security Council's readiness to address gross violations of human rights, 'as genocide and mass crimes against humanity may constitute threats to

27 Report of the High-Level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN Doc. A/59/565, 2 December 2004, available at <http://www.un.org/secureworld/report.pdf> (last visited 12 December 2009).

28 *Ibid.*, para. 203.

29 Report of the United Nations Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005, 21 March 2005, para. 135, available at <http://www.un.org/largerefreedom/contents.htm> (last visited 19 December 2009).

30 United Nations General Assembly, *2005 World Summit Outcome*, UN Doc. A/RES/60, 15 September 2005, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> (last visited 12 December 2009).

international peace and security'.<sup>31</sup> In February 2008, the United Nations Secretary-General appointed a Special Adviser to focus on the R2P.<sup>32</sup> In January 2009, Secretary-General Ban Ki Moon released a report entitled 'Implementing the Responsibility to Protect'.<sup>33</sup> This report seeks to articulate ways we can better prevent and protect people against atrocities (but does not add to the discussion about the international acceptance of the doctrine).

Bellamy argues that there has been a 'watering down' of the 2001 doctrine in its 2005 World Summit Outcome Document articulation.<sup>34</sup> Optimists, however, point to these endorsements by the international community as giving the doctrine increasing legitimacy. As we will see, both assessments have some degree of merit.

## A short history of military intervention for humanitarian purposes

### Before the United Nations Charter

The principles that underpin humanitarian intervention and the R2P have origins in 15th century religious and 'just-war' theories, although the term itself was not used. Vitoria (1492–1546) viewed it as the duty of 'civilised' states to intervene in 'backward' states to end inhuman practices such as cannibalism and human sacrifice, and to spread Christianity.<sup>35</sup> Grotius (1583–1645) added to these criteria the suppression of idolatry, atheism and sexual immorality.<sup>36</sup> More generalized sentiments of this nature can be traced even further back to the work of Aristotle. *Politics* 'posit[ed] that war was a means to defend "the good life" and to help others "to share in the good life"'.<sup>37</sup> Similarly the principle of non-intervention, which underpins our current system of international order, is rooted in history. Since the 1648 Peace of Westphalia ended thirty years of brutal war in Europe, the notion of the nation state and the inviolability of its territory has been on the rise.<sup>38</sup> The underlying premise being that international order is best maintained by respect for non-intervention in the internal affairs of other states. Some authors have

31 SC Res. 1674, 28 April 2006, UN Doc. S/RES/1674.

32 United Nations, *Secretary-General Appoints Edward C. Luck of United States Special Adviser*, Press Release, February 2008, <http://www.un.org/News/Press/docs/2008/sga1120.doc.htm> (last visited 5 December 2009).

33 United Nations General Assembly, *Implementing the Responsibility to Protect*, 12 January 2009, UN Doc. A/63/677, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> (last visited 3 March 2009).

34 Alex J. Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit', *Ethics and International Affairs*, Vol. 20, No. 2, 2006, pp. 143–169.

35 Bhikhu Parekh, 'Rethinking Humanitarian Intervention', *International Political Science Review*, 1997, pp. 50–51.

36 *Ibid.*, p. 51.

37 Sean D. Murphy, *Humanitarian Intervention*, University of Pennsylvania Press, Philadelphia, 1996, p. 37. Murphy also notes that the Jewish, Greek and Roman natural law traditions from which the Christian just war doctrine emerged contain ideas relating to the justice of using force against others: p. 62.

38 See Antonio Cassese, *International Law*, 2nd edn, Oxford University Press, Oxford, 2005, pp. 22–25.

described the two concepts, respect for the basis principles of humanity and sovereignty, as incompatible, noting that regard for humanitarian principles is 'subversive' and 'destined to foster tension and conflict among States'.<sup>39</sup> Although many theorists do recognize that sovereignty and respect for humanity are two sides of the same coin, the tension between the two is evident in both the work of theorists and the practice of states since the 15th century. Murphy articulates this well when he says:

'the earliest writers on international law (...) observed how states reacted to the anarchy (...) by building an international system [where] (...) the necessity of obedience of persons to their sovereign was firmly stated, but so was the right of a sovereign to intervene to protect the subjects of another sovereign from harsh treatment'.<sup>40</sup>

Literature referring to what we would today understand as humanitarian intervention dates from around 1840.<sup>41</sup> Brownlie asserts that by the end of the nineteenth century the majority of scholars had accepted the existence of a *right* of humanitarian intervention but goes on to note that the doctrine was 'inherently vague' and 'open to abuse by powerful states'<sup>42</sup>. There are various examples of interventions to suggest that European powers thought likewise.<sup>43</sup> In 1921, humanitarian intervention was described by Stowell as being:

'the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from the treatment which is so arbitrarily and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice'.<sup>44</sup>

A mixture of moral and legal arguments was put forward for the existence of such right. Some early 20th century writers even sought to argue that intervention could be justified as a 'quasi-judicial police measure'.<sup>45</sup> However, Chesterman notes that the examples used by those seeking to assert the existence of the right of humanitarian intervention really had very little in the way of state practice to rely on.<sup>46</sup> Furthermore, although in the inter-war period, the international community through the League of Nations provided an international force in the Saar plebiscite in 1934–35,<sup>47</sup> the Covenant of the League of Nations and the 1928 Kellogg-Briand Pact did not comment on humanitarian intervention, and the latter expressly prohibited war. Similarly the Kellogg-Briand's Latin American

39 *Ibid.*, p. 375.

40 S.D. Murphy, above note 37, pp. 62–63.

41 T.G. Weiss, above note 20, p. 8.

42 Ian Brownlie, *International Law and the Use of Force by States*, Oxford University Press, Oxford, 1963, p. 338.

43 For a discussion of these, see S.D. Murphy, above note 37, ch. 2.

44 T.G. Weiss, above note 20, p. 8.

45 S. Chesterman, above note 7, pp. 36–37.

46 *Ibid.*, p. 25.

47 Stephen C. Neff, *War and the Law of Nations*, Cambridge University Press, Cambridge, 2005, p. 297.

counterpart, the Saavedra-Lamas Treaty of 1933, expressly prohibited ‘intervention’ both armed and diplomatic.<sup>48</sup>

## The United Nations Charter and the Cold War years

The United Nations Charter established as a universal legal norm the doctrine of non-intervention. Article 2(1) states that the United Nations is based on the principle of the sovereign equality of all its members. Article 2(4) prohibits the threat or use of force against the territorial integrity or political independence of any state. Article 2(7) notes that nothing contained in the Charter authorizes the United Nations to intervene in matters which are essentially within the domestic jurisdiction of a state.<sup>49</sup> Articles 42 (collective security authorized by the United Nations Security Council) and 51 (the inherent right of self defence) articulate the two sole exceptions to article 2(4)’s prohibition on the use of force.<sup>50</sup> While this seems to paint a fairly clear picture of the prohibition on the use of force, the charter also affirms ‘faith in fundamental human rights’ in its preamble. In this regard the Charter has ensured that the dilemma, posed by the debates and tensions between sovereignty and assisting the oppressed, survives its operation. However, although some arguments are put forward to the contrary, it is fair to say that the predominant view has always been that the Charter did not intend to permit the use of force for the protection of populations from humanitarian crisis by states acting at their own discretion.<sup>51</sup> Furthermore, during this period the use of force for the protection of populations from humanitarian crisis by the international community did not gain any widely accepted legal precedent. In particular, the International Court of Justice rejected the possibility that a right of intervention by force could be consistent with international law. The Court stated that ‘whatever be the present defects in international organisation’ the right of intervention by force cannot find a place in international law.<sup>52</sup> (The International Court of Justice has also asserted that the use of force is not the appropriate method to monitor or ensure respect for human rights.)<sup>53</sup> Further, there was no mention by the Security Council of any issue of humanitarian concern during the period from 1945 until the Six Day War of 1967.<sup>54</sup> Indeed, intervention during the Cold War era has been described as being ‘undertaken unabashedly to promote

48 *Ibid.*, p. 296.

49 Charter of the United Nations, *Statute and rules of court and other documents*, International Court of Justice, The Hague, 1978.

50 *Ibid.*

51 Jeffrey L. Holzgrefe and Robert O. Keohane (eds), *Humanitarian Intervention Ethical, Legal and Political Dilemmas*, Cambridge University Press, Cambridge, 2003, p. 216.

52 International Court of Justice (ICJ), *Corfu Channel (United Kingdom of Great Britain and Northern Ireland-Albania)*, Judgement, *ICJ Reports 1949*, para. 29; S. Chesterman, above note 7, p. 54.

53 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgement, *ICJ Reports 1986*, para. 268.

54 T.G. Weiss, above note 6, p. 136.

strategic ends' as opposed to humanitarian ones.<sup>55</sup> The analysis of ten prominent interventions in the period between 1945 and 1990 by the researchers for the Commission concludes that 'humanitarian justifications were most robust in cases where purely humanitarian motives were weakest'.<sup>56</sup> The Cold War period therefore did little to advance the legality of humanitarian intervention. The concept of humanitarian intervention received little attention. Although some military interventions occurred in failing states this was more the result of an extension of the Cold War than it was humanitarian in nature.<sup>57</sup> Humanitarian intervention went from being an inherently vague *right* which arguably existed in the pre-war years to a non-entity in the post-war years.

### From the first Gulf War to the Responsibility to Protect

Bellamy dates the origins of the emergence of the current notion of a 'humanitarian exception to the principle of non-intervention' to the 'invasions' in northern and southern Iraq in the 1990s.<sup>58</sup> Bellamy attributes the lack of public criticism of those interventions, from those nations that did not support them, as setting some form of precedent for future humanitarian interventions.<sup>59</sup> Western powers publicly justified their actions in humanitarian terms and the other nations 'were prepared tacitly to legitimate Western action'.<sup>60</sup> Further, Teson's analysis shows that in the years since the Gulf War the Security Council has passed a number of resolutions which indicate that the Security Council views the failure to protect human rights or prevent abuse as coming within the 'threats to peace and security' mandate.<sup>61</sup> These observations are certainly supported by the prominence of a number of humanitarian intervention theories in the 1990s. The phrase 'right to intervene' was coined by the cofounders of *Médecins Sans Frontières*, Dr Bernard Kouchner, and Professor of Law Mario Bettati. Francis Deng's work as Special Representative of the Secretary-General on Internally Displaced Persons developed the idea of 'sovereignty as responsibility'.<sup>62</sup> Kofi Annan sought to redefine the concept of state sovereignty by articulating it as being 'weighed and balanced against individual sovereignty, as recognized in the international human rights

55 Mohammed Ayoob, 'Humanitarian Intervention and State Sovereignty', *International Journal of Human Rights*, Vol. 6, No. 1, 2002, pp. 81–102.

56 ICISS, 'The Responsibility to Protect: Supplementary Volume', International Development Research Centre, Canada, December 2001, p. 67.

57 Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It*, Oxford University Press, Oxford, 2008, p. 124.

58 Alex J. Bellamy, 'Motives, outcomes, intent and the legitimacy of humanitarian intervention', *Journal of Military Ethics*, Vol. 3, No. 3, 2004, pp. 216–232, at p. 218.

59 *Ibid.*, p. 218; Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford University Press, Oxford, 2000, p. 154.

60 N.J. Wheeler, above note 59, p. 154.

61 Fernando R. Teson, 'Collective Humanitarian Intervention', *Michigan Journal of International Law*, Vol. 17, 1995–1996, pp. 323–370.

62 T.G. Weiss, above note 6, p. 139.

instruments'.<sup>63</sup> The 'doctrine of the international community' was the then British Prime Minister Tony Blair's contribution to the discourse to justify what Russia, China and India saw 'as an illegitimate attempt to force Serbians and Kosovars to change their government and their political system'.<sup>64</sup> Orford calls the result of all of these theories gaining prominence a move from reliance on the Security Council to a 'more amorphous international community' as the 'guarantor' of human rights.<sup>65</sup> These ideas have also some found acceptance in regional law and politics. Significantly article 4(h) of the Constitutive Act of the African Union provides:

'The Union shall function in accordance with the following principles:

....

h. The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity'.<sup>66</sup>

This provision has not been invoked to date and it remains to be seen if and when it is what the response of the Security Council and the rest of the international community will be. Use of this provision could be contrary to the United Nations Charter, as it seems to suggest that the African Union could take a decision to authorize intervention without resort being had to the Security Council.

As Welsh and Teson, among others, observe, by the end of the 1990s there existed state practice which evidenced, if not support, at least 'toleration', for United Nations authorized actions with an 'expressly humanitarian purpose'.<sup>67</sup> That said, however, there was no evidence of any international consensus on the *legality* of humanitarian intervention. Indeed, Teson is perhaps the strongest advocate of a right of humanitarian intervention<sup>68</sup> and even he makes the argument in support of such a right on the basis of morality not law.<sup>69</sup> It is fair to assert that the majority of international lawyers continue to express views that are in line with the International Court of Justice's interpretation in the *Corfu Channel Case* and its more recent decision in the *Nicaragua Case*.<sup>70</sup> However, many of the ideas prominent in the 1990s debates have been taken up by the Commission. It is against this background that we can now assess whether the R2P's articulation of the use of force for humanitarian ends differs such as to provide an advance on the 1990s

63 G. Evans, above note 12, p. 37.

64 J. Welsh *et al.*, above note 8, p. 492.

65 Anne Orford, 'Muscular Humanitarianism: Reading the narratives of the new interventionism', *European Journal of International Law*, Vol. 10, No. 4, 1999, pp. 679–711, at p. 680.

66 Constitutive Act of the African Union, adopted 11 July 2000, available at: [http://www.africa-union.org/root/au/AboutAu/Constitutive\\_Act\\_en.htm](http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm) (last visited 14 May 2009).

67 Jennifer M. Welsh, *Humanitarian Intervention and International Relations*, Oxford University Press, Oxford, 2006, ch 4; see also F.R. Teson, above note 61.

68 Rein Mullerson, *Human Rights Diplomacy*, Routledge, London, 1997, p. 150.

69 F.R. Teson, above note 61.

70 R. Mullerson, above note 68, p. 150.

proposition that, although the resort to armed force may sometimes be ethically justified, it remains contrary to international law.<sup>71</sup>

## The Responsibility to Protect in light of previous articulations of humanitarian intervention

Gareth Evans, as co-chair of the Commission, is not surprisingly very quick to defend against any suggestion that the 'R2P is just another name for humanitarian intervention'.<sup>72</sup> Evans' assertion, that the R2P is designed to be about more than just coercive military intervention for humanitarian purposes, is clearly evidenced by the R2P's focus on prevention, non-military forms of intervention and post-conflict rebuilding, in addition to military intervention. In this regard, there is no doubt that the R2P provides a more holistic and integrated approach to conflict prevention, and the avoidance of human rights abuses and mass atrocities, than previous articulations of humanitarian intervention. However, notwithstanding the R2P's inclusion of responsibilities to prevent and rebuild, it is clear that the crux of the doctrine remains devoted to the question of military intervention. Indeed, the text of the Commission's report devotes by far the most paper to the responsibility to react. As such, after briefly making some general observations about the distinguishing features of the R2P's approach, the paper now turns to consider how different the 'responsibility to react' component of the R2P actually is compared with previous articulations of military intervention for humanitarian purposes.

### Responsibility *versus* right and protection *versus* intervention

The shift in language under the R2P, away from the ideas of a 'right to intervene' and 'humanitarian intervention', is of some significance. The Commission took the approach that the language of the debate was very important for three key reasons. First, there was a need to focus attention on the beneficiaries of the doctrine rather than the rights of the intervening states. Second, there was a need to incorporate the often neglected elements of preventative effort and post-conflict assistance. Third, the use of the word 'right' was problematic in that it 'load[ed] the dice in favour of intervention before the argument ha[d] even begun'.<sup>73</sup> Bellamy goes so far as to say that the use of language, to prevent abuse of the doctrine by those wishing to use humanitarian arguments to justify interventions that are anything but, is 'one of the two key strategies' adopted by the R2P 'for preventing future Rwandas and Kosovos'.<sup>74</sup> The meaning of 'humanitarian' is open to interpretation. Vitoria and Grotius had different ideas to that of the Commission; China and Russia often have different ideas to Britain and the United States. Further, the use of the word

71 Imer Berisha, *Humanitarian Intervention The Case of Kosova*, Kosovo Law Centre, Pristina, 2002, p. 29.

72 G. Evans, above note 12, p. 56.

73 ICISS, above note 1, pp. 16, 17.

74 A.J. Bellamy, above note 34, pp. 143–169.

‘humanitarian’ for military action has always been of concern to humanitarian actors. The International Committee of the Red Cross (ICRC), as well as some non-governmental organizations working in this field, stress the importance of neutrality and impartiality in their work: the argument being that, whilst the military can do good deeds (and certainly are often the organization with the best logistics chain to effectively support the civilian population), there is always an underlying political agenda to their actions. The military can never be acting in a truly humanitarian manner.<sup>75</sup> This is the case even when military engineers are, for example, constructing water-sanitation facilities for civilian use. As such, disposing of the term ‘humanitarian’ when discussing military intervention will certainly be welcome in some circles.

However, while the Commission’s reasoning behind the change in the language makes sense and is in keeping with the general approach of the R2P towards a more holistic, victim-focused approach, it should be understood that the phrase ‘responsibility to protect’ creates expectations. Terry warns against the use of the phrase, in particular by humanitarian organizations without the resources or mandate to actually provide protection.<sup>76</sup> Further, the word ‘protect’ is a very powerful one. There is a difference between intervention and protection:

‘It is one thing to intervene because the country in question is unstable and unable to provide protection to its citizens. It is quite another thing to enforce stability and provide protection for the citizens of that country, having once intervened’.<sup>77</sup>

That said, there seems to be consensus that speaking in terms of a responsibility to protect rather than a right to intervene provides a very significant departure from 1990s articulations of humanitarian intervention. Indeed, this language shift is seen by many as being very powerful.

Of course the terminology itself is not going to save lives. However, what it can do is go some way to making the military intervention aspect of the R2P appear different to previous articulations of humanitarian intervention. This may have the effect of invoking more widespread support for it. Certainly the R2P’s adoption (in part) by the World Summit Outcome Document goes some way to evidencing this. What may, however, be of more significance is what Weiss calls the ‘continuum of responsibility’ at the heart of the R2P, which he asserts is of ‘indisputable’ ‘utility’.<sup>78</sup> Welsh, Thielking and MacFarlane use the phrase ‘Spectrum of Responsibilities’.<sup>79</sup> Bellamy focuses on the ‘parameters of responsibility’:

‘[B]y defining the circumstances in which international society should assume responsibility for preventing, halting, and rebuilding after a humanitarian

75 Fiona Terry, ‘Humanitarian Protection Conference’, seminar delivered at Melbourne University, 22 February 2006.

76 *Ibid.*

77 Satvinder Juss, *International Migration and Global Justice*, Ashgate, England, 2006, p. 112.

78 T.G. Weiss, above note 20, p. 199.

79 J. Welsh *et al.*, above note 8, p. 494.



emergency and placing limits on the use of the veto, the commission aimed to make it more difficult for Security Council members to shirk their responsibilities'.<sup>80</sup>

Although *Agenda for Peace*, the work of former Secretary-General Boutros Boutros-Ghali, adopted a tripartite vision of peacemaking stressing the need for focus on both prevention and 'post-conflict peacebuilding',<sup>81</sup> this idea of a continuum of responsibility had not previously been picked up with such rigour as it has been in the wake of the R2P.

Added to the terminology change and focus on a continuum of responsibility is the idea of the authority and responsibility of states being subject to their capacity. Orford places great significance on this. She notes that while humanitarian intervention of the 1990s provided an exceptional and temporary measure in emergencies whereby authority and responsibility remained with the state, under the R2P authority and responsibility shift in cases of state failure. Orford stresses that the R2P grounds the authority and responsibility on the capacity to provide protection.<sup>82</sup> That is, the legitimacy of authority is based on protection. In this sense the R2P cannot be said to be altogether innovative. Deng gave considerable attention to the idea of 'sovereignty as responsibility'<sup>83</sup> and indeed, 'sovereignty as responsibility' itself is regarded as having earlier origins in the 'standard of civilization argument'.<sup>84</sup> Further, as Stahn recognizes, sovereignty has never been understood without reference to corresponding duties – at least *vis a vis* other states.<sup>85</sup> This is acknowledged by the International Court of Justice, which gave recognition to the concept obligations *erga omnes* (obligations owed to the international community by States) in the *Barcelona Traction Case*.<sup>86</sup> However, the R2P's refocusing of the discussion on the limits of sovereignty, in cases of large scale loss of life or ethnic cleansing, is certainly a positive development.

## The criteria for military intervention

### *Justa causa – genocide and large scale ethnic cleansing*

The idea of requiring a set *justa causa* for humanitarian intervention is clearly not new. For example, Thomas Aquinas articulated that the target entity of the intervention must have had some form of guilt.<sup>87</sup> Indeed, it has been suggested that the Commission's criteria are a reformulation of Augustine's doctrine of just war.<sup>88</sup>

80 A.J. Bellamy, above note 34, pp. 143–169.

81 Carsten Stahn, 'Responsibility to protect: political rhetoric or emerging legal norm?', *American Journal of International Law*, Vol. 101, No. 1, 2007, pp. 99–120, at p. 114.

82 A. Orford, above note 5.

83 T.G. Weiss, above note 6, p. 139.

84 M. Ayoob, above note 55, p. 84.

85 C. Stahn, above note 81, p. 112.

86 *Ibid.*, p. 112.

87 S.D. Murphy, above note 37, pp. 40–41.

88 S.N. MacFarlane *et al.*, above note 10, p. 980.

That said, the *justa causa* of the R2P is novel in so far as its subject matter – large scale loss of life and ethnic cleansing – is a reflection of the key humanitarian concerns of the late 1990s. Vittoria's concept of intervention sought to prevent cannibalism,<sup>89</sup> while today it seems the international community is more concerned with genocide. The longevity of this as mankind's prevailing concern remains to be seen. Some African states had favoured the inclusion of the overthrow of democratically elected regimes as part of the doctrine;<sup>90</sup> this was (and still is) also supported by some academics.<sup>91</sup> In 1945 France unsuccessfully proposed that the United Nations Charter be drafted so as to allow intervention in situations where 'the clear violation of essential liberties and of human rights constitutes a threat capable of compromising peace'.<sup>92</sup> Others have more recently suggested that the irradiation of weapons of mass destruction<sup>93</sup> and terrorism<sup>94</sup> should also invoke a responsibility to protect. However, the fact that the Commission has chosen to limit the R2P to apprehend large scale loss of life (with or without genocidal intent) or large scale 'ethnic cleansing' means that the R2P is not at risk of lacking cultural legitimacy or consensus, as may have been the case if concepts of democracy or certain aspects of human rights had been brought into play.<sup>95</sup> The universal condemnation of the large scale taking of life, and in particular genocide, gives the R2P universal credibility.

### *Right authority*

The R2P outlines that the Security Council should always be the first point of call on matters relating to military intervention. The Security Council should be the body that authorizes any intervention.<sup>96</sup> The United Nations Charter clearly provides for the use of force necessary to 'maintain or restore international peace and security' when authorized by the Security Council.<sup>97</sup> The idea of collective security dates at least to the Peace of Westphalia, which included a collective security mechanism (although this was never utilized),<sup>98</sup> and is not of itself controversial. However, as the High-level Panel notes '[t]he Security Council so far has been

89 See further B. Parekh, above note 35.

90 T.G. Weiss, above note 20, p. 201; see also F.R. Teson, above note 61, p. 333.

91 E.g. Paul Collier, *War, guns and votes: democracy in dangerous places*, Oxford University Press, Oxford, 2009.

92 J.L. Holzgrefe and R.O. Keohane, above note 51, p. 207.

93 S.N. MacFarlane *et al.*, above note 10, p. 989.

94 George R. Lucas, 'The Role of the International Community in Just War Tradition – Confronting the Challenges of Humanitarian Intervention and Preemptive War', *Journal of Military Ethics*, Vol. 2, No. 2, 2003, pp. 122–144.

95 Abdullahi Ahmed An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights', in An-Na'im and Dend (eds), *Human Rights in Africa: Cross Cultural Perspectives*, The Brookings Institution, Washington DC, 1990, pp. 331–367; Inque Tatsuo, 'Liberal Democracy and Asian Orientalism', in J. Bauer and D.A. Bell (eds), *The East Asian Challenge for Human Rights*, Cambridge University Press, New York, 1999, pp. 27–59.

96 ICISS, above note 1, p. 53.

97 United Nations Charter, art. 42.

98 A. Cassese, above note 38, pp. 24–25.

neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all'.<sup>99</sup> Differing geo-political interests and agendas has meant that unanimous consensus of the permanent five members of the Security Council has rarely been achieved in respect of determinations of breaches of the peace, condemnations of acts of aggression or authorizations of the use of military force.<sup>100</sup> This lack of agreement leads to one of two consequences: inactivity and cries of Rwanda being repeated (the cases like Darfur and Zimbabwe) on the one hand and arguably morally legitimate, but illegal military interventions in for example Yugoslavia (by the North Atlantic Treaty Organisation), Liberia, and Sierra Leone (by the Economic Community of West African States) on the other.

The Commission's 'solution' to this problem is to discuss the potential roles of the General Assembly and Regional Organizations in authorizing military intervention. Of General Assembly authorization, the R2P says 'if supported by an overwhelming majority of member states, [it] would provide a high degree of *legitimacy* for an intervention'.<sup>101</sup> Specifically the R2P proposes the use of Emergency Special Sessions of the General Assembly established under the 1950s 'Uniting for Peace' procedures (which were designed to specifically address cases where the Security Council failed to maintain international peace and security) to authorize the use of force (by a two-thirds majority).<sup>102</sup> Of Regional Organizations' authorization, the comment that is made is that there is 'certain leeway for future action in this regard'.<sup>103</sup> While these ideas are of course very controversial they are not without significant academic and political precedent (if not any legal precedent). That intervention without Security Council authorization should be part of international law is not an idea confined to the post-Rwandan genocide world.<sup>104</sup> The Uniting for Peace resolution,<sup>105</sup> although of questionable legality, also evidences previous attempts to resolve Security Council deadlocks. Further, according to Dinstein, the legislative background materials to article 51 of the Charter note that the reference to collective self defence was intended to confirm the legitimacy of regional security arrangements.<sup>106</sup> The many proponents of the North Atlantic Treaty Organisation intervention in Kosovo have also raised various arguments to justify intervention without Security Council authorization.<sup>107</sup> More recently regional security organizations have looked to engage in military

99 Report of the High-Level Panel on Threats, Challenges and Change, above note 27, para. 202.

100 S. Chesterman, above note 7, pp. 114–115.

101 ICISS, above note 1, p. 53.

102 *Ibid.*, p. 53.

103 *Ibid.*, p. 54.

104 N.J. Wheeler, above note 59, p. 45.

105 UN General Assembly Resolution 377(V) A, 3 November 1950.

106 Yoram Dinstein, *War Aggression and Self Defence*, 3rd edn, Cambridge University Press, Cambridge, 2001, p.161, quoting Goodrick, Hambro and Simons, *Charter of the United Nations* (3rd edn, 1969), pp. 342–44.

107 See A. Cassese, above note 38; I. Berisha, above note 71.

interventions without any recourse being had to the Security Council.<sup>108</sup> Certainly all these arguments could help rebut the assertion that moves to legitimize collective security without Security Council authorization are against the spirit of the United Nations Charter. However, such arguments are not widely supported.

In sum, despite discussing the options at length, chapter six of the Commission report does not go so far as to permit bodies other than the Security Council to authorize the use of force to protect populations. Further, the paragraphs of World Summit Outcome Document that seek to embrace the R2P are entirely limited to those aspects which speak to collective action *through the Security Council*. Thus in this respect, it can be argued that even in theory, the R2P does not envisage a reassessment of international law so as to alter the ‘right authority’.

### *Right intention*

The primary purpose of an intervention must be to halt or avert human suffering.<sup>109</sup> That there are some criteria by which the ‘goodness’ of any use of force is judged is certainly not a new idea. Thomas Aquinas’s theory of just war required there to be an intention to promote good not evil.<sup>110</sup> There are, however, two aspects of this criterion that warrant further analysis in terms of the question of whether the R2P differs from previous articulations of humanitarian intervention. The first is the term ‘intention’. The second is the term ‘primary purpose’.

The Commission’s use of the word ‘intention’ rather than ‘motives’ or ‘purpose’ is potentially significant. In order to distinguish between these concepts, it is helpful to adopt an example Bellamy uses: a country could intervene with the intention of halting injustice but still be motivated by, for example, a desire to secure its borders.<sup>111</sup> Bellamy argues that looking at the intention of the intervener as opposed to its motives is significant because intentions are much easier to judge than motives,<sup>112</sup> seeing that they can be inferred from acts.<sup>113</sup>

The use of the term ‘primary purpose’ arguably presents a significant and positive departure from ‘classical’ humanitarian intervention (of which some would argue has never actually taken place) where the ‘threat or use of force (...) for the *sole* purpose of preventing (...) serious violation of human rights’<sup>114</sup> was

108 For example, the Economic Community of West African States (ECOWAS) intervention in Sierra Leone. ECOWAS and the Organisation of African Unity both included provisions in their respective charters which suggest that they are prepared to bypass the Security Council and engage in regional military action without seeking Security Council authorization.

109 ICISS, above note 1, p. 35.

110 S.D. Murphy, above note 37, pp. 40–41.

111 A.J. Bellamy, above note 58, p. 229.

112 *Ibid.*, pp. 227–229.

113 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Basic Books, New York, 1977, pp. 155–56; A.J. Bellamy, above note 58, p. 226.

114 Wil Verwey, *Het gebruik van geweld voor humanitaire doeleinden – Dwangmaatregelen voor humanitaire doeleinden en humanitaire interventie*, Advies Nummer 15, 18 June 1992, quoted in A.J. Bellamy, above note 58, p. 221.

required. The reference to 'primary purpose' may be viewed as a concession, but can perhaps be best viewed as a concession to reality. Humanitarian intervention critic Mohammed Ayoob argues that it is 'impossible to prevent considerations of national interest from intruding upon decisions' regarding humanitarian intervention.<sup>115</sup> This is a common (and valid) criticism of any attempt at military intervention. To have adopted a *sole* purpose criteria would, for this reason, undoubtedly result in the R2P never gaining momentum.

### *Last resort*

The 'last resort' criterion is criticized by some who warn that the time taken to exhaust other measures before using force is often the time in which the deaths of those most in need of protection occur. Furthermore, it has been argued that delays in invoking military intervention can result in any such intervention being 'politically less likely and practically more lethal'.<sup>116</sup> However, the inclusion of this criterion is unsurprising given the international community's Charter-based ideal to exhaust all peaceful means of dispute settlement before resorting to the use of military force.<sup>117</sup> As such there is nothing in this criterion to distinguish it much from previous articulations of humanitarian intervention. Furthermore, 'last resort' refers as much to the fact that any form of military intervention should be invoked in rare and extreme cases<sup>118</sup> as much as it does to the timing of the intervention itself.

### *Proportional means*

The Commission defines proportionality as meaning 'the scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question'.<sup>119</sup> Proportionality is a fundamental principle of *jus ad bellum*; its inclusion as a criterion for intervention is therefore necessary and uncontroversial. However, that is not to say that such importance has always been attributed to clearly articulating this requirement in previous situations of humanitarian intervention. Chesterman notes that 'it is curious that more writers did not comment on the modality of humanitarian intervention, given the amount of ink spilt on the question of its legitimacy'.<sup>120</sup> As such perhaps the main significance here, in contrast to previous articulations of humanitarian intervention, is that proportionality is clearly spelt out as a requirement.

115 M. Ayoob, above note 55, p. 85.

116 T.G. Weiss, above note 20, pp. 200–201.

117 United Nations Charter, Article 2(3).

118 S. Chesterman, above note 7, p. 40.

119 ICISS, above note 1, p. 37.

120 S. Chesterman, above note 7, p. 41.

### *Reasonable prospects*

The Commission notes that ‘military intervention is not justified if actual protection cannot be achieved or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all’.<sup>121</sup> That this criterion is so overt in the R2P is significant. Michael Ignatieff has made the comment:

‘It is not merely that no one wants to go in anymore. It is also that no one believes that, once you do, you can succeed and then come home. Fixing broken states once looked possible. In Afghanistan and Iraq, everyone has learned how difficult it is to stay this course.’<sup>122</sup>

The interventions in Afghanistan and Iraq might, as Ignatieff argues, put the world off invoking any form of military intervention for some time; however, if and when it does intervene it is vitally important that this criterion has been given explicit acknowledgement. Its importance in intervention decision making should never be overlooked. Doing so could and has led to disastrous consequences. That said, it is not clear how one might objectively and correctly evaluate if a proposed action ‘stands a reasonable chance of success’. Military strategists can certainly be relied on to some extent to undertake this analysis, but even the world’s military super powers can get this drastically wrong. Perhaps this is one area where much more work needs to be done: to create sub-criteria for evaluating whether there are ‘reasonable prospects for success’.

## **A practical reassessment of military intervention for humanitarian purposes**

International law, by its very consensus nature, will always be the result of a series of compromises. The R2P itself is the product of compromises. The Commission’s report acknowledges that some commissioners would have preferred a wider range of threshold criteria.<sup>123</sup> The issue therefore is whether this compromise leads to advancement on previous articulations of humanitarian intervention; or are we now just grappling with a new name for an old ‘inherently vague’ doctrine that has been unable to effectively protect a number of populations from mass atrocities? The R2P clearly seeks to distinguish itself from previous articulations of humanitarian intervention. That it theoretically does so in a number of ways is clear from aspects of the six criteria for military intervention, the shift in terminology from ‘right to intervene’ to ‘responsibility to protect’ and the focus on a continuum of responsibility. To conclude the evaluation, it is necessary to consider whether, in practical terms, the R2P overcomes many of the arguments against military

121 ICISS, above note 1.

122 M. Ignatieff, above note 9.

123 ICISS, above note 1, p. VIII.

intervention, so as to challenge the *opponents*, inspire the *agnostics* and *sceptics* and prove the *optimists* right. The problems posed by military intervention have been the subject of extensive academic discussion. The arguments seem to fit quite neatly into five categories: the rule of law, political will, consistency, perceptions of imperialism and feasibility. This is of course not the first discussion of this type.<sup>124</sup> It is hoped, however, that the distinguishing feature of this analysis will be its consideration of the R2P's ability (or inability) to overcome these five practical impediments to military intervention.

## The rule of law

The underlying dilemmas posed by humanitarian intervention are nicely put by the Commission when it states:

'For some the new activism has been a long overdue internationalization of the human conscience; for others it has been an alarming breach of an international state order dependent on the sovereignty of states and the inviolability of their territory. For some, again, the only real issue is ensuring that coercive interventions are effective; for others, questions about legality, process and the possible misuse of precedent loom much larger.'<sup>125</sup>

From a legal perspective two key issues arise in relation to humanitarian intervention. The first concerns the legality of the use of force. The second concerns the authorization of the use of force. Turning first to the issue of the legality of the use of force for humanitarian ends. Article 2(7) notes that nothing contained in the Charter authorizes the United Nations to intervene in matters that are essentially within the domestic jurisdiction of a state.<sup>126</sup> Chapter VII of the Charter, however, dictates that force (other than in cases of self defence) can only be utilized in situations which constitute a 'threat to peace'. Although the idea of using force for humanitarian ends had entered academic debate, and some incidents of state practice<sup>127</sup> evidence willingness on the part of the international community to try and protect vulnerable populations in this way, the idea remained subject to considerable controversy at the end of the 1990s. However, the adoption by the World Summit Outcome Document of paragraphs 138 and 139 of the R2P may signify the crystallization of customary international law, as evidenced by state practice and *opinio juris* in respect of the interpretation of 'threat to peace' in chapter VII of the United Nations Charter. That is, in the wake of 1990s developments such as the Security Council's determination on more than one occasion, that serious or systematic, widespread and flagrant violations of international humanitarian law

124 See for example, Thakur's 2002 article which addressed the question of the 'added value' of the R2P. This discussion framed the benefits of R2P as being 'balance, outreach, independence, comprehensiveness, innovativeness and political realism': R. Thakur, above note 4, pp. 325–27.

125 ICISS, above note 1, p. VII.

126 United Nations Charter, above note 49.

127 See particularly F.R. Teson, above note 61, on Somalia, Iraq, Kosovo and Rwanda.

may contribute to a threat to international peace and security,<sup>128</sup> as well as action taken outside the Security Council in Kosovo, the General Assembly has seen fit to acquiesce to such an interpretation. As such, genocide, war crimes, ethnic cleansing and crimes against humanity, can now surely be said to constitute ‘threats to peace’ pursuant to the United Nations Charter. This is the most significant legal advance provided by the R2P, and in effect its crowning glory. However, as we will see, despite this significant legal advancement, it seems little will change in respect of humanitarian intervention. This is because of the requirements in the Charter surrounding the authorization of the use of force.

The debates centre around two clauses of the United Nations Charter: article 2(4) (the prohibition on the use of force) and article 39 (which states that the ‘Security Council shall determine the existence of any threat to the peace and decide upon subsequent measures’). Many arguments have been put forward (in various combinations) to justify humanitarian intervention without Security Council authorization.

There are those that assert that the language of the Charter (specifically in that it prohibits the use of force ‘against the territorial integrity or political independence of any state’) does not exclude the use of force to ensure that other Charter values – such as human rights – are able to be enjoyed.<sup>129</sup> There are also those that rely on the International Court of Justice’s statement that the Charter does not cover the whole area of the regulation of the use of force<sup>130</sup> and that therefore humanitarian uses of force can operate outside the Charter. The argument is also made that since the Charter’s adoption, customary international law has developed to allow for humanitarian intervention and the Charter must accordingly be interpreted in light of the new customary norms. Humanitarian intervention is seen by some as a form of self-help that survived the adoption of the Charter.<sup>131</sup> There is also the view that intervention is lawful in cases of failed states because there is no state sovereignty to breach.<sup>132</sup> Another argument put forward is that the failure of the Charter’s collective security mechanisms means that the right of individual states to intervene is retained.<sup>133</sup> Finally, there are also those who maintain the argument that the resort to armed force can be ethically justified, although it is contrary to international law.<sup>134</sup>

These arguments may have some limited legal and academic merit. However, as we saw in chapter three, even in theory, the R2P does not seek to permit the use of force other than in self-defence without the authorization of the Security Council. ‘[W]e are prepared to take collective action, in a timely and

128 See for example SC Res 808 (1993), SC Res 827 (1993), and SC Res 955 (1994) establishing the International Criminal Tribunals for Rwanda and the former Yugoslavia.

129 ICJ, *Nicaragua*, above note 53, para. 176. See also J.M. Welsh, above note 67, p. 55.

130 ICJ, *Nicaragua*, above note 53, para. 176.

131 S. Chesterman, above note 7, pp. 52–53.

132 David Luban, ‘Just War and Human Rights’, in *Philosophy and Public Affairs*, Vol. 9, No. 2, 1980, pp. 160–181, at p. 169.

133 F.R. Teson, above note 61, S. Chesterman, above note 7, p. 57.

134 I. Berisha, above note 71, p. 29.



decisive manner, *through the Security Council*' (emphasis added) is the only operative military intervention component of the World Summit Outcome Document's 'endorsement'. As such, until such time as reform changes the international order, and the underlying premise of the United Nations Charter, the legal doctrine of non-intervention will remain a fundamental principle of the international legal system. Any use of force that is not sanctioned by the United Nations Security Council will undermine this.

Thus from a legal perspective, whilst the R2P can certainly be held up as confirming an international acceptance of the right of the United Nations Security Council to find a 'threat to peace' in cases of genocide, war crimes, ethnic cleansing and crimes against humanity, it does not change the fact that the use of force, other than in self defence, without United Nations Security Council authorization remains contrary to international law. I conclude therefore that, whilst somewhat momentous in a legal sense, the practical effect of the responsibility to react aspect of R2P is of little significance. It does not advance the legality of the use of force for humanitarian ends. Indeed the R2P effectively concedes that morally legitimate but illegal military interventions will continue to take place in order to protect populations due to inactivity by the Security Council.

## Political will

The discourse on humanitarian intervention is necessarily multidisciplinary, as the law does not operate in a vacuum. The question of whether there is political will for the R2P to deliver on its promise to the vulnerable must be added to any discussion of the legality of such a promise. Political will in this regard involves two aspects: the political will to embrace the R2P and the political will to provide appropriately resourced military forces with the legal mandate to enable them to protect.

Evans is critical of 1990s articulations of humanitarian intervention such as the 'right to intervene' and the 'doctrine of the international community' on the basis that these doctrines, while they 'rallied' the North, failed to engage the South.<sup>135</sup> Evans points to the adoption of the R2P by the African Union as evidence of the R2P's ability to bridge the North–South divide.<sup>136</sup> While the West are joined by some of sub-Saharan Africa and Latin America in supporting the R2P, the East Asian approach is much more 'cautious', Russia is 'lukewarm' and China disapproving.<sup>137</sup> As we have seen, United Nations papers subsequent to the R2P have adopted the idea that states should commit to 'helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity' and 'to assisting those which are under stress before crises and conflicts break out' and to supporting 'collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter'.<sup>138</sup>

135 G. Evans, above note 12, p. 34.

136 *Ibid.*

137 S.N. MacFarlane *et al.*, above note 10, p. 982.

138 United Nations General Assembly, *2005 World Summit Outcome*, above note 30, para. 139.

However, the political will just does not exist to embrace the R2P's suggestion that when the Security Council fails, the right authority would be the General Assembly or Regional Organization. The author is perhaps not as inspired as Thakur was when he concluded of the Commission's report:

'the fact that a dozen people of diverse backgrounds and varied starting positions were able to agree on a challenging, substantial and wide-ranging report encourages us to believe that an international consensus can indeed be forged around the ideas and principles it contains'.<sup>139</sup>

As we have seen, in both Srebrenica and in Rwanda, a lack of resources and a lack of a mandate to actually provide protection is just as harmful (or perhaps more so) to humanitarian intervention efforts as a lack of will to intervene in the first place.<sup>140</sup> Indeed the willingness to put resources on the line is often a more pressing concern than respect for state sovereignty.<sup>141</sup> As Ayoob frames it 'even if they commit themselves to intervene for altruistic and humanitarian reasons (...) they will normally not be in a position to sustain such a commitment when faced by human and material costs'.<sup>142</sup> With the American military engaged in Afghanistan (and to some extent in Iraq still) for the foreseeable future, their support for any proposed operation is unlikely to be forthcoming. There is also a lack of interest in Europe – as Weiss notes, both by politicians and by populations – to spending money on defence such as to give Europe a military capacity independent to the United States.<sup>143</sup> Fatigue by those who have the resources to intervene (given the number of instances which would warrant such intervention) is a reality.

The six criteria of military interventions under the R2P and the notion of 'responsibility' seek to eliminate the question of political will. Strictly applied this doctrine would say that there is no question of political will. Rather, if the six criteria are met, the intervention takes place. Stahn notes that if this is the case then the doctrine is significant because it creates a positive duty. There are only very limited positive duties in international law and very little by way of implications for failing to comply with these duties.<sup>144</sup> Unfortunately, however, although the Commission has tried to be politically realistic and forward thinking, it has not been able to inspire the international community to agree to any positive duty. Ignatieff may be right in his assertions that the War on Terror and the war in Iraq have disengaged political will for humanitarian intervention. However, irrespective

139 R. Thakur, above note 4, p. 337.

140 See for example Fiona Terry, *The Paradox of Humanitarian Action: Condemned to Repeat*, Cornell University Press, New York, 2002; Mary Ellen O'Connell, 'The Responsibility to Protect (R2P): A way forward – or rather part of the problem?', *Foreign Voices*, Vol. 1, 2008, available at [http://www.humansecuritygateway.info/documents/FV\\_R2Pwayforwardorproblem.pdf](http://www.humansecuritygateway.info/documents/FV_R2Pwayforwardorproblem.pdf) (last visited 16 December 2009).

141 N.J. Wheeler, above note 59, p. 300.

142 M. Ayoob, above note 55, p. 85.

143 T.G. Weiss, above note 6, p. 141.

144 C. Stahn, above note 81, pp. 115–118.

of these recent events, national self-interest considerations still come first. The notion that the vulnerable are ‘merely strangers’<sup>145</sup> continues to resonate despite the Commission’s aspirations and solid humanitarian reasoning. Thus although the R2P is innovative and a progressive development of the law if understood in the sense of a positive duty,<sup>146</sup> there is no evidence of any political will to accept such a duty.

## Consistency

By the end of the nineteenth century the majority of scholars had accepted the existence of a right of humanitarian intervention. However, as Brownlie notes such doctrine was ‘inherently vague’ and open to abuse by powerful states.<sup>147</sup> Chesterman is among those who argue that a lack of consistency undermines the United Nations as a whole and is to be avoided.<sup>148</sup> On the other hand, however, there is a growing consensus that the inability to intervene in some cases of need should not prevent intervention were possible and necessary.<sup>149</sup> Fearing that the shortcomings of Operation Iraqi Freedom will leave the world shying away from military intervention and lead to ‘another Rwanda’ (which he describes as the aftermath of the failed intervention in Somalia) Collier argues in support of military intervention ‘but not necessarily everywhere’.<sup>150</sup> Others also accept the political reality of this approach. Ayoob and Weiss, who offer opposing views on many aspects of humanitarian intervention, both concede that ‘states will pick and choose’ and ‘selectivity (...) seems to be inevitable’.<sup>151</sup> In this sense the R2P has made a very practical contribution to the humanitarian intervention discourse. It has dismissed the lack of consistency arguments by asserting that just because interventions cannot be mounted in every case where they should be is no reason for not mounting them in any case.<sup>152</sup> It has significantly moved the debate on in this sense. Furthermore, without setting out a ‘shopping list’ as such for humanitarian interventions it has again articulated that criteria are a necessary aspect of reaching international agreement and come to some agreement as to their required content.

## Perceptions of imperialism

Humanitarian intervention always has the ‘potential of becoming a tool for the interference by the strong in the affairs of the weak, with humanitarian considerations providing a veneer to justify such intervention’.<sup>153</sup> The legitimization of the use of unauthorized force on ‘humanitarian’ grounds by way of camouflaging

145 N.J. Wheeler, above note 59.

146 C. Stahn, above note 81, p. 115.

147 I. Brownlie, above note 42, p. 338.

148 S. Chesterman, above note 7, p. 161.

149 G. Evans, above note 12.

150 P. Collier, above note 57, p. 128.

151 M. Ayoob, above note 55, p. 86.

152 ICISS, above note 1, p. 37.

153 M. Ayoob, above note 55, p. 92.

the interventionist policies of the West is a well-acknowledged concern of the South.<sup>154</sup> Further, humanitarian intervention presupposes that some societies know better than others<sup>155</sup> and that there is universal cultural legitimacy for a certain interpretation of human rights.<sup>156</sup> Reading the R2P report, it is evident that the Commission was keen to dispel any potential allegation that the R2P is a tool of imperialism. Indeed, proponents of human rights and humanitarian intervention alike argue that the Commission was quite timid in setting the bar for humanitarian intervention so high. The overthrow of democratically elected regimes and mass abuses of human rights could well have been included. Both situations have often been cited as creating conditions for humanitarian intervention. Certainly precedent, in the form of the Security Council-approved intervention in Haiti in 1994 to restore the elected government, as well as the *ex post facto* sanction by the Security Council of the Nigerian-led Economic Community of West African States mission to overthrow the government in Sierra Leone in 1997, can be found to support the former as valid humanitarian interventions.<sup>157</sup>

Specifically excluding these two situations marks perhaps the most significant way in which military intervention under the R2P is different from previous articulations of humanitarian intervention. Humanitarian intervention was predominantly seen as a human rights issue,<sup>158</sup> while the just cause criterion that the R2P adopts is focused on the most serious international crimes.

The argument made by some is that, by setting the bar high with regard to the gravity of the crimes required, the Commission has aimed low; but in aiming low there is more scope for saving lives, because the perception of imperialism and the ongoing debates about the universality of human rights are avoided. Weiss makes a valid point when he says that the R2P criteria for military intervention means that R2P cannot be a ‘smokescreen for bullies’ (he argues rather that the pressing concern in this respect is not humanitarian intervention at all, but rather the United States pre-emptive doctrine of self defence).<sup>159</sup> No doubt many governments will happily label the R2P as imperialism, but an objective observer must note its limited scope, which addresses only universally acknowledged crimes of the most serious nature.

## Feasibility

‘Inherent in the idea of humanitarian intervention is the contradiction that it is acceptable to kill and injure some, even wholly innocent people, to preserve human rights of others.’<sup>160</sup>

154 Thelma Ekiyor, ‘The Responsibility to Protect (R2P): A way forward – or rather part of the problem?’, *Foreign Voices*, vol. 1, 2008, available at [http://www.humansecuritygateway.info/documents/FV\\_R2Pwayforwardorproblem.pdf](http://www.humansecuritygateway.info/documents/FV_R2Pwayforwardorproblem.pdf) (last visited 18 December 2008).

155 D. Luban, above note 132.

156 A.A. An-Na’im, above note 95; I. Tatsuo, above note 95.

157 T.G. Weiss, above note 6, p. 139.

158 See for example M. Ayoob, above note 55, p. 81.

159 T.G. Weiss, above note 6, p. 142.

160 M.E. O’Connell, above note 140.

Of the 'humanitarian' interventions in East Pakistan in 1971, Idi Amin's Uganda in the 1970s and Pol Pot's Cambodia in the late 1970s the Commission's supplementary volume notes Kofi Annan's statement that 'few would now deny that in those cases intervention was a lesser evil than allowing the massacres to continue'.<sup>161</sup> These cold war interventions which are sometimes *ex post facto* cited as being examples of legitimate and worthwhile humanitarian interventions, were, at the time, the subject of declarations by intervening states about invoking the right of self-defence. Similarly Wheeler argues that in all three of these cases 'the use of force was the only means of ending atrocities on a massive scale'.<sup>162</sup> Similarly, Collier for example, makes the case for humanitarian intervention by holding up the British intervention in Sierra Leone in 2000 as being a model for military intervention, describing it as 'cheap, confident and sustained'.<sup>163</sup> However, as the government of Sierra Leone invited the intervention this cannot be said to be humanitarian intervention in the strict sense.

However, the question that really remains is: can lasting peace be brought by external intervention? As Kennedy notes:

'how easily ethical denunciation and outrage can get us into things on which we are not able to follow through – triggering intervention in Kosova, Afghanistan and even Iraq, with humanitarian promises on which we cannot deliver'.<sup>164</sup>

This is of course a question for which an answer is well beyond the scope of this paper. An analysis of all instances of external intervention (in which consideration is given to the whole multitude of additional factors that may have influenced peace or its opposing state – whatever that may be described as) is needed. Pickering and Kisangani have conducted some empirical studies around the consequences of intervention but conclude that significantly more work needs to be done in this area.<sup>165</sup> Furthermore, this issue is not addressed directly by the Commission. However, by including a specific responsibility to rebuild, the R2P goes some way to address the feasibility concerns associated with uninvited foreign military intervention.

## Conclusion

There are undoubtedly a plethora of unanswered questions in the development of the R2P, yet it is still a significant step forward for the international community in so far as it clearly articulates a holistic and integrated approach to protecting

161 ICISS, above note 56, pp. 67–68.

162 N.J. Wheeler, above note 59, p. 295.

163 P. Collier, above note 57, p. 128.

164 David Kennedy, *Of Law and War*, Princetown University Press, Princetown, 2006, p. 108.

165 Jeffrey Pickering and Emizet F Kisangani, 'Political, Economic and Social Consequences of Foreign Military Intervention', *Political Research Quarterly*, Vol. 59, No. 3, 2006, pp. 363–376.

populations from mass atrocities. It resoundingly supports the adoption of measures short of the use of military force that can save lives. Furthermore, military intervention under the R2P differs from previous articulations of humanitarian intervention in that it:

1. clearly articulates humanitarian intervention decision making criteria. These criteria reflect the views of various practitioners and academics in this field as set out in the literature to date as well as aspects of state practice;
2. asserts that an inability to intervene in one situation should not be used as a justification for not intervening in another;
3. limits the use of force by way of humanitarian intervention to situations of actual or apprehended large scale loss of life. It is not therefore intended to be a human rights advocacy tool but rather a protection against the most serious breaches of international humanitarian law. As such, it gains legitimacy rather than contributing to perceptions of imperialism; and
4. most significantly, its acceptance by United Nations confirms the legality of declarations by the Security Council in which they find genocide, war crimes, ethnic cleansing or crimes against humanity within the borders of one state constitute a threat to peace.

In sum, it is fair to say that the R2P builds in a positive way on the existing literature on humanitarian intervention. In particular it provides greater specificity to criteria for intervention that had begun to crystallize as a result of usage in both academic circles and state practice. The opponents therefore, who view the idea of humanitarian intervention as a return to semi-colonial practices dividing the world into the civilized (democratic and human rights observing) and the uncivilized (undemocratic and human rights abusing), do not give the doctrine its due. The R2P evidences a universal (rather than purely Western) acceptance that certain aspects of un-civilization can constitute a threat to peace.

However, the *optimists*, who view the R2P as a realistic and substantial step forward, are deceiving themselves. The R2P claims to novelty are exaggerated. It does not provide a real reassessment of humanitarian intervention such as to change the prospects of the world's most vulnerable. The R2P does not overcome the issue of a deadlocked Security Council and a lack of political will to actually protect vulnerable populations. The R2P's assertion that the world is moving towards a new regime in international law, whereby the authority of the United Nations Security Council is not always required for intervention in cases of 'serious and irreparable harm occurring to human beings',<sup>166</sup> is too far in the camp of the optimists and not grounded in political reality. As such it is the agnostics and sceptics, who see merit in many of the R2P's ideas but concede its lack of ability to resolve the fundamental problems of the operation of the United Nations Security Council, who are unfortunately proved most right: '[t]he history of efforts to make the Security Council more reflective of growing UN membership of a changing

166 ICISS, above note 1, p. XII.

world politics suggests slim prospects for change'.<sup>167</sup> Although the R2P's acceptance makes limited forms of humanitarian intervention legal, the R2P does not make military intervention without Security Council authorization any more legal than it was in the 1990s. Similarly, the R2P's acceptance does not make military intervention without Security Council authorization any more palatable to those who have always opposed it. Indeed, in the context of the post-Iraq War world, humanitarian intervention is arguably no longer on the agenda of many of those who once supported it.

The word promise is used only once in the R2P report. Nonetheless, the R2P is a promise, by the international community, to the world's most vulnerable. It promises that they will be protected from actual or apprehended large scale loss of life (with or without genocidal intent) or large scale 'ethnic cleansing'. I fear this is to be a promise cruelly betrayed by the current world order. Despite the efforts of the International Commission on Intervention and State Sovereignty, and the best intentions of those who seek to prevent another Rwanda, a solution is not forthcoming. It has been some 150 years since Mill stated '[t]here assuredly are cases in which it is allowable to go to war, without having ourselves been attacked (...); and it is very important that nations should make up there mind in time, as to what there cases are'.<sup>168</sup> Mill would therefore be disappointed at having to acknowledge the strength of Chesterman's point when he says '[t]he failure to reconcile the relevant Charter provisions with (...) customary international law analysis is indicative of how little has changed in the tenor of debate on humanitarian intervention over the last hundred or so years'.<sup>169</sup> Even if you argue that the United Nations Charter legally supports a wider use of force for humanitarian ends than this paper acknowledges, the reality is that, only when and where it meets the self-interest criteria of those nations with the capacity to protect vulnerable populations will such populations be protected.

167 T.G. Weiss, above note 6, p. 145.

168 John Stuart Mill, 'A Few Words on Non-intervention' in *Dissertations and Discussions*, Longmans, Green, Reader and Dyer, London, 1867, Vol. III.

169 S. Chesterman, above note 7, p. 45.





## SELECTED ARTICLE ON INTERNATIONAL HUMANITARIAN LAW

# What does ‘intent to destroy’ in genocide mean?

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### **Abstract**

*Genocide is a crime with a double mental element, i.e. a general intent as to the underlying acts, and an ulterior intent with regard to the ultimate aim of the destruction of the group. The prevailing view in the case-law interprets the respective ‘intent to destroy’ requirement as a special or specific intent (dolus specialis) stressing its volitional or purpose-based tendency. While this view has been followed for a long time in legal doctrine without further ado, it has recently been challenged by knowledge- and structure-based approaches, which have not received sufficient attention. A historical, literal, systematic and teleological interpretation of the ‘intent to destroy’ requirement, taking into account the particular structure of the genocide offence and the meaning of ‘intent’ in comparative law, reveals that the traditional view can no longer be maintained. It should be replaced by a combined structure- and knowledge-based approach that distinguishes according to the status and role of the (low-, mid- and top-level) perpetrators. Thus, the purpose-based intent should be upheld only with regard to the top- and mid-level perpetrators, whereas for the low-level perpetrators knowledge of the genocidal context should suffice. Lastly, this new*

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*approach requires a fresh look at the ‘intent to destroy’ requirement in cases of participation in genocide.*



## **Preliminary remarks: the ‘intent to destroy’ requirement in the particular structure of the genocide offence**

The genocide offence has *two separate mental elements*, namely a general one that could be called ‘general intent’ or *dolus*, and an additional ‘intent to destroy’.<sup>1</sup> A general intent normally relates to all objective elements of the offence definition (*actus reus*) and has now been defined in international criminal law by Article 30 of the Statute of the International Criminal Court (ICC) as basically encompassing a volitional (intent) and/or a cognitive or intellectual (knowledge) element.<sup>2</sup> In the case of genocide, the general intent relates to the opening paragraph as well as to the acts listed in the offence<sup>3</sup> and directed against one of the protected groups.<sup>4</sup> The perpetrator must, for example, know that his actions target one of the protected groups, since the group element is a factual circumstance as defined by Article

- 1 See also *International Commission of Inquiry on Darfur*, Report of the International Commission of Inquiry on Darfur to the UN Secretary-General, pursuant to SC Res. 1564, 18 September 2004, Annex to letter dated 31 January 2005 from the UN Secretary-General addressed to the President of the Security Council, S/2005/60, 1 February 2005, para. 491; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009 (ICC-02/05-01/09), para. 139; Otto Triffterer, ‘Genocide, its particular intent to destroy in whole or in part the group as such’, *Leiden Journal of International Law (LJIL)*, No. 14, 2001, pp. 399–408, at pp. 400ff.; Otto Triffterer, ‘Kriminalpolitische und dogmatische Überlegungen zum Entwurf gleichlautender ‘Elements of Crimes’ für alle Tatbestände des Völkermords’, in Bernd Schünemann *et al.* (eds.), *Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001*, Beck, Munich, 2001, pp. 1438ff.; William Schabas, ‘The *Jelisić* case and the *mens rea* of the crime of genocide’, *LJIL*, Vol. 14, Issue 1, 2001, pp. 125–139, at p. 129; Elies van Sliedregt, ‘Joint criminal enterprise as a pathway to convicting individuals for genocide’, *Journal of International Criminal Justice (JICJ)*, No. 5, 2007, pp. 184–207, at p. 195; Robert Cryer, ‘The definitions of international crimes in the Al Bashir Arrest Warrant Decision’, *JICJ*, No. 7, 2009, pp. 283–296, at 293. The double intent structure has apparently been overlooked by the International Law Commission (ILC), see ‘Report on the Work of its Forty-Eighth Session to the U.N.’, UN GAOR, 51st session, Supp. No. 10, UN Doc. A/51/10 (1996), p. 87, referring only to (one) *mens rea* and *actus reus*. Roberta Arnold, ‘The *mens rea* of genocide under the Statute of the International Criminal Court’, *Criminal Law Forum (CLF)*, No. 14, 2003, pp. 127–151, at pp. 135–136 also argues in favour of one intent, considering that the ‘special intent’ is an element of the *mens rea* and encompasses the general intent. She ignores, however, that in the genocide definition the points of reference of the ‘general’ and ‘special’ intent are different. She also confuses intent with motive (misinterpreting the German doctrine in fn. 43).
- 2 Art. 30(1) reads: ‘Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.’
- 3 See Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277 (hereinafter Genocide Convention), now the identical Art. 6(a)-(e) of the ICC Statute.
- 4 See also Otto Triffterer, ‘Genocide ...’, above note 1, pp. 400, 403.

30(3) of the ICC Statute.<sup>5</sup> In contrast, the ‘intent to destroy’ constitutes an additional subjective requirement that complements the general intent and goes beyond the objective elements of the offence definition.<sup>6</sup> One should therefore speak more precisely of an ulterior intent<sup>7</sup> (“surplus” of intent<sup>8</sup>) characterized by an extended – with regard to the *actus reus* – mental element or a transcending internal tendency (*‘überschießende Innentendenz’*).<sup>9</sup> Indeed genocide, thus understood, is a crime of ulterior intent or a goal-oriented crime (*Absichts- oder Zieldelikt*).<sup>10</sup> In practical terms, this means that the genocidaire may intend more than he is realistically able to accomplish. A case in point would be a white racist who intends to destroy the group of black people in a large city but, acting alone, will only be able to kill a few members of this group. Taking seriously the specific-intent-crime structure of genocide, his genocidal intent would suffice to fulfil the offence elements if only one of the underlying acts, *in casu* the ‘killing [of] members’ of the said group (ICC Statute, Art. 6(a)), were to be accomplished.

As for crimes against humanity, on the one hand genocide essentially constitutes such a type of crime in its similarity to persecution for particular discriminatory reasons (ICC Statute, Art. 7(1)(h)).<sup>11</sup> The ‘intent to destroy’ requirement turns genocide into ‘an extreme and the most inhumane form of

- 5 Art. 30(3) reads: ‘For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.’
- 6 See also Otto Triffterer, ‘Genocide ...’, above note 1, pp. 402–403.
- 7 See e.g. Itzhak Kugler, *Direct and Oblique Intention in the Criminal Law*, Ashgate, Aldershot, 2002, p. 3.
- 8 *Prosecutor v. Milomir Stakić*, Trial Judgement, Case No. IT-97-24-T, 31 July 2003, para. 520. See also *Prosecutor v. Omar Hassan Ahmad Al Bashir*, above note 1, paras 119ff, which, in essence, characterizes genocide as a crime of (concrete) endangerment (para. 124: ‘completed when the relevant conduct presents a concrete threat to the existence of the targeted group ...’).
- 9 See also *Prosecutor v. Radoslav Brđjanin*, Trial Judgement, Case No. IT-99-36-T, 1 September 2004, para. 695: specific intent ‘characterises the crime of genocide’.
- 10 See in detail the excellent work of Alicia Gil Gil, *Derecho penal internacional: Especial consideración del delito de genocidio*, Tecnos, Madrid, 1999, pp. 178f., 231ff., 258ff.; A. Gil Gil, ‘Die Tatbestände der Verbrechen gegen die Menschlichkeit und des Völkermordes im Römischen Statut des Internationalen Strafgerichtshofs’, *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)*, No. 111, 2000, pp. 394–395. See also Daniel David Ntanda Nsereko, ‘Genocide: A crime against mankind’, in Kirk Gabrielle McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, vol. I, *Commentary*, Kluwer, The Hague et al., 2000, pp. 124ff., 137; William Schabas, *Genocide in International Law*, 2nd edn, Cambridge University Press, Cambridge, 2009, pp. 259, 262, 264ff.; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, above note 1, para. 120 with fn. 140 (‘crime of *mens rea*’). On the structure of the crime of genocide, see also Kai Ambos and Stefan Wirth, ‘Sentencing, cumulative charging, genocide and crimes against humanity’, in André Klip and Göran Sluiter (eds), *Annotated Leading Cases: The International Criminal Tribunal for Rwanda 1994–1999*, vol. II, 2001, pp. 703ff.
- 11 Cf. e.g. *Prosecutor v. Goran Jelisić*, Trial Judgement, Case No. IT-95-10-T, 14 December 1999, para. 68; also *Prosecutor v. Georges Ruggiu*, Trial Judgement, below note 124, para. 21 (with reference to *Kupreškić et al.*). The German Supreme Court (BGH), *Neue Zeitschrift für Strafrecht (NSTZ)*, no. 19, 1999, p. 396, at p. 401 also views genocide as ‘part of a crime against humanity.’ On the German jurisprudence, see Kai Ambos and Stefan Wirth, ‘Genocide and war crimes in the former Yugoslavia before German criminal courts (1994–2000)’, in Horst Fischer, Claus Kress and Sascha Rolf Lüder (eds), *International and National Prosecution of Crimes under International Law: Current Developments*, Berlin-Verlag Spitz, Berlin, 2001, pp. 769ff.

persecution.<sup>12</sup> On the other hand, the ulterior intent distinguishes genocide from persecution<sup>13</sup> and all other crimes against humanity and contributes to its particular wrongfulness and seriousness.<sup>14</sup> Yet while genocide may then be qualified as a special intent crime, this does not answer the question as to the concrete meaning and degree of this intent.

## The meaning of ‘intent to destroy’

### The case-law

Leaving the terminological variety of the case-law aside,<sup>15</sup> let us turn immediately to the meaning of the ‘intent to destroy’ requirement. The seminal *Akayesu*

- 12 *Prosecutor v. Zoran Kupreškic et al.*, Trial Judgement, Case No. IT-95-16-T, 14 January 2000, para. 636: ‘... genocide is an extreme and most inhumane form of persecution.’ See also Kirk Gabrielle Swaak-Goldmann, ‘Persecution’, in Kirk Gabrielle McDonald and Olivia Swaak-Goldman, above note 10, pp. 247ff., on the elements of the offence of persecution.
- 13 On the distinction made recently between a genocidal and persecutory intent, see *Prosecutor v. Omar Hassan Ahmad Al Bashir*, above note 1, para. 141ff. discussing in particular ethnic cleansing. See also Daniela Demko, ‘Die von der Genozidkonvention geschützten “Gruppen” als Regelungsgegenstand des “Specific Intent”’, *Schweizerische Zeitschrift für Internationales und europäisches Recht*, vol. 19, no. 2, 2009, pp. 223–246.
- 14 Cf. *Prosecutor v. Goran Jelusic*, TJ, above note 11, paras 66, 79, 82; concurring W. Schabas, above note 10, pp. 11, 13, 15; similarly Ntanda Nsereko, above note 10, p. 119. For a distinction based on the legally protected good, cf. Gil Gil, *Derecho penal internacional*, above note 10, pp. 123, 125–126, 159ff., 177ff.; A. Gil Gil, ‘Tatbestände’, above note 10, pp. 393–394, according to which genocide protects a collective good, i.e. the group as such, and crimes against humanity protect individual rights; similarly Alexander Greenawalt, ‘Rethinking genocidal intent: The case for a knowledge-based interpretation’, *Columbia Law Review*, no. 99, 1999, pp. 2293–2294; even more broadly Martin Shaw, *What is Genocide?*, Polity, Cornwall, 2007, reprint 2008, p. 28 (‘... the idea of genocide as the *intentional destruction of social groups* remains foundational’ (emphasis in the original), pp. 33ff., 154ff. (p. 154: ‘violent social conflict’ with the ‘aim to destroy civilian social groups ...’). As for the *concurus delictorum*, when multiple actions with genocidal intent are committed, this results in a single genocide (i.e. a single offence) (*Handlungseinheit*) in ideal concurrence (*Idealkonkurrenz*) with crimes against humanity (cf. A. Gil Gil, ‘Tatbestände’, above note 10, pp. 396–397; also German Supreme Court, above note 11, pp. 401ff., with case note by Ambos. On the relationship between genocide and other serious crimes see Shaw, above note 14, p. 28: ‘whether genocide constitutes a crime against humanity (which in non-legal terms is self-evident) remains contentious’, and p. 34: ‘Genocide involves mass killing but it is much more than mass killing.’)
- 15 The following terms have been employed: ‘special intent’ (*Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 498; *Prosecutor v. Athanase Seromba*, Trial Judgement, Case No. ICTR-2001-66-I, 13 December 2006, paras. 175, 319); ‘dolus specialis’ (*Prosecutor v. Jean-Paul Akayesu*, op. cit., para. 498; *Prosecutor v. Juvénal Kajelijeli*, Trial Judgement, Case No. ICTR-98-44A-T, 1 December 2003, para. 803; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Trial Judgement, Case No. ICTR-95-1-T, 21 May 1999, para. 91; *Prosecutor v. Georges Rutaganda*, Trial Judgement, Case No. ICTR-96-3-T, 6 December 1999, para. 59; *Prosecutor v. Ignace Bagilishema*, Trial Judgement, Case No. ICTR-95-1A-T, 7 June 2001, para. 55; *Prosecutor v. Alfred Musema*, Trial Judgement, Case No. ICTR-96-13-A, 27 January 2000, para. 164); ‘genocidal intent’ (*Prosecutor v. Clément Kayishema*, op. cit., para. 91); ‘specific intent’ (*Prosecutor v. Juvénal Kajelijeli*, op. cit., para. 803; *Prosecutor v. Clément Kayishema*, op. cit., para. 91; *Prosecutor v. Ignace Bagilishema*, op. cit., para. 55); ‘specific genocidal intent’ (*Prosecutor v. Ignace Bagilishema*, op. cit., para. 55); ‘exterminatory intent’ (*Prosecutor v. Goran Jelusic*, TJ, above note 11, para. 83); ‘specific intention’ (*Prosecutor v. Akayesu*, op. cit., para. 498; *Prosecutor v. Georges Rutaganda*, op. cit., para. 59). This terminological variety did not end with the *Jelusic* Appeals Chamber’s preference for the term ‘specific intent’ (*Prosecutor v. Goran Jelusic*, Appeal Judgement, Case No. IT-95-10-A, 5 July 2001, para. 45). The Chamber stressed that it does

judgement understood the ‘intent to destroy’ as a ‘special intent’ or *dolus specialis*, defining it as ‘the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged’<sup>16</sup> or, in other words, has ‘the clear intent to cause the offence’.<sup>17</sup> The Chamber described the genocidal intent as the ‘key element’ of an intentional offence, which is ‘characterized by a psychological relationship between the physical result and the mental state of the perpetrator’.<sup>18</sup> The subsequent case-law of the International Criminal Tribunal for Rwanda (ICTR) basically followed the *Akayesu* findings,<sup>19</sup> requiring in addition the aim to destroy one of the protected groups.

The case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY) took the same approach. Rejecting the Prosecutor’s attempt to introduce a mere knowledge standard,<sup>20</sup> the *Jelusic* Trial Chamber applied the *Akayesu* definition. In this case, however, it was not convinced that *Jelusic* was ‘motivated’ (*sic*) by the *dolus specialis* of the crime,<sup>21</sup> as he performed the executions only randomly<sup>22</sup> and acted by virtue of his disturbed personality.<sup>23</sup> Thus ‘he killed arbitrarily rather than with the clear intent to destroy a group’.<sup>24</sup> The Appeals Chamber confirmed, again dismissing the Prosecutor’s knowledge approach,<sup>25</sup> that the ‘specific intent requires that the perpetrator [...] seeks to achieve’<sup>26</sup> the destruction of a group. It further made clear that the existence of a personal motive, e.g. personal economic benefits or political advantage, does not exclude the perpetrator’s specific intent.<sup>27</sup> The Chamber equally conceded, this time against the Trial Chamber and in accordance with the Prosecutor, that a disturbed or borderline personality, as identified in *Jelusic*, does not *per se* exclude ‘the ability to form an intent to destroy a particular protected group’.<sup>28</sup> Similarly, the Chamber considered that a certain randomness in the perpetrator’s killings does not rule out

not attribute to this term any meaning it might carry in national jurisdictions (*ibid.*, para. 45 with fn. 81). See also *Prosecutor v. Radoslav Brdjanin*, TJ, above note 9, para. 695. For an ‘interchangeable’ use of *dolus specialis* and specific intent see *Prosecutor v. Milomir Stakić*, TJ, above note 8, para. 520.

16 *Prosecutor v. Jean-Paul Akayesu*, TJ, above note 15, para. 498.

17 *Ibid.*, para. 518.

18 *Ibid.*, para. 518.

19 *Prosecutor v. Georges Rutaganda*, TJ, above note 15, para. 61; *Prosecutor v. Ignace Bagilishema*, TJ, above note 13, para. 62; *Prosecutor v. Alfred Musema*, TJ, above note 15, para. 164: ‘clearly intended the result charged’.

20 *Prosecutor v. Goran Jelusic*, Prosecutor’s Pre-Trial Brief, Case No. IT-95-10-PT, 19 November 1998, para. 3.1 (perpetrator ‘knew the likely consequence’ that the committed acts would destroy a group in whole or in part). See also *Prosecutor v. Goran Jelusic*, TJ, above note 11, para. 42; *Prosecutor v. Radislav Krstic*, TJ, above note 29, para. 569 (‘consciously desired’ the destruction of the group or ‘knew his acts were destroying’).

21 *Prosecutor v. Goran Jelusic*, TJ, above note 11, para. 108.

22 *Ibid.*, para. 106.

23 *Ibid.*, para. 105.

24 *Ibid.*, para. 108.

25 *Prosecutor v. Goran Jelusic*, AJ, above note 15, para. 52.

26 *Ibid.*, para. 46.

27 *Ibid.*, para. 49, citing *Prosecutor v. Dusko Tadic*, Appeal Judgement, Case No. IT-94-1-A, 15 July 1999, para. 269.

28 *Ibid.*, para. 70.

the specific intent.<sup>29</sup> It also confirmed the irrelevance of motive,<sup>30</sup> thereby implicitly criticizing the Trial Chamber’s use of the term ‘motivated’ in relation with intent.

Following the same line, the *Krstić* Trial Chamber held that genocide embraces only acts ‘committed with the goal of destroying all or part of a group’.<sup>31</sup> It convicted Krstić for genocide; his intent to kill the ‘military-aged Bosnian Muslim men of Srebrenica’ was grounded on the finding that he was ‘undeniably [...] aware of the fatal impact’ that the killings would have on the community.<sup>32</sup> However, the Appeals Chamber, while reaffirming the ‘stringent requirement of specific intent’ in light of the seriousness of the genocide offence and explicitly rejecting a mere knowledge requirement,<sup>33</sup> overturned Krstić’s conviction for genocide. As it could not find the special intent in Krstić, but only his knowledge of the other perpetrators’ genocidal intent, it convicted him only for aiding and abetting genocide.<sup>34</sup> The *Sikirica* Trial Chamber dismissed straight away ‘an examination of theories of intent’, since it considered the special intent as a ‘relatively simple issue of interpretation’ and held further that the offence ‘expressly identifies and explains the intent that is needed’.<sup>35</sup> In substance, the Chamber followed the *Jelisić* Appeal Judgment’s ‘seeks to achieve’ standard.<sup>36</sup> The *Blagojević* and *Brdjanin* judgements also called for a goal-oriented approach<sup>37</sup> and rejected a mere knowledge requirement.<sup>38</sup>

In sum, the case-law’s approach is predicated on the understanding, as originally suggested by *Akayesu*, that ‘intent to destroy’ means a special or specific intent which, in essence, expresses the volitional element in its most intensive form and is purpose-based. This position is shared by other authorities. Thus the International Court of Justice (ICJ) also refers, citing the ICTY, to a ‘special or specific intent’ as an ‘extreme form of wilful and deliberate acts designed to destroy a group or part of a group’.<sup>39</sup> The Court of Bosnia-Herzegovina held in the Kravica cases involving genocide charges in connection with the events in Srebrenica that genocidal ‘intent can only be the result of a deliberate and

29 *Ibid*, para. 71.

30 *Ibid*, para. 71.

31 *Prosecutor v. Radislav Krstić*, Trial Judgement, Case No. IT-98-33-T, 2 August 2001, para. 571.

32 *Ibid*, para. 634.

33 *Prosecutor v. Radislav Krstić*, Appeal Judgement, Case No. IT-98-33-A, 19 April 2004, para. 134.

34 *Ibid*, paras 135ff.

35 *Prosecutor v. Dusko Sikirica*, Judgement on defence motions to acquit, Case No. IT-95-8-T, 3 September 2001, paras 58 and 59.

36 *Ibid*, para. 59, fn 165; for this standard see above note 24.

37 *Prosecutor v. Vidoje Blagojević and Dragan Jokic*, Trial Judgement, Case No. IT-02-60-T, 17 January 2005, para. 656 (‘destruction [...] must be the aim of the underlying crime.’); *Prosecutor v. Radoslav Brdjanin*, TJ, above note 9, para. 695.

38 *Prosecutor v. Vidoje Blagojević and Dragan Jokic*, TJ, above note 37, para. 656 (‘not sufficient that the perpetrator simply knew that the underlying crime would inevitably or likely result in the destruction of the group.’).

39 ICJ, *Case concerning the application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, 26 February 2007, para. 188 (citing *Prosecutor v. Zoran Kuprešić et al.*, above note 12, para. 636). See also ILC, above note 1, p. 88 (‘intention ... to destroy’).

conscious aim.<sup>40</sup> The Darfur Commission of Inquiry similarly speaks, on the one hand, of ‘an aggravated criminal intent, or *dolus specialis*’ that ‘implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction’ of a protected group. On the other hand, however, it requires in addition knowledge of the perpetrator ‘that his acts would destroy, in whole or in part, the group as such.’<sup>41</sup> Last but not least, in the *Al Bashir* Arrest Warrant Decision the ICC Pre-Trial Chamber I, while at least taking note of the ‘knowledge-based approach’, followed the traditional approach as to top-level perpetrators and denied genocidal intent.<sup>42</sup>

## Dissenting views in the doctrine

While a large part of the doctrine basically follows the case-law and interprets the intent to destroy in the sense of a special, ulterior intent,<sup>43</sup> some scholars have recently challenged this view.<sup>44</sup> In her fundamental work on the elements of

40 *Prosecutor v. Milos Stupar et al.*, First Instance Verdict, Case No. X-KR-05/24, 29 July 2008, p. 56; available at <http://www.sudbih.gov.ba/?opcija=predmeti&id=22&jezik=e> (visited 5 June 2009).

41 Darfur Report, above note 1, para. 491. The Commission ultimately rejects a genocidal intent, since it finds ‘more indicative elements’ that speak against it (*ibid.*, para. 513ff.), e.g. the selective killings (para. 513) and the imprisonment of survivors in camps where they received humanitarian assistance (para. 515). Thus it finds instead an ‘intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare’ (para. 518). For the same result see Andrew T. Cayley, ‘The Prosecutor’s strategy in seeking the arrest of Sudanese President Al Bashir on charges of genocide’, *JICJ*, vol. 6, no. 5, 2008, pp. 829–840, at pp. 837ff. For a critique on the Darfur Report’s findings, see M. Shaw, above note 14, p. 168ff. (essentially following Eric Reeves, ‘The report of the International Commission of Inquiry on Darfur: A critical analysis (Part I)’, *H-Genocide*, 2 February 2005).

42 *Prosecutor v. Omar Hassan Ahmad Al Bashir*, above note 1, para. 139–40 with fn. 154 following the ICJ’s position (above note 39) and stating (in fn. 154) that the ‘knowledge-based approach’ would only make a difference as to low- or mid-level perpetrators and is therefore not relevant for the ICC. The majority of the Chamber (Judge Ušacka dissenting) ultimately reject the genocide charge, arguing that from the evidence presented the existence of a specific genocidal intent ‘is not the only reasonable conclusion’ that can be drawn (*ibid.*, para. 202 ff., p. 205). Critique by Claus Kress, ‘The crime of genocide and contextual elements’, *JICJ*, vol. 7, no. 2, 2009, pp. 297–306, at p. 305. The App. Chamber reversed the decision with regard to genocide because of the (erroneous) standard of proof used by the Pre-Trial Ch. and directed it to decide anew whether an arrest warrant should be issued also with regard to that crime (ICC-02/05-01/09-OA, 3 Febr. 2010).

43 Antonio Cassese, *International Criminal Law*, 2nd edn, Oxford University Press, Oxford *et al.*, 2008, p. 137; Ntanda Nsereko, above note 10, pp. 117, 124; Payam Akhavan, ‘The crime of genocide in the ICTR jurisprudence’, *JICJ*, vol. 3, no. 4, 2005, pp. 989–1006, at p. 992; Elies van Sliedregt, above note 1, p. 191 ff.; David Nersessian, ‘The contours of genocidal intent’, *Texas International Law Journal*, no. 37, 2002, pp. 231–276, at p. 265; Jan Hübner, *Das Verbrechen des Völkermordes im internationalen und nationalen Recht*, Peter Lang, Frankfurt a.M. *et al.*, 2004, pp. 152 ff.; Johan D. Van de Vyver, ‘Prosecution and punishment of the crime of genocide’, *Fordham International Law Journal*, no. 23, 1999, pp. 286–356, at p. 308; Johan D. Van de Vyver, ‘The International Criminal Court and the concept of mens rea in international criminal law’, *University of Miami International and Comparative Law Review*, no. 12, 2004, pp. 57–149, at pp. 84 ff.; R. Arnold, above note 1, pp. 142, 150; W. Schabas, *Genocide in International Law*, Cambridge University Press, Cambridge, 2000, pp. 214 ff., 219, 221; Angela Paul, *Kritische Analyse und Reformvorschlag zu Art. II Genozidkonvention*, Springer, Berlin *et al.*, 2008, pp. 254, 257 (‘aimed at the physical destruction’); M. Shaw, above note 14, p. 82; Stefan Kirsch, ‘Two notions of genocide’, *Creighton Law Review*, no. 42, 2009, pp. 347–360, at p. 352.

44 Apart from the authors quoted in the text, Schabas, in the new edition thereof (above note 10), also now follows the knowledge-based approach, p. 252 f., 254 (‘An approach to the knowledge requirement that

genocide, Gil Gil takes the view that the concept of intention (*intención*) must be understood in a wider sense and encompasses the concept of *dolus eventualis*<sup>45</sup> or conditional intent.<sup>46</sup> She justifies this for genocide by invoking the parallels between its structure and that of attempt. Attempt, according to Gil Gil an inchoate crime, requires on the one hand general intent, including *dolus eventualis*, with regard to the *actus reus* of the attempted crime, and on the other hand unconditional will (*voluntad incondicionada*) or intention (*intención*) as a transcending subjective element (*elemento subjetivo trascendente*) with regard to the constituent acts of the offence and the criminal result.<sup>47</sup> As to these constituent acts, e.g. the killing of a member of the group in the case of genocide, *dolus eventualis* would be sufficient, combined however with intention in the sense of the unconditional will with regard to the remaining acts – i.e. the killing of other members of the group – necessary to bring about the final result of the crime, or at least knowledge of the co-perpetrators’ intention to that effect, and at the same time the presumption that the realization of these acts is possible. Otto Triffterer<sup>48</sup> arrives at the same result, allowing in principle for *dolus eventualis*, but his argument is based less on doctrinal than policy considerations. In essence, he argues that a literal and historical interpretation of the intent requirement is not conclusive, but that from a teleological perspective it makes no difference whether one acts with a special intent or only *dolus eventualis* with regard to the destruction of the group.<sup>49</sup> His position is mainly motivated by the difficulty to prove a special intent and hence to obtain convictions for genocide.<sup>50</sup>

Other writers have argued that the ‘intent to destroy’ encompasses the entire scope of direct intent, i.e. also includes positive knowledge (*dolus directus* of the second degree). Alexander Greenawalt makes the case for such a knowledge-based approach on the basis of a historical and literal interpretation of the intent concept in the Genocide Convention and in national (criminal) law, which he finds inconclusive, leading to ‘multiple interpretations’.<sup>51</sup> He argues that ‘principal

considers recklessness about the consequences of an act to be equivalent to full knowledge provides an answer to such an argument.’) and 264 (‘The knowledge-based approach, [...] whereby the mens rea of both perpetrator and accomplice is assessed not by their goal or purpose but by their knowledge of the plan or policy, avoids these difficulties.’).

45 On the continental concept of *dolus eventualis* that can be situated somewhere between purpose/knowledge and recklessness/negligence, see George P. Fletcher, *Basic Concepts of Criminal Law*, Oxford University Press, New York, 1998, p. 123; and Kai Ambos, ‘General principles of criminal law in the Rome Statute’, *CLF*, no. 10, 1999, p. 1 ff., at p. 21 with further references.

46 A. Gil Gil, *Derecho penal internacional*, above note 10, pp. 231 ff., 236 ff., 258, 259, with reference to her mentor Cerezo Mir in notes 124 and 127 and further references in note 136. See also, for a summary of her position, A. Gil Gil, ‘Tatbestände’, above note 10, p. 395.

47 A. Gil Gil, *Derecho penal internacional*, above note 10, p. 241.

48 O. Triffterer, ‘Genocide ...’, above note 1, pp. 403ff.

49 *Ibid.*, pp. 404–405. See also Otto Triffterer, ‘Can the “Elements of Crimes” narrow or broaden responsibility for criminal behavior defined in the Rome Statute?’, in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the ICC*, Martinus Nijhoff Publishers, Leiden *et al.*, 2009, pp. 381–400, at p. 390, where he argues that with regard to the context element (as defined in the Elements of Crimes, above note 85) ‘general intent’ would be sufficient.

50 O. Triffterer, ‘Genocide ...’, above note 1, pp. 405–406 (‘much more difficult to be proven ...’).

51 A. Greenawalt, above note 14, pp. 2265 ff. (2279).



culpability should extend to those who may lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions'.<sup>52</sup> In cases in which a 'perpetrator is otherwise liable' for genocide, the requirement for genocidal intent is fulfilled if that person 'acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group ...'.<sup>53</sup> Greenawalt's reading of the intent requirement of the Convention combines two elements: selection of group members based on their membership in the group, and knowledge of the destructive consequences of the respective conduct for the survival of the group.<sup>54</sup> Hans Vest follows the knowledge-based approach and develops it further, focusing on the twofold structure of genocidal intent.<sup>55</sup> According to Vest, this structure consists of the 'mixed individual-collective point of reference' of the intent: while the general intent refers to the individual acts (*Einzeltaten*) of the genocide definition, the 'intent to destroy' refers to the collective or broader action inherent in any genocide conduct,<sup>56</sup> i.e. to 'the overall conduct of the genocidal campaign and its consequences' (*Gesamttat*).<sup>57</sup> As to this 'collective' or 'contextual' intent, 'practical certainty' on the part of the perpetrator as to the genocidal consequence of the collective operation he is participating in suffices as an intent standard: 'the knowledge-based standard of genocidal intent is established when the perpetrator's knowledge of the consequences of the overall conduct reaches the *level of practical certainty*'.<sup>58</sup> In fact, John Jones had already earlier drawn a similar distinction between the intent as an attribute of the genocidal plan and of the individual participating in it.<sup>59</sup> He argued that the intent to destroy is (only) an attribute of the genocidal plan, whereas the individual participating in this plan only needs – as in the case of crimes against humanity – to possess intent with regard to the underlying acts (e.g. Art. 6 (a)–(e) of the ICC Statute) and knowledge with regard to the genocidal context. Claus Kress follows, in essence, this structure-based approach distinguishing between the 'collective level of genocidal activity' and the 'individual genocidal conduct'.<sup>60</sup> Accordingly, in the 'typical case' of

52 *Ibid*, pp. 2259, 2265.

53 *Ibid*, p. 2288 (emphasis added).

54 *Ibid*, p. 2289.

55 Hans Vest, 'A structure-based concept of genocidal intent', *JICJ*, vol. 5, no. 4, 2007, pp. 781–797, at pp. 790 ff. (793), originally *Genozid durch organisatorische Machtapparate*, Nomos, Baden-Baden, 2002, pp. 101 ff.; H. Vest, 'Humanitätsverbrechen: Herausforderung für das Individualstrafrecht?', *ZStW*, no. 113, 2001, pp. 457–498, at pp. 480 ff.

56 H. Vest, above note 54, 'A structure-based concept...', pp. 785–786, 789–790.

57 *Ibid*, p. 790.

58 *Ibid*, p. 793 (emphasis in the original).

59 John Jones, "'Whose intent is it anyway?'" Genocide and the intent to destroy a group', in L.C. Vorah *et al.* (eds), *Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese*, Kluwer Law International, The Hague, 2003, pp. 467–480, at pp. 468, 471, 473, 477, 479–480.

60 Claus Kress, 'The Darfur Report and genocidal intent', *JICJ*, vol. 3, no. 3, 2005, pp. 562–578, pp. 572 ff.; see also recently C. Kress, '§ 6 Völkermord', in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar zum Strafgesetzbuch*, vol. 6/2 *Nebenstrafrecht III/Völkerstrafgesetzbuch* (VStGB) (2009), § 6 VStGB, mn. 82ff., pp. 563–564; *ibid*, above note 74, pp. 304 ff. Essentially the same argument for the knowledge-based approach is made by A. Paul, above note 43, pp. 255 ff., especially referring to H. Vest

genocide the low-level perpetrator must, on the one hand (drawing a parallel with crimes against humanity), act with knowledge of the collective genocidal attack,<sup>61</sup> and on the other hand (following Gil Gil), with *dolus eventualis* as to the at least partial destruction of a protected group.<sup>62</sup>

## The structure- and knowledge-based approaches combined

### *The ambiguous meaning of the intent concept*

The knowledge-based approach rests on the premise that the concept of ‘intent’ is not limited to a pure volitional or purpose-based reading. This is correct. Greenawalt demonstrates convincingly that the historical and literal interpretation of the Genocide Convention is not conclusive in that regard.<sup>63</sup> As to a literal interpretation, the wording of Article 6 of the ICC Statute (modelled on Article 2 of the Genocide Convention) is by no means clear: while the French and Spanish versions of the ICC Statute’s Article 6 seem to suggest a volitional interpretation by employing a terminology which, *prima facie*, expresses purpose-based conduct (*l’intention de détruire*; *intención de destruir*), the English version (‘intent to destroy’) is already unclear in its wording since the meaning of ‘intent’ is ambiguous. While traditional common law knows specific intent crimes implying aim and purpose, e.g. burglary,<sup>64</sup> intent or intention was always understood in both a volitional and cognitive sense.<sup>65</sup> Modern English law still includes in the definition of intention, apart from purpose, ‘foresight of virtual certainty’; at best, the core meaning of intent or intention is reserved to desire, purpose etc.<sup>66</sup> In *R. v. Woollin* the House of Lords, with regard to a murder charge, defined intention by referring to ‘virtual certainty’ as to the consequence of the defendant’s

(p. 258) and suggesting a concrete reform proposal (pp. 273, 323–324). Also, Elise van Sliedregt, above note 1, at pp. 192–193, finds Kress’ approach ‘appealing’ but ultimately sticks to the ICTY/ICTR’s under-theorized view with the formal argument that it ‘cannot be ignored’. Following Claus Kress’ collective-individual distinction, see also S. Kirsch, above note 43, pp. 352 ff.

61 C. Kress, Darfur Report ..., above note 60, pp. 573 ff.

62 *Ibid.*, pp. 576–577.

63 Also correct in this regard, O. Triffterer, ‘Genocide ...’, above note 1, p. 404; see above note 47 and accompanying text.

64 Glanville Williams, *Criminal Law: The General Part*, Stevens, London, 1961, p. 34, but see also p. 49 where he says about the term ‘specific intent’ that the ‘adjective “specific” seems to be somewhat pointless, for the intent is no more specific than any other intent required in criminal law.’

65 See Glanville Williams, *The Mental Element in Crime*, Hebrew University, Jerusalem, 1965, p. 20: ‘Intention is a state of mind consisting of knowledge of any requisite circumstances plus desire that any requisite result shall follow from one’s conduct, or else of foresight that the result will certainly follow.’ See also George Fletcher, *Rethinking Criminal Law*, Little, Brown, Boston *et al.*, 1978, reprint 2000, p. 440, tracing this doctrinal tradition to the nineteenth-century utilitarian John Austin. Recently in this sense Mohamed Elewa Badar, ‘The mental element in the Rome Statute of the ICC: A commentary from a comparative criminal law perspective’, *Criminal Law Forum*, vol. 19, no. 3–4, 2008, pp. 473–518, at p. 479.

66 Andrew Ashworth, *Principles of Criminal Law*, Oxford University Press, Oxford, 6th edn, 2009, pp. 170 f. (171); Andrew Perry Simester and Robert Sullivan, *Criminal Law: Theory and Doctrine*, Hart, Oxford *et al.*, 3rd edn, 2007, p. 120 f. (121). In this sense also I. Kugler, above note 7, p. 4 ff., distinguishing between direct and oblique intention.

actions.<sup>67</sup> The International Criminal Court Act 2001 defines intention for the purpose of the crime of genocide in English law to include a person's awareness that a consequence will occur in the ordinary course of events.<sup>68</sup> Also, the US Model Penal Code, which served as a reference for the ICC Statute in many regards, albeit distinguishing between 'purpose' and 'knowledge' (section 2.02 (a)), defines the former in a cognitive sense by referring to the perpetrator's 'conscious object' with regard to conduct and result.<sup>69</sup>

However, in civil law jurisdictions, too, the distinction between purpose and knowledge and thus the meaning of 'intention' is not always clear-cut. In French law, the expression '*intention criminelle*' was introduced into the former Criminal Code (Article 435) by a legislative act on 2 April 1892 but never explicitly defined. The Code employed the expressions '*à dessein, volontairement, sciemment, frauduleusement, de mauvaise foi*' ('intentionally, voluntarily, knowingly, fraudulent and *mala fide*'). The new Criminal Code refers to criminal intent in Article 121–3 but does not define it either. The French judges seem to consider themselves – in the sense of Montesquieu's famous proverb – to be only the mouthpiece of the law ('*bouche de la loi*') and therefore also refrain from proposing a general definition of criminal intent.<sup>70</sup> In the scholarly literature 'intention' is defined in both a volitional sense<sup>71</sup> and a cognitive sense.<sup>72</sup> On this basis, a distinction between the volitional *dolus directus* and the cognitive *dolus indirectus* is drawn.<sup>73</sup>

In German and Spanish law, the *dolus directus* of first degree ('*dolus specialis*', '*intención*', '*Absicht*') is normally understood as expressing a strong volitional (will, desire) and a weak cognitive (knowledge, awareness) element.<sup>74</sup>

67 *R. v Woollin* [1999] 1 Cr App R 8, HL, at pp. 20–21 ('... the jury should be directed that they are not entitled to find the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions ...'). According to the Court of Appeal in *R v Matthews and Alleyne* [2003] 2 Cr App R 30, however, the jury is not obliged to find intention on the basis of foresight of virtual certainty (I am indebted to Professor Ian Dennis, who brought this to my attention). See also section 12 of the Judicial Studies Board, Specimen Directions, available at [www.jsboard.co.uk/criminal\\_law/cbb/index.htm](http://www.jsboard.co.uk/criminal_law/cbb/index.htm) (last consultation 1 February 2010).

68 International Criminal Court Act 2001 (UK) s 66(3) (I am indebted to Professor Ian Dennis, who brought this to my attention).

69 The respective part of section 2.02 (a) reads: 'A person acts purposely with respect to a material element of an offense when [...] if the element involves the nature of his conduct or a result thereof, it is his *conscious object* to engage in conduct of that nature or to cause such a result ...' (emphasis added). See also G. Fletcher, above note 65, pp. 440 ff.

70 Jacques Pradel, *Droit pénal général*, Cujas, Paris, 17th edn, 2008, p. 468.

71 Bernard Bouloc, *Droit pénal général et procédure pénale*, Sirey, Paris, 16th edn, 2006, p. 238: '*volonté tendue à dessein vers un but interdit par la loi pénale*' ('will that aims to realize an illegal goal').

72 Cf. Crim., 7 January 2003, Bulletin No. 1: '*la connaissance ou la conscience chez l'agent qu'il accomplit un acte illicite*' ('the agent's knowledge or awareness that he commits an illegal act'). See also Emile Garçon, Code pénal annoté, art. 1, no. 77; Roger Merle and André Vitu, *Traité de droit criminel*, vol. 1, Cujas, Paris, 7th edn, 1997, No. 579.

73 J. Pradel, above note 70, p. 463; Christiane Hennau-Hublet and Jacques Verhaegen, *Droit pénal général*, Bruylant, Brussels, 3rd edn, 2003, no. 350 ff.

74 Claus Roxin, *Strafrecht-Allgemeiner Teil. Grundlagen: Der Aufbau der Verbrechenslehre*, vol. 1, Beck, Munich, 4th edn, 2006, § 12 mn. 7 ff.; Santiago Mir Puig, *Derecho Penal Parte General*, Reppertor, Barcelona, 7th edn, 2006, p. 244, mn. 82–83.

*Dolus* in this sense means the desire to bring about the result or can be defined as a ‘purpose-bound will’.<sup>75</sup> Yet this apparently straightforward interpretation is by no means uncontroversial. In the Spanish doctrine, ‘*intención*’ is understood by an important part of the doctrine either as intent in a general sense (‘*dolus*’, ‘*dolo*’)<sup>76</sup> or as encompassing both forms of *dolus directus* (desire and knowledge).<sup>77</sup> In legal terminology even the German term ‘*Absicht*’, which in ordinary language possesses a clear volitional tendency, is not invariably understood in a purpose-based sense.<sup>78</sup> Apart from that, the ‘*Absicht*’ need not necessarily refer to all preconditions, transitional stages, intermediate goals or side-effects that are inevitably connected with the desired ultimate aim and are necessary steps to be taken on the way to this ultimate aim (e.g. the destruction of a group). Such inevitable, closely interconnected side-effects or intermediate steps are encompassed by the ‘*Absicht*’ if the perpetrator knows with virtual certainty of their occurrence.<sup>79</sup> On the other hand, the perpetrator may desire or wish the destruction of the group only as an intermediate goal, as a means to a further end.<sup>80</sup> He may, for example, pursue the final aim of a military occupation of a region populated by the affected group and, in order to reach this final goal, kill or deport members of the respective group with intent to destroy it. While in this case this intermediate goal would still be part of the main consequences brought about by the perpetrator’s acts and as such would be willingly, intentionally produced on the way to the final goal, the situation would be different if the destruction of the group would only be an unwelcome side-effect of the perpetrator’s acts to gain final control of the respective region, i.e. it would not be part of the main consequences as envisaged by the perpetrator but only an unfortunate, subsidiary collateral consequence.<sup>81</sup>

From these considerations, it quite clearly follows that a literal interpretation of the term ‘intent’ does not indicate any clear preference for a purpose- or knowledge-based approach.<sup>82</sup> To be sure, genocide requires a general ‘intent to destroy’, not a ‘special’ or ‘specific’ intent in the sense of a ‘*dolus specialis*’. While the ‘intent to destroy’ may be understood as an ulterior intent in the sense of the

75 Mohamed Elewa Badar, ‘*Mens rea* – Mistake of law & mistake of fact in German criminal law: A survey for international criminal tribunals’, *International Criminal Law Review (ICLR)*, no. 5, 2005, pp. 203–246, at p. 222.

76 Cf. Jose Cerezo Mir, *Curso de Derecho penal español, Parte General II: Teoría jurídica del delito*, Tecnos, Madrid, 1998, p. 153; A. Gil Gil, as quoted in above note 10 with further references.

77 Cf. D.M. Luzon Peña, *Curso de Derecho penal: parte general*, Editorial Universitas, Madrid, 2004, p. 416.

78 See generally Klaus Gehrig, *Der Absichtsbegriff in den Straftatbeständen des Besonderen Teils des StGB*, Duncker & Humblot, Berlin, 1986, *passim* (on German law); Beatrice Gukelberger, *Die Absichtsdelikte des Schweizerischen Strafgesetzbuches*, Herbert Lang & Cie, Berne, 1968, pp. 20 ff. (on Swiss law).

79 See H. Vest, ‘A structure-based concept ...’, above note 55, p. 788 with references in fn. 20.

80 Helmut Gropengiesser, ‘The criminal law of genocide. The German perspective’, *ICLR*, no. 5, 2005, pp. 329–342, at p. 339. Generally on this possibility, see I. Kugler, above note 7, p. 4.

81 See generally on the relationship between an intermediate goal and specific intent Wolfgang Joecks, in Joecks and Klaus Miebach, *Münchener Kommentar Strafgesetzbuch*, Beck, Munich, 2003, § 16 mn. 12; C. Roxin, above note 74, § 12 mn. 10 ff.; Kristian Kühl, *Strafrecht Allgemeiner Teil*, Vahlen, Munich, 6th edn, 2008, § 5 mn. 35.

82 For the same view see Claus Kress, Darfur Report ..., above note 60, p. 567 ff. (570, 572); *ibid*, above note 60, mn. 83.

double intent structure of genocide explained at the beginning of this paper,<sup>83</sup> it is quite another matter to give this requirement a purpose-based meaning by reading into the offence definition the qualifier ‘special’ or ‘specific’. Even if this qualifier were part of the offence definition, it does not necessarily refer to the degree or intensity of the intent;<sup>84</sup> instead it may also be interpreted, as opposed to ‘general’ intent, in the sense of the double intent structure, i.e. it would merely clarify that the ‘special’ intent to destroy must be distinguished from the ‘general’ intent referring to the underlying acts.<sup>85</sup>

### *A twofold solution distinguishing between low-level and mid-/high-level perpetrators*

If one accepts the above conclusion, i.e. that a literal reading of the intent concept does not unambiguously determine the meaning of the ‘intent to destroy’, a solution must be sought in a systematic and teleological interpretation of this requirement. Clearly, such an interpretation must not, in conformity with the *nullum crimen* principle (principle of strict construction and prohibition of analogy, ICC Statute, Article 22(2)),<sup>86</sup> extend beyond the boundaries set by the letter of the (criminal) law, but if these boundaries are not precisely determined, as demonstrated in the preceding section, the recourse to other methods of interpretation is not only legitimate but also necessary.

Such an interpretation must start, systematically, from the structure-based approach as developed by Vest and Kress. This approach rests on the distinction between the general intent with regard to the individual acts (*Einzelthaten*) and the ‘intent to destroy’ with regard to the collective genocidal action (*Gesamtthat*).<sup>87</sup> Both forms of intent encompass the *mens rea* of the genocide offence but a distinction must, as explained at the beginning of this paper, be made between them. The – here relevant – (additional) ‘intent to destroy’ refers to the collective genocidal action and thus encapsulates the context element of the crime of genocide. In other words, while the objective offence definition lacks – contrary to the definition in the ICC’s Elements of Crimes<sup>88</sup> – a context

83 Note 4 above and main text.

84 This is, however, the prevailing view in the general criminal law doctrine as to the meaning of ‘specific intent’, see e.g. Fiandaca Musco, *Diritto Penale, parte generale*, Zanichelli, Bologna, 5th edn, 2008, p. 328 ff.

85 In this sense also O. Triffterer, ‘Überlegungen’, above note 1, pp. 1423, 1438 ff.

86 For a discussion of this principle in international criminal law, see Kai Ambos, ‘Nulla poena sine lege in international criminal law’, in Roelof Haveman and Olaoluwa Olusanya (eds), *Sentencing and Sanctioning in Supranational Criminal Law*, Intersentia, Antwerp et al., 2006, p. 17 ff.

87 The *Krstic* Trial Chamber, albeit not with the necessary precision, also distinguished, on the one hand, between the ‘individual intent’ and ‘the intent involved in the conception and commission of the crime’ and, on the other hand, between the ‘intent to destroy’ and the ‘intent of particular perpetrators’. (See *Prosecutor v. Radislav Krstic*, T. Ch., above note 31, para. 549; also referred to by H. Vest, p. 794 with fn. 47, and C. Kress, above note 60, p. 573 with fn 45).

88 See the last Element (no. 4 or 5) to each act requiring that ‘[T]he conduct took place in the context of a manifest pattern of similar conduct ...’ (Preparatory Commission for the ICC, Addendum, Part II. Finalized draft text of the Elements of Crimes. PCNICC/2000/1/Add. 2, 2 November 2000).

element,<sup>89</sup> this element becomes part of the (subjective) offence definition by means of the ‘intent to destroy’ requirement as its ‘carrier’.<sup>90</sup> Turning to the teleological interpretation, the crucial question then goes to the rationale of the ‘intent to destroy’ requirement. As has already been said at the beginning of this paper, the main purpose of this requirement is to distinguish genocide from other crimes, especially ‘general’ crimes against humanity. This purpose, however, does not predetermine the concrete meaning or contents of this requirement. In fact, while this special requirement turns genocide into a special crime against humanity, i.e. a crime directed not only against individuals but against a group as such, it fulfils this function independent of its either purpose- or knowledge-based meaning. In other words the status of genocide as the ‘crime of crimes’, characterized by a special degree of wrongfulness, is not predicated on an either purpose- or knowledge-based reading of the ‘intent to destroy’ element<sup>91</sup> but on its specificity in protecting certain groups from attacks and ultimately destruction.<sup>92</sup>

Against this background it is now possible to suggest a twofold solution distinguishing between low-level and mid-/high-level perpetrators.<sup>93</sup> As to the former, i.e. the easily interchangeable ‘foot soldiers’ of a genocidal campaign who normally lack the means to destroy a group on their own,<sup>94</sup> it is neither necessary nor realistic to expect that they will always act with the purpose or desire to destroy. Indeed, it is possible to think of a collective genocidal campaign without any or only some individual (low-level) perpetrators acting with a destructive purpose or desire.<sup>95</sup> In fact, as these individuals cannot, on their own, contribute in any meaningful way to the ultimate destruction of a group, they cannot express any meaningful, act-oriented will either as to the overall result. It should thus suffice for genocide liability if these perpetrators act with knowledge, i.e. know that they

89 See Kai Ambos, *Internationales Strafrecht*, Beck, Munich, 2nd edn, 2008, § 7 mn. 145. Against a context element for this reason, see also O. Triffterer, ‘Genocide ...’, above note 1, p. 407.

90 Cf. D. Demko, above note 13, pp. 228–229. Similarly, for C. Kress (above note 42, pp. 304–305) the context element of the Elements (above note 88) constitutes the point of reference of genocidal intent (conc. S. Kirsch, above note 43, pp. 354–355). In any case, the context element must not be understood as a requirement of a genocidal plan or policy but the relevant conduct must only occur against the background of a ‘manifest pattern of similar conduct’ (cf. R. Cryer, above note 1, p. 291).

91 For a purpose-based interpretation, however, which is the prevailing view in the German doctrine, see e.g. C. Roxin, above note 74, § 10, mn. 74, § 12 mn. 15, discussing the respective provision in the German law (previously § 220a of the German Criminal Code [Strafgesetzbuch], now § 6 VStGB). For an apparently different view, see O. Triffterer, ‘Genocide ...’, above note 1, pp. 404–405, who does not, however, really discuss the teleological argument.

92 In the same vein C. Kress, *Darfur Report ...*, above note 60, p. 576.

93 For a similar, albeit not further elaborated ‘differential approach’ see also Harmen Van der Wilt, ‘Genocide, complicity in genocide and international v. domestic jurisdiction’, *JICJ*, vol. 4, no. 2, 2006, pp. 239–257, at pp. 243 ff. A similar distinction was already made by Nina H.B. Jorgensen, ‘The definition of genocide: Joining the dots in the light of recent practice’, *ICLR*, vol. 1, no. 3–4, 2001, pp. 285–313, at p. 309. For a much more sophisticated typology of perpetrators of international crimes that also may be applied to genocide, see Alette Smeulders, ‘Perpetrators of international crimes: Towards a typology’, in A. Smeulders and R. Haveman, *Supranational Criminology: Towards a Criminology of International Crimes*, Intersentia, Antwerp et al., 2008, pp. 233–266, at p. 240 ff.

94 C. Kress, *Darfur Report ...*, above note 60, p. 577 with note 61, speaks in this regard of ‘the typical case’.

95 See H. Vest, *Humanitätsverbrechen*, above note 55, at p. 486; concurring C. Kress, *Darfur Report ...*, above note 60, p. 573.

are a part of a genocidal campaign and thus contribute to the materialization of the *collective* intent to destroy.<sup>96</sup> In other words, a defendant who is a low-level operative must at least know that the masterminds of the genocidal campaign are acting with a genocidal intent construed in the narrow sense.

There are at least four arguments in support of this approach. First of all, the incorporation of a context element in the offence definition by way of its special subject requirement corresponds to the criminological reality of genocidal conduct and campaigns, i.e. that a genocide cannot be committed by a few crazy individuals alone but needs intellectual masterminds and an organizational apparatus to implement their evil plans.<sup>97</sup> Second, in terms of their overall contribution to the genocidal campaign these low-level perpetrators are, albeit carrying out the underlying genocidal acts with their own hands, only secondary participants, thus more precisely aides or assistants.<sup>98</sup> In other words, while they are the direct executors of the genocidal plan and therefore should be convicted as such (i.e. as principals) their executive acts receive only their full 'genocidal meaning' because a plan exists in the first place. As the executors were not involved in designing this plan but are, in a normative sense, only used as mere instruments to implement it, they are not required, even according to the mainstream view held in the case-law and doctrine of international criminal law, to possess the destructive special intent themselves but only to know of its existence. Admittedly, this may be different in cases of a 'spontaneous' genocide if one assumes, *arguendo* and against our first argument, that such cases may exist. Yet the direct perpetrators will then possess the special intent themselves anyway and thus fulfil the subjective requirements for being a principal to genocide. Third, although there is, as explained above, a structural difference between genocide and crimes against humanity in terms of the scope of protection, the former has developed out of the

96 The underlying distinction was recognized in a first draft of the ICC Elements of Crime, see the last element (no. 3 or 4) to each underlying act, here 'Genocide by killing': 'The accused knew [...] that the conduct would destroy [...] such group ...' (Preparatory Commission for the International Criminal Court, Addendum, Annex III, Elements of Crimes, PCNICC/1999/L.5/Rev. 1/Add. 2, 22 December 1999), but the final version retained only the (special) intent requirement (see Elements of Crime, above note 85, art. 6, third element in each case). M. Shaw, above note 14, p. 86 ff. recognizes the organized form of genocide but is critical of the idea of a collective intention. In substance he follows Max Weber's approach of an action-centred sociology with its respective theoretical framework ('Genocidists invariably have multiple goals and deviate from their rationalistic pursuit. The ideal-typical concept of "rational", "intentional" genocide can be no more than a heuristic tool enabling us to grasp the complexity of real cases.', *ibid.*, p. 88).

97 Cf. *Prosecutor v. Krstić*, T. Ch., above note 31, para. 549 ('The gravity and scale of the crime of genocide ordinarily presume that several protagonists were involved in its perpetration'). See also W. Schabas, above note 10, p. 243 f., at p. 243 (a 'knowledge-based' approach highlights 'the collective dimension of the crime of genocide'), at p. 244 ('genocide presents itself as the archetypical crime of State, requiring organization and planning'); M. Shaw, above note 14, p. 82 ('Genocide has been seen legally as an organized, not a spontaneous, crime; it could not be committed by an individual acting alone.'). I have elaborated on the criminological reality of genocide in my paper 'Criminologically explained reality of genocide, structure of the offence and the intent to destroy requirement', to be published in Alette Smeulers and Elies van Sliedregt (eds), *Collective violence and international criminal justice: An interdisciplinary approach*, Intersentia, Antwerp *et al.*, 2010.

98 For a similar complicity approach, see also C. Kress, *Darfur Report ...*, above note 60, pp. 574–575.

latter<sup>99</sup> and remains in essence a (special) crime against humanity.<sup>100</sup> This ‘structural congruity’<sup>101</sup> justifies construing genocide structurally as a crime against humanity with regard to the ‘knowledge-of-the-attack’ requirement of such crimes (ICC Statute, Article 7). Fourth, in terms of the direct perpetrator’s (hostile) attitude towards the group, it makes no difference whether he acts himself with purpose or knowledge of the overall genocidal purpose.<sup>102</sup> He may even act with a kind of indirect purpose by not distancing himself completely from the overall genocidal purpose. In all these cases the low-level perpetrator expresses his contempt for the respective group and takes a clear decision against the legal interest protected by the genocide offence provisions.

This all means that, apart from the general intent with regard to the underlying acts, a simple, low-level perpetrator must (only) act with knowledge of the respective context required by genocide and crimes against humanity to be held liable for such crimes. He may also possess a purpose-based intent, for example in the case of a ‘spontaneous’ genocide, but this is not a prerequisite for his (subjective) liability. The context serves in both cases as the reference point for the perpetrators’ knowledge, i.e. the knowledge need not concern the ultimate destruction of the group in the future – indeed, this is only a future expectation which as such cannot be known but only hoped or desired<sup>103</sup> – but only the overall genocidal context. As to genocide, this means that the low-level perpetrator participates in an overall genocidal plan or enterprise, i.e. his individual acts constitute, together with the acts of the other low-level perpetrators, the realization of the genocidal will or purpose represented by the leaders or mastermind of the enterprise. The existence of the enterprise interconnects the acts of the low-level perpetrators and, at the same time, links them to the mastermind’s will, i.e. both the acts of the subordinate and the thoughts of the superiors complement each other.

From this it follows that the purpose-based approach must be upheld for the *top-level perpetrators*, i.e. the intellectual and factual leaders of the genocidal enterprise. They are the brains of the genocidal operation and have the power to get

99 On the origins of the legal prohibition of genocide, see W. Schabas, above note 10, p. 17 ff.; see also *ibid.*, p. 59 ff., on the Genocide Convention and the subsequent normative development.

100 J. Jones, above note 59, p. 479; C. Kress, Darfur Report ..., above note 60, pp. 575–576. Stressing the distinction between genocide and crimes against humanity but still recognizing their affinity, W. Schabas, above note 10, pp. 11, 13 ff., at p. 15 (‘genocide stands to crimes against humanity as premeditated murder stands to intentional homicide. Genocide deserves its title as the “crime of crimes”.’).

101 C. Kress, Darfur Report ..., above note 60, pp. 575–576; *ibid.*, Münchner Kommentar ..., above note 60, mn. 87; C. Kress, above note 42, p. 301.

102 See also A. Paul, above note 60, p. 259 ff., with further references.

103 For a fundamental analysis of knowledge with regard to risks caused by an act and mere wishes, hopes or desires with regard to future results, see Wolfgang Frisch, *Vorsatz und Risiko: Grundfragen des tatbestandsmäßigen Verhaltens und des Vorsatzes. Zugleich ein Beitrag zur Behandlung außertatbestandlicher Möglichkeitsvorstellungen*. Heymann, Cologne *et al.*, 1983, pp. 222 ff. See also O. Triffterer, ‘Genocide ...’, above note 1, p. 406, admitting that the ‘particular intent is directed towards the realization of the expectations of the perpetrator in the future’ but failing to acknowledge that these future expectations can only be desired or wanted, i.e. be the object of hope but not of certainty or knowledge.



it going in the first place. They are the ones who can and must act with the ulterior intent which is, as explained at the beginning of this paper, characteristic of the crime of genocide and turns it into a goal-oriented crime. Who, if not the top-level perpetrators, can realistically possess the ulterior intent directed at the ultimate destruction of a protected group? The harder question is what requirements to set with regard to the *mid-level perpetrators*, i.e. those people who, like Adolf Eichmann, have an important organizational or administrative function without which the genocidal campaign could not have been implemented. These people must act on purpose, since they do not execute the underlying acts – as do the low-level perpetrators – but are rather intellectual perpetrators and are therefore to be compared to the top-level perpetrators. They can thus only be qualified as genocidaire if they share the top perpetrators' purpose-based intent.

The differentiation between top-/mid-level and low-level perpetrators according to their status and role in the genocidal enterprise is also convincing from a policy perspective. By retaining the requirement of a purpose-based intent with regard to the former, it avoids the arbitrary expansion and politicization of the genocide offence down a slippery slope that ultimately leads to the classification of 'ordinary' crimes against humanity as genocide,<sup>104</sup> thereby devaluating the abhorrent character of the latter. In this sense the purpose-based approach has an important function in operating as a 'preventative bulwark',<sup>105</sup> for the discriminatory selection and targeted persecution alone of people or even members of a group do not, contrary to what an *absolute* knowledge-based approach suggests,<sup>106</sup> constitute genocide but 'only' persecutions as a crime against humanity.

In the case of low-level perpetrators, the combined structure- and knowledge-based approach suggested here opts for a knowledge-based reading of the 'intent to destroy' requirement, with the *genocidal context as the point of reference* for that intent. In that respect a lower mental standard, e.g. *dolus eventualis* or even recklessness,<sup>107</sup> cannot be admitted, since it would radically change the character of the genocide offence in terms of its wrongfulness and particularity vis-à-vis crimes against humanity. Also, the argument of the parallel structures of attempt and genocide, as submitted by Gil Gil in support of *dolus eventualis*,<sup>108</sup> is not cogent: while it can be argued that the *actus reus* of genocide is structurally identical to that of an attempt crime, this does not mean that it must have the same subjective requirements. On the contrary, an attempt crime does not necessarily contain a special subjective element that is in any way comparable to the intent to destroy. Furthermore, recognizing a *dolus eventualis* with regard to the genocidal context would be incompatible with the suggested structural congruity between genocide

104 The distinction is also emphasized by *Prosecutor v. Jean-Paul Akayesu*, TJ, above note 15, para. 469.

105 See in the same vein Nikolas Kajković, 'The politics of the ICJ Genocide case and its interpretation', *LJIL*, vol. 21, issue 4, December 2008, pp. 885–910, at p. 904.

106 A. Greenawalt, above note 14, pp. 2287–2288 and 2293–2294 (stressing the threat to the survival of the group).

107 Against *dolus eventualis*, also A. Paul, above note 60, pp. 262–263.

108 See above note 44 and main text.

and crimes against humanity. For if this congruity allows on the one hand for a knowledge-based approach with regard to genocide liability of low-level perpetrators – drawing on the knowledge-of-the-attack requirement in crimes against humanity – this standard constitutes on the other hand a minimum that would be undermined by a lower standard, such as *dolus eventualis*, as to the context element.

However, the interpretation of the ‘intent to destroy’ *with regard to the ultimate destruction* of the group in the future is a different matter. As has been argued above, such a future expectation cannot be known but only hoped for or desired.<sup>109</sup> Take for example the case of a soldier who knowingly participates in the destruction of a certain ethnic group, i.e. satisfies the knowledge-based interpretation as to the genocidal context, but only acts with indifference as to the group’s ultimate destruction, i.e. with *dolus eventualis*.<sup>110</sup> It would not make sense to require knowledge of this soldier as to their ultimate destruction since he simply cannot possess this knowledge. With regard to this future event he can only act with purpose or desire, i.e. with *dolus directus* in the first degree. Admittedly, he may also take it into account as a possibility or even approve in the sense of *dolus eventualis*,<sup>111</sup> but to allow for *dolus eventualis* would not only be inconsistent with the interpretation of the terms ‘*intent*’, ‘*intention*’, ‘*intención*’ or ‘*Absicht*’ as defended above<sup>112</sup> but would also constitute a forbidden analogy at the expense of the accused and therefore violate the *nullum crimen* principle.<sup>113</sup> Thus if any mental state as to the ultimate destruction is required at all, it must be a purpose-based state of mind.

## Consequences of the combined structure- and knowledge-based approach for other forms of participation in genocide

### The case-law

While the case-law, as shown above, requires a purpose-based intent for any form of perpetration in genocide, it is not completely clear whether participants other

109 Note 100 above, and main text.

110 Cf. A. Gil Gil, *Derecho penal internacional*, above note 10, pp. 262–263 and 261 ff. for further examples.

111 See also C. Kress, Darfur Report ..., above note 60, p. 577, considering it ‘more realistic’ to require *dolus eventualis* instead of positive knowledge with regard to the effective destruction of the group.

112 Referring to notes 61 ff above and main text.

113 Apart from that, it is highly controversial whether existing international criminal law as codified in the ICC Statute does recognize *dolus eventualis* as a separate type of intent at all. In my view (K. Ambos, above note 86, § 7 mn. 67 with further references), this is not the case since the perpetrator acting with this type of intent is not aware, as required by Article 30(2)(b) of the ICC Statute, that a certain result or consequence will occur in the ordinary course of events. This awareness standard would only then correspond to *dolus eventualis* if one interpreted this concept in line with some cognitive theories which raise the *dolus eventualis* threshold to probability as to the occurrence of the respective consequence (see C. Roxin, above note 74, § 12 mn. 45–46; now also against the inclusion, ICC, Pre-Trial Chamber II, *Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Decision pursuant to Art. 61(7)(a) and (b) of the Rome Statute etc., 15 June 2009, ICC-01/05-01/08, paras. 360 ff.; for a comment see Kai Ambos, ‘Critical issues in the Bemba confirmation decision’, *LJIL*, vol. 22, issue 4, December 2009, pp. 715–726, at p. 718). In any case, this is not relevant if one considers that the ‘unless otherwise provided’ formula in Article 30 allows for different (higher or lower) mental standards in the offence definitions.

than the direct perpetrator must also act with this kind of intent. As to *complicity*, the *Akayesu* Trial Chamber held that an accomplice to genocide in the sense of Article 2(3)(e) of the ICTR Statute need not necessarily possess the *dolus specialis* himself<sup>114</sup> but must only know or have reason to know that the principal acted with the specific intent,<sup>115</sup> because accomplice liability is accessory to principal liability:

‘[C]omplicity is borrowed criminality (criminalité d’emprunt). In other words, the accomplice borrows the criminality of the principal perpetrator. By borrowed criminality, it should be understood that the physical act which constitutes the act of complicity does not have its own inherent criminality, but rather it borrows the criminality of the act committed by the principal perpetrator of the criminal enterprise. Thus, the conduct of the accomplice emerges as a crime when the crime has been consummated by the principal perpetrator. The accomplice has not committed an autonomous crime, but has merely facilitated the criminal enterprise committed by another.’<sup>116</sup>

Surprisingly, however, the *Akayesu* Chamber demanded the proof of special intent where a person is accused of aiding and abetting, planning, preparing or executing genocide in the sense of Article 6(1) of the ICTR Statute,<sup>117</sup> i.e. it rejected the specific intent requirement in favour of the special genocide complicity but demanded it for the general forms of secondary participation. This inconsistency was rightly dismissed by the *Musema* Trial Chamber, which held that complicity in genocide – independent of its legal basis and form – requires only knowledge of the genocidal intent.<sup>118</sup> As to aiding and abetting the Chamber, thus far following the *Akayesu* Chamber,<sup>119</sup> considered even possible knowledge, i.e. culpable ignorance (‘had reason to know’), as sufficient.<sup>120</sup> While the correct intent requirement for complicity is open to discussion, it does not make sense to distinguish between complicity in the sense of Article 2(3)(e) and Article 6(1) of the ICTR Statute. It was therefore correctly held by the *Krstić* Appeals Chamber that the general participation provision of Article 7(1) of the ICTY Statute should be read into the special genocide provision of the ICTY Statute’s Article 4(3)(e), leading to a common form of ‘aiding and abetting genocide’.<sup>121</sup> As a result, the case-law unanimously takes the view that an aider and abetter need not himself possess the specific intent, but only be aware of such an underlying intent.<sup>122</sup>

114 *Prosecutor v. Jean-Paul Akayesu*, TJ, above note 15, para. 540, 545, 548.

115 *Ibid.*, para. 541.

116 *Ibid.*, para. 528.

117 *Ibid.*, para. 546.

118 *Prosecutor v. Alfred Musema*, TJ, above note 15, para. 181 ff.

119 *Prosecutor v. Jean-Paul Akayesu*, TJ, above note 15, para. 541.

120 *Prosecutor v. Alfred Musema*, TJ, above note 15, para. 182.

121 *Prosecutor v. Radislav Krstić*, AJ, above note 33, paras 138–139. See also *Prosecutor v. Milomir Stakić*, TJ, above note 8, para. 531; *Prosecutor v. Laurent Semanza*, Trial Judgement and Sentence, Case No. ICTR-97-20-T, 15 May 2003, para. 394; *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, TJ, above note 37, para. 679.

122 ICTY: *Prosecutor v. Radislav Krstić*, AJ, above note 33, para. 140; *Prosecutor v. Dusko Tadić*, AJ, above note 25, para. 229; *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, TJ, above note 37, para. 782; Appeal

As to *incitement* to commit genocide, the *Akayesu* Trial Chamber called for a specific intent as regards incitement within the meaning of Article 2(3)(c) of the ICTR Statute:

‘The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.’<sup>123</sup>

This was confirmed by other ICTR judgements.<sup>124</sup> There is no reason to hold otherwise for ‘instigation’ as a form of (secondary) participation within the meaning of the ICTR Statute’s Article 6(1) if one considers with the Appeals Chamber, on the basis of the French version of the Statute (*‘incitation’*), that this is to be understood synonymously to ‘incitement’.<sup>125</sup>

Similarly, the *Musema* Trial Chamber made the case for specific intent in the case of *conspiracy* to commit genocide:

‘With respect to the *mens rea* of the crime of conspiracy to commit genocide, the Chamber notes that it rests on the concerted intent to commit genocide that is to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. Thus, it is the view of the Chamber that the requisite intent for the crime of conspiracy to commit genocide is, *ipso facto*, the intent required for the crime of genocide, that is the *dolus specialis* of genocide.’<sup>126</sup>

Judgement, Case No. IT-02-60-A, 9 May 2007, para. 127; *Prosecutor v. Radoslav Brdjanin*, TJ, above note 9, para. 730; *Prosecutor v. Radoslav Brdjanin*, Decision on Motion for Acquittal pursuant to Rule 98 bis, Case No. IT-99-36-T, 8 November 2003, para. 66; *Prosecutor v. Radoslav Brdjanin*, Decision on Interlocutory Appeal, Case No. IT-99-36-A, 19 March 2004, para. 7. According to *Prosecutor v. Milorad Krnojelac*, Appeal Judgement, Case No. IT-97-25-A, 17 September 2003, para. 52 concerning the crime of persecution: ‘... the aider and abettor in persecution, an offence with a specific intent, must be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime. He need not share the intent but he must be aware of the discriminatory context in which the crime is to be committed ...’ See also *Prosecutor v. Mitar Vasiljević*, Appeal Judgement, Case No. IT-98-32-A, 25 February 2004, para. 142. ICTR: *Prosecutor v. Ignace Bagilishema*, TJ, above note 15, para. 71; *Prosecutor v. Gérard Ntakirutimana et al.*, Appeal Judgment, Case No. ICTR-96-10-A and ICTR-96-17-A, 13 December 2004, para. 500; *Prosecutor v. Laurent Semanza*, TJ, above note 121, paras 394–395; *Prosecutor v. Athanase Seromba*, Appeal Judgement, Case No. ICTR-2001-66-A, 12 March 2008, para. 56.

123 *Prosecutor v. Jean-Paul Akayesu*, TJ, above note 15, para. 560.

124 Cf. *Prosecutor v. Georges Ruggiu*, Trial Judgement, Case No. ICTR-97-32-I, 1 June 2000, para. 14; *Prosecutor v. Ferdinand Nahimana*, Trial Judgement, Case No. ICTR-99-52-T, 3 December 2003, para. 1012.

125 *Prosecutor v. Jean-Paul Akayesu*, Appeal Judgement, Case No. ICTR-96-4-A, 1 June 2001, para. 474 ff.

126 *Prosecutor v. Alfred Musema*, TJ, above note 15, para. 192.

As to Joint Criminal Enterprise (JCE), it is uncontroversial that all participants in a JCE I must ‘share’ the (specific) intent of the respective offence,<sup>127</sup> but the standard for a JCE III is controversial.<sup>128</sup> The *Stakić* Trial Chamber took a strict doctrinal stance:

‘... the application of a mode of liability can not replace a core element of a crime. [...] Conflating the third variant of joint criminal enterprise and the crime of genocide would result in the *dolus specialis* being so watered down that it is extinguished. Thus, the Trial Chamber finds that in order to “commit” genocide, the elements of that crime, including the *dolus specialis* must be met. The notions of “escalation” to genocide, or genocide as a “natural and foreseeable consequence” of an enterprise not aimed specifically at genocide are not compatible with the definition of genocide under Art. 4(3)(a).’<sup>129</sup>

Yet this position did not meet with the approval of the Appeals Chamber. It held in *Brdjanin* that JCE III is, ‘as a mode of liability’, not ‘different from other forms of criminal liability which do not require proof of intent’.<sup>130</sup> Consequently, a member of a JCE III may be convicted for genocide if it was reasonably foreseeable for him that one of the objective acts of the genocide offence would be committed and that it would be committed with genocidal intent.<sup>131</sup>

Still more confusing is the situation in the case of superior responsibility. While the *Stakić* Trial Chamber held that the superior needs to possess the requisite specific intent,<sup>132</sup> the *Brdjanin* Appeals Chamber saw no

‘inherent reason why, having verified that it [superior responsibility] applies to genocide, Article 7(3) should apply differently to the crime of genocide than to any other crime in the Statute. [...] In the case of genocide, this implies that the superior must have known or had reason to know of his or her subordinate’s specific intent. [...] [S]uperior criminal responsibility is a form of criminal liability that does not require proof of intent to commit a crime on the part of a superior [...]’<sup>133</sup>

127 See recently *Prosecutor v. Milan Milutinovic et al.*, Judgement TC III, IT-05-87-T, 26 February 2009, para. 109.

128 On the three forms of JCE as developed by the *Tadic* Appeals Chamber (Judgement of 15 July 1999, IT-94-1, para. 185 ff.) see Kai Ambos, ‘Joint Criminal Enterprise and Command Responsibility’, *JICJ*, vol. 5, no. 1, March 2007, pp. 159–183. While JCE I and its variant JCE II are similar to a form of co-perpetration (without the requirement of an essential contribution) JCE III serves to impute excessive acts to all members of a JCE if these are only foreseeable to these other members.

129 *Prosecutor v. Milomir Stakić*, TJ, above note 8, para. 530 and 558. See also *Prosecutor v. Milomir Stakić*, Decision on Rule 98 bis Motion for Judgement of Acquittal, Case No. IT-97-24-T, 31 October 2002, para. 93; *Prosecutor v. Radoslav Brdjanin*, Dec. TC, above note 122, para. 57.

130 *Prosecutor v. Radoslav Brdjanin*, Dec. AC, above note 122, para. 7. See also *Prosecutor v. Milomir Stakić*, Appeal Judgement, Case No. IT-97-24-A, 22 March 2006, para. 38.

131 *Prosecutor v. Radoslav Brdjanin*, TJ, above note 9, para. 709; *Prosecutor v. Slobodan Milošević*, Decision on Motion for Judgement of Acquittal, Case No. IT-02-54, 16 June 2004, para. 291, 292, 300; conc. Cayley, above note 41, p. 839.

132 *Prosecutor v. Milomir Stakić*, Decision 98 bis, above note 129, para. 92.

133 *Prosecutor v. Radoslav Brdjanin*, AC, above note 122, para. 7; see also *Prosecutor v. Brdjanin*, TJ, above note 9, para. 720.

Thus while (only) the subordinates need to possess the specific intent, the superior does not<sup>134</sup> and the case-law turns, in fact, a specific intent crime into a crime of negligence.

The asserted position: a twofold distinction between top-/mid- and low-level perpetrators on the one hand, and principal and secondary forms of participation on the other

The starting point for the position proposed here is twofold.<sup>135</sup> First, it follows from the combined structure- and knowledge-based approach taking into account the status and role of the perpetrators. If the purpose-based reading of the ‘intent to destroy’ requirement is maintained only for top- and mid-level perpetrators, then the question arises for them alone whether their mere participation in genocide other than direct perpetration must be treated differently. In contrast, with regard to the low-level perpetrators the knowledge-based approach defended above must also apply to other forms of participation. Second, a distinction must be made between the different forms of ‘commission’ or ‘participation’ other than (direct) perpetration. More specifically, it should be made between principal-like forms of participation and other secondary forms of participation. Consequently, all forms of perpetration other than direct or immediate perpetration, namely co-perpetration (including joint criminal enterprise) and perpetration by means, as well as similar forms of intellectual and/or mental control of the genocidal conduct (soliciting, inducing, incitement, conspiracy) are to be treated like direct perpetration.<sup>136</sup> This means that in the case of top- and mid-level participants a purpose-based intent is required, while in the case of low-level participants knowledge as to the genocidal context is sufficient. In contrast, secondary participation in its weakest form, i.e. complicity by aiding or assisting a principal, requires only knowledge as to the existence of the principal’s special intent.<sup>137</sup> This lower

134 *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, TJ, above note 37, para. 686; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, TJ, above note 15, para. 92; *Prosecutor v. Andre Ntagerwa et al.*, Trial Judgement, Case No. ICTR-99-46-T, 25 February 2004, paras 653–654.

135 For the necessary background on the forms of participation in international criminal law, see Kai Ambos, ‘Article 25: Individual criminal responsibility’, in Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC*, 2nd edn, 2008, pp. 743 ff.

136 Also for joint criminal enterprise III see George William Mugwanya, *The Crime of Genocide in International Law*, Cameron, London, May 2007, pp. 131–132; for conspiracy see Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, United States, 2007, p. 318; a different view for incitement is given in Gerhard Werle, *Völkerstrafrecht*, Mohr Siebeck, Tübingen, 2nd edn, 2007, mn. 438 (knowledge is sufficient).

137 In the same vein *Prosecutor v. Radislav Krstic*, AJ, above note 33, para. 140 ff., with further references from the jurisprudence (fn. 235) and national law (fn. 236 ff.); for knowledge also *Prosecutor v. Emmanuel Nindabahizi*, Trial Judgement, Case No. ICTR-2001-71-I, 15 July 2004, para. 457 with further references; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, AJ, above note 121, para. 127 with further references; *Prosecutor v. Athanase Seromba*, AJ, above note 122, para. 146; *Prosecutor v. Frans van Anraat*, Judgement, AX6406, Rechtbank’s Gravenhage, 09/751 003-04, 23 December 2005, para. 6.5.1. and 8 (in which the defendant was convicted only for crimes against humanity and for lack of knowledge, not for genocide). See also Erwin van der Borgh, ‘Prosecution of international crimes in the Netherlands: An analysis of recent case-law’, *Criminal Law Forum*, vol. 18, no. 1, March 2007,

standard also follows from the rationale of any form of secondary participation, in particular assistance in a crime. If such a secondary participation is, as correctly recognized by the *Akayesu* Trial Chamber,<sup>138</sup> a form of derived or accessorial responsibility ('borrowed criminality') with regard to the main act or principal conduct,<sup>139</sup> it suffices that the accomplice acts with knowledge of the genocidal purpose of the principal perpetrators.

If these principles are now applied to the forms of participation discussed in the case-law, the result is this: with regard to complicity the distinction in *Akayesu* cannot be followed.<sup>140</sup> It simply makes no sense to treat complicity under the Genocide Convention differently from general complicity. With the adoption of the Rome Statute, we can proceed from the assumption that there is a general law of complicity that is equally applicable for all international crimes. It is hence correct and in perfect harmony with the above considerations if the *Akayesu* Chamber and the subsequent case-law take the view that the accomplice (assistant in a crime) need only know of the main perpetrators' special intent without possessing it himself. To give an example: if A organizes a genocidal campaign against Jews with the requisite intent to destroy this religious group and B assists in the killing of some Jews while being aware of A's genocidal purpose, B acts with the sufficient knowledge as to the genocidal context. This view also finds support in

pp. 87–136, at pp. 125–126; Harmen G. van der Wilt, 'Genocide, complicity in genocide and international v. domestic jurisdiction: Reflections on the van Anraat case', *JICJ*, vol. 4, no. 2, May 2006, pp. 239–257, at pp. 246–247; Helmut Gropengiesser and Helmut Kreicker, *Nationale Strafverfolgung völkerrechtlicher Verbrechen: Deutschland*, edition iuscrim, Freiburg i.B., 2003, vol. 1, pp. 107–108; Chile Eboe-Osui, "'Complicity in genocide' versus "aiding and abetting genocide": Construing the difference in the ICTR and ICTY Statutes', *JICJ*, vol. 3, no. 1, March 2005, pp. 56–81, at pp. 63 ff.; van Sliedregt, above note 1, p. 194; Payam Akhavan, 'The crime of genocide in ICTR jurisprudence', *JICJ*, vol. 3, no. 4, September 2005, pp. 989–1006, at p. 994; Hernan Folgueiro, 'El crimen de genocidio etc.', in Pablo F. Parenti *et al.* (eds), *Los crímenes contra la humanidad y el genocidio en el derecho internacional: Origen y evolución de las figuras, elementos típicos, jurisprudencia internacional*, Ad Hoc, Buenos Aires, 2007, p. 176; W. Mugwanya, above note 134, pp. 132–133 (different on page 201!). In favour of a purpose-based intent, however, Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, Oxford *et al.*, 2005, pp. 259–260, 287; Alex Obote-Odora, 'Complicity in genocide as understood through the ICTR experience', *JCLR*, vol. 2, no. 4, March 2002, pp. 375–408, at pp. 377, 382 ff., 387, 397 ff.; also apparently Roger S. Clark, 'Drafting a general part to a penal code: Some thoughts inspired by the negotiations on the Rome Statute of the ICC and by the Court's first substantive law discussion in the Lubanga Dyllo confirmation proceedings', *CLF*, vol. 19, no. 3–4, December 2008, pp. 519–552, at pp. 547 ff., referring to Article 25(3)(c) and (d) of the ICC Statute.

138 Note 114 above, and main text.

139 Obviously, there are various theories on the rationale of secondary participation (for one example see Claus Roxin, *Strafrecht Allgemeiner Teil*, vol. I, *Besondere Erscheinungsformen der Straftat* [2003] § 26 mn. p. 11 ff.), but they all agree on the dependence of the secondary participation on the main act/conduct.

140 In this regard I depart from my earlier view expressed in Kai Ambos, 'Art. 25. Individual criminal responsibility', in Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC*, 1st edn, 1999, mn. 30; see for the author's view the new 2nd edition, 2008, Beck *et al.*, Munich *et al.*, special print, mn. 32. For critique, also Greenawalt, above note 14, pp. 2282 ff.; H. Van der Wilt, above note 93, pp. 244 ff.; Grant Dawson and Rachel Boynton, 'Reconciling complicity in genocide and aiding and abetting genocide in the jurisprudence of the United Nations *ad hoc* tribunals', *Harvard Human Rights Journal*, vol. 21, issue 2, 2008, pp. 241–279, at pp. 256 ff.; Daniel M. Greenfield, 'The crime of complicity in genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia got it wrong and why it matters', *Journal of Criminal Law and Criminology*, vol. 98, issue 3, 2008, pp. 921–952, at pp. 945 ff.

national case-law<sup>141</sup> and in the specialized literature.<sup>142</sup> It applies to all who assist, independent of their status in the genocidal apparatus, for the decisive factor in this case is not the assistant’s hierarchical level but the fact that he acts only as an assistant and therefore need not possess a purpose-based intent himself.

The knowledge standard in cases of mere assistance is also sound for policy reasons. To require a purpose-based intent on the part of the assistant himself would entail impunity in the many cases where the destruction of a particular group is not the assistant’s aim or goal, but is only accepted by him as a predictable side-effect.<sup>143</sup> Imagine, for example, a company that uses forced labourers who belong to a particular group and imposes conditions of life upon them calculated to lead to the partial or complete physical destruction of the group in question (ICC Statute, Article 6(c)), but whose primary goal is not the destruction of the group but the maximization of profit through the use of cheap labour. Indeed, the often existing complicity of big business in protracted armed conflicts and thus in genocide committed in the course of such conflicts is a strong argument for accepting a knowledge standard.<sup>144</sup> One can even accept a lower standard, e.g. *dolus eventualis* – as did the Court of Appeal of the Netherlands in the *Van Anraat* case<sup>145</sup> – or culpable ignorance – as did the *Akayesu* and *Musema* Chambers<sup>146</sup> – as long as this lower standard is included in the applicable concept of intent. It is, however, misleading to equate the ‘had reason to know’ standard with *dolus eventualis*,<sup>147</sup> for this would only be correct if one reduces this form of intent to a pure cognitive standard without any volitional underpinning.

As for *incitement* and *conspiracy*, the particular character of these modes of participation as criminalizing forms of ‘anticipated’ criminal conduct (*Vorverlagerung*) in view of the (abstract) endangerment or risk that they pose to legally protected interests, in this case the attack on the existence of the group, calls for a restriction that can only be achieved at the subjective level by requiring a purpose-based intent to destroy.<sup>148</sup> Such a restriction will not create a loophole with

141 BayObLG (Bayerisches Oberstes Landesgericht), *Neue Juristische Wochenschrift* (NJW), no. 51, 1998, pp. 392 ff., with case note by Kai Ambos, *Neue Zeitschrift für Strafrecht*, no. 18, 1998, p. 139.

142 Cf. R. Arnold, above note 1, pp. 145, 151; H. Van der Wilt, above note 93, p. 246; H. Van der Wilt, ‘Genocide v. war crimes in the Van Anraat appeal’, *JICJ*, vol. 6, no. 3, July 2008, pp. 557–567, at p. 560. Dissenting, W. Schabas, above note 10, pp. 221, 259, 300 ff., who criticizes the distinction in *Akayesu* but in the end argues for the requirement of the special intent to destroy for all forms of participation.

143 According to Günter Heine and Hans Vest, ‘Murder/willful killing’, in McDonald, Swaak and Goldman (eds), above note 10, vol. I, p. 175, at p. 186, the result, side-effects and preconditions cannot be distinguished due to the collective nature of genocide; the knowledge requirement must therefore be retained.

144 See the excellent observations by H. Van der Wilt, above note 93, pp. 256–257.

145 This did not, however, make a difference *in casu* since the Court considered that the businessman Van Anraat did not even dispose of sufficient information from which he could have inferred genocidal intent of his business partner (the Iraqi government of Saddam Hussein); for a discussion and references, see H. Van der Wilt, above note 140, pp. 557 ff., supporting the Court’s position at p. 561 (still leaving it open in H. Van der Wilt, above note 93, pp. 247–248); see also Alexander Zahar and Goran Sluiter, *International Criminal Law: A critical Introduction*, Oxford University Press, 2007, pp. 494–496.

146 Notes 118 and 119 above, and main text.

147 See H. Van der Wilt, above note 93, p. 247 with fn. 34.

148 Cf. also W. Schabas, above note 10, p. 27, on incitement.



regard to criminal liability, because both the inciter and the conspirator generally act with the required intent to destroy; in the case of incitement this intent is often provoked in the addressees of the inciting conduct. As for our distinction between different levels of perpetrators, it seems obvious that inciters and conspirators normally belong to the top- or mid-level of the criminal apparatus.

With regard to JCE III and superior responsibility, the case-law's approach of downgrading the specific intent to either foreseeability (JCE III) or negligence (superior responsibility) demonstrates the common function of both JCE III and superior responsibility to overcome evidentiary problems.<sup>149</sup> Yet such an approach ultimately means that on the basis of JCE or superior responsibility a superior, who is by definition a top- or at least mid-level participant, is no longer punished as a (co-)perpetrator (by omission in the latter case), but only as a mere assistant, since only in this case can knowledge of the genocidal context – instead of a purposed-based intent to destroy on the part of the (top- or at least mid-level) perpetrator himself – be considered sufficient;<sup>150</sup> unlike the assistant, the perpetrator, to be characterized as such, must himself possess the (specific) subjective element of the wrongful act.<sup>151</sup> If, taking another line, one holds the superior liable for having negligently failed to adequately supervise his subordinates (low-level perpetrators) who committed genocide with (a purpose- or knowledge-based) intent to destroy, he cannot be held responsible for a commission of genocide by omission but only for his negligent absence of supervision, i.e. for a conduct that amounts to a form of secondary participation.<sup>152</sup> For this very reason, the German International Criminal Law Code (*Völkerstrafgesetzbuch*)<sup>153</sup> distinguishes between a principal-like commission by omission for the failure to prevent the subordinates' crimes (section 4) and *accomplice liability* for the (intentional or negligent) failure to

149 In a similar vein, Allison Danner and Jennifer Martinez, 'Guilty associations: Joint criminal enterprise, command responsibility, and the development of international criminal law', *California Law Review*, no. 93, 2005, pp. 75–169, at p. 152.

150 For the same view, see Antonio Cassese, *International Criminal Law*, Oxford University Press, 2nd edn, 2008, at p. 216; see also W. Schabas, above note 43, p. 312, where, in this case, he considers 'complicity, not command responsibility' as 'the proper basis for guilt'. In the new edition (above note 10) at pp. 365–366, Schabas also criticizes the conviction of Nahimana by the ICTR (Case no. ICTR-99-52-A) on the basis of superior responsibility and states that he 'could have been charged as part of a joint criminal enterprise to incite genocide, one for which he would then readily have been convicted as the directing mind of a notorious radio station whose broadcasts dramatically contributed to the carnage. Such an approach would also more accurately describe his culpability.'). About the relevant case-law which seems to follow the same line see E. van Sliedregt, above note 1, at p. 193 ff.

151 For the same result see E. Van Sliedregt, above note 1, pp. 203–204, considering JCE as a form of participation and treating it, in fact, as complicity; also W. Schabas, above note 1, p. 132, when stating that 'the commander who simply "should have known" cannot possibly[!] have the specific intent ...' (yet not explicitly distinguishing between perpetration and complicity). Apparently W. Schabas (above note 10, at p. 270) changed his position on this point, since he assumes that 'the plain words of the statutes of the *ad hoc* tribunals and of the International Criminal Court, recognizing the application of command responsibility to genocide, make it at least theoretically possible for a superior or commander to be found guilty of genocide where the mental element was only one of negligence.'

152 In this sense R. Arnold, above note 1, at p. 151.

153 *Bundesgesetzblatt* 2002 I 2254.

properly supervise the subordinates (section 13) and to report the crimes (section 14).<sup>154</sup>

## Conclusion

The traditional interpretation of the intent to destroy requirement in genocide as purpose-based will stem from too narrow a reading of the concept of intent, equating it with the volitional element of intent. Nor does it sufficiently account for the particular structure of the offence. This twice twofold structure – the two mental elements and the dual point of reference (individual acts and genocidal context) – requires a differentiation according to the status and role of the participant in the genocidal enterprise. While the traditional purpose-based reading of the intent to destroy requirement can be maintained with regard to the top- and mid-level perpetrators, with regard to the low-level perpetrators a knowledge-based interpretation is more convincing for doctrinal and policy reasons. Consequently, a low-level perpetrator need not himself act with a ‘special’ intent (purpose or desire) to destroy a protected group, but only with the knowledge that his acts are part of an overall genocidal context or campaign. In practical terms, such an approach would overcome or at least mitigate the well-known evidentiary problems linked to a purpose-based concept of intent. As to the ultimate destruction of the group, the low-level perpetrator can, by definition, have no knowledge thereof but may only wish or desire this result, since it is a future event. In any case, his attitude towards this ultimate consequence is not decisive for the required intent to destroy.

As to the forms of participation in genocide other than perpetration, a twofold distinction between top-/mid- and low level perpetrators on the one hand and principal and secondary forms of participation on the other is suggested. In the case of top-/mid-level perpetrators, the required intent to destroy depends on the form of participation (if it is a perpetration – or principal-like participation – a purpose-based intent is required); in the case of low-level perpetrators, knowledge concerning the overall genocidal context always suffices.

154 Concurring, A. Cassese, above note 150, pp. 244–247; Chantal Meloni, ‘Command responsibility: Mode of liability for the crimes of subordinates or separate offence of the superior?’, *JICJ*, vol. 5, no. 3, July 2007, pp. 628–637, at p. 637 with fn. 108.

## REPORTS AND DOCUMENTS

# Expert meeting on procedural safeguards for security detention in non-international armed conflict\*

Chatham House and International Committee of the Red Cross, London, 22–23 September 2008

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An informal Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict was convened by the International Committee of the Red Cross (ICRC) and Chatham House, bringing together experts with a military, academic, government and NGO background. The discussion was focused on outstanding legal and operational issues linked to internment practice. The ICRC's 2005 position paper on Procedural Principles and Safeguards for Internment/Administrative Detention<sup>1</sup> and a list of practical questions prepared by the ICRC served as background documents for the discussion.<sup>2</sup>

The experts took part in their personal capacity. As the meeting was conducted under the Chatham House Rule the views reflected in this summary report are not attributed to individual persons or the institutions they represent.

While inevitably touching on both criminal and administrative detention/internment in situations of international armed conflict, occupation, and situations of violence below the applicability threshold of international humanitarian law, the debate was focused on security detention in non-international armed conflict. The report therefore covers only that issue; expansions into wider areas of discussion will be mentioned only where directly relevant.

\* The report was prepared by Els Debuf (Legal Advisor, ICRC) and benefited from the valuable comments made by Jelena Pejic (Legal Advisor, ICRC), Elizabeth Wilmshurst and Toby Fenwick (Chatham House).

## Preliminary questions: terminology, classification and interplay between legal regimes

The scope of the discussions was limited in two ways. First, the discussion only dealt with internment (in the sense of administrative detention) and thus excluded deprivation of liberty for the purposes of criminal proceedings. Internment was understood as the deprivation of liberty in armed conflict for security reasons – i.e. outside criminal proceedings – ordered by the executive. There was some discussion on when internment starts, i.e. whether from the moment of capture and whether it includes short-term deprivation of liberty without intent to hold a person for any significant length of time.<sup>3</sup> It was agreed that for the purposes of the discussion internment is meant to indicate the period of deprivation of liberty from the moment a decision to intern (i.e. to detain for security reasons) is taken until the person is released. Secondly, the debate focused on situations of non-international armed conflict (NIAC) and thus excluded questions regarding internment that only rise in situations of international armed conflict or occupation (covered by the four Geneva Conventions of 1949 and their First Additional Protocol of 1977)<sup>4</sup> or in other situations of violence – not reaching the threshold of armed conflict (usually called administrative or preventative detention, covered by domestic and human rights law).

In situations of NIAC, the relevant bodies of law for questions of internment are threefold: international humanitarian law (also known as the Law of Armed Conflict (LOAC) and hereinafter referred to as “IHL”), international human rights law (IHRL) and each State’s domestic law. The interplay between these bodies of law is not always easy to articulate, and can be complex to implement operationally.

First and most importantly, different bodies of law provide different rules on the legal bases and procedures for internment in NIAC. Moreover, in a complex situation such as a NIAC involving third State intervention in the territory of a

- 1 The position paper is entitled “Procedural Principles and Safeguards on Internment/Administrative Detention in Armed Conflict and Other Situations of Violence”, J. Pejić, *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 375–391. It was attached as Annex I to an ICRC Report on “IHL and the Challenges of Contemporary Armed Conflicts” presented to the 30<sup>th</sup> International Conference of the Red Cross and Red Crescent held in Geneva in November/December 2007.
- 2 The issue of security detention was also discussed at an expert meeting convened by the ICRC and the Frederick K. Cox International Law Center at Case Western Reserve University in Cleveland, USA in 2007. The report of that meeting is available at: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/security-detention-report-300909?opendocument> (visited 14 December 2009).
- 3 In this context it remained unclear whether the 96-hour detention system implemented by ISAF nations in Afghanistan before transfer to Afghan authorities would qualify as internment. The International Security Assistance Force (ISAF) in Afghanistan is a NATO-led coalition of about 40 troop-contributing nations with a peace-enforcement mandate under Chapter VII of the United Nations Charter. See <http://www.nato.int/isaf/index.html> (visited 14 December 2009).
- 4 The four Geneva Conventions of 12 August 1949 are hereafter referred to respectively as GC I, II, III and IV. Their two Additional Protocols of 8 June 1977 are hereafter referred to respectively as AP I and AP II. Article 3 common to the four Geneva Conventions is hereafter referred to as “common article 3 GC” or “CA3 GC”.

“host” State, the different parties to the conflict may be bound by different sets of rules. Also, members of the same multinational force may have different IHRL obligations.

Secondly, there is the outstanding question of the exact interplay between IHL and IHRL in situations of armed conflict. The prevailing view is that IHRL continues to apply during armed conflict and is particularly relevant when addressing the issue of detention in NIAC. However, when giving concrete substance to interplay with IHL in practice, the different cultures of the two regimes need to be taken into account: “IHL” is not equal to “IHRL during armed conflict”. The two bodies of law – while similar in some of their purposes and on many points of substance – are designed to address very different contexts. Finally, while IHL imposes obligations on all parties to a conflict, including non-State actors, IHRL – in the current state of international law – can only be said to be directly binding on States.<sup>5</sup>

The latter issue raised another topic of the debate, namely that of the classification of situations of armed conflict. Whilst often a seemingly theoretical exercise, classification is extremely important as it defines which bodies of law apply to the situation at hand. IHL treaty law makes a distinction between international armed conflict (an armed conflict between two or more States, hereafter “IAC”) on the one hand, and non-international armed conflict (NIAC) on the other hand. The latter covers armed conflicts opposing a State and an organized non-State armed group, or opposing two or more such groups in a State’s territory.<sup>6</sup> Whilst correct, the simplicity of this definition hides the existing diversity of ongoing NIAC’s across the globe.<sup>7</sup>

While many different scenarios were discussed during the meeting, the focus remained on two types of NIAC in particular: that of a so-called “traditional NIAC” opposing a State and a non-State armed group in the territory of a State,

- 5 The ongoing debate on this question was reflected in the different opinions of meeting participants. Without concluding on the issue, the discussion highlighted the need to take into account that even if IHRL can be said to be binding on non-State actors, some of its obligations are of a nature that allows implementation only by States.
- 6 No distinction is made in this paper between NIAC as defined in common article 3 GC and NIAC as defined in art. 1 AP II since neither body of rules specifically regulates the legality of or grounds and process for internment. Article 3 is silent on internment, while AP II elaborates only certain aspects of a detention/internment regime.
- 7 The following typology was proposed by one expert and briefly discussed: Type 1 – armed conflict between two or more non-State actors (NSA), subcategories: in a functioning State v. in a weak or non-functioning or failed State; Type 2 – armed conflict between a State and a non-State actor in the territory of that State, subcategories: armed conflict without territorial control by a NSA, armed conflict with a NSA in control of a part of the territory but without a full governmental structure in the territory, armed conflict where one or more NSA exercise control over a territory, with a government-like structure in place and a stabilization of conflict with remaining potential for active hostilities (in the latter category, the issue of self-determination may come into play and affect the issues raised); Type 3 – armed conflict with third-State intervention, subcategories: third State(s) assisting the State in whose territory a NIAC against a NSA is ongoing, third State(s) assisting the host-State under UNSC cover, and finally a third State fighting a NSA in the territory of another State without the involvement of the territorial State in the conflict. To be noted that this typology was not endorsed by the participants but very much helped provide a “real world” context to the debate.

and that of a so-called “multinational-forces-NIAC” (MNF-NIAC), where a State that is confronting a non-State actor in its territory receives the assistance of a third State or of a multi-national force whose involvement is such that it becomes a party to the armed conflict (for example the ongoing conflicts in Afghanistan, Iraq or the Democratic Republic of the Congo). The term can be confusing and does not indicate a separate category of NIAC that would be covered by a different set of rules, but serves – if only in an imperfect way – to indicate situations where a traditional NIAC forms the basis of a conflict that takes on an “international dimension” through the intervention of third States. It was acknowledged that the issue of classification is not without controversy, that it merits further reflection and impacts directly on the discussions about internment in NIAC, but it was agreed by participants to focus on the two above-mentioned scenarios.<sup>8</sup>

What follows aims to reflect the debates on the three topics on the meeting agenda:

- i) the legal basis for internment in NIAC,
- ii) the right to information and to legal assistance, and
- iii) review (initial and periodic) of the continued necessity of internment.

It should be noted that these issues, and the issue of classification itself, are all intricately linked and that it is difficult to discuss them in an isolated way. For purposes of rigour and clarity, they are set out separately in the report, but references to connected issues and the way these impacted the debate are included. Also, while the focus was on IHL and on the two above-mentioned types of NIAC, participants agreed that any rules or guidelines regarding internment must be formulated in a way that would allow them to be implemented in a realistic way in the different types of NIACs, by both States and non-State actors. Finally, an examination of internment practice should aim at identifying a regime that would be most protective of internees’ rights, while being consistent with operational necessities. Therefore, the obvious starting point should be IHL (which inherently makes the above-mentioned balance), complemented by other bodies of law as appropriate.

## **Session 1 – The legal basis for internment in non-international armed conflict**

One of the most important legal challenges posed by internment in NIAC is that there is no explicit legal basis for this type of deprivation of liberty in any branch of international law. At the same time, in reality both States and non-State armed groups detain individuals for security reasons in NIAC and do so outside the

<sup>8</sup> The question of whether different types of NIAC impose a diversification of applicable rules was raised, but not discussed substantially as it fell outside the direct scope of the meeting.

framework of criminal proceedings. The legal basis for internment, the grounds and procedural safeguards applicable are questions of urgent concern to both policy and operational military personnel, the academic community, international think tanks, NGO's and others.

### An inherent right to intern under international humanitarian law?

The first question addressed was whether parties to a NIAC have the right to intern individuals to start with. During the meeting, consensus was reached quite easily about two parts of the answer to that question.

On the one hand, the experts agreed that there was not so much a "right" but rather an "authorization" inherent in IHL to intern persons in NIAC. It was suggested to speak of the "power to intern" or of a "qualified or conditional right to intern" rather than of a "right to intern". This was held to be consistent with both the spirit of IHL and from an IHRL perspective. The experts agreed that it flows from the practice of armed conflict and the logic of IHL that parties to a conflict may capture persons deemed to pose a serious security threat and that such persons may be interned as long as they continue to pose a threat. Otherwise, the alternatives would be to either release or kill captured persons.

Moreover, even IHRL does not prohibit internment *per se*. What is prohibited, at all times, is the *arbitrary* deprivation of liberty. The definition of arbitrary deprivation of liberty in the context of an armed conflict is to be considered through the prism of IHL based on the *lex specialis* principle that governs the relationship between the two bodies of law.

If IHL provides an implied power to intern in NIAC and IHRL does not exclude it *per se*, the debate is then narrowed to the question of the parameters of such a power and how it may be practically exercised. Participants were of the view that, taking into account the exceptional nature of internment as recognized under both IHL and IHRL, any internment must be "necessary" for "imperative reasons of security" (meaning directly related to the armed conflict). There was also agreement that there must be "lawful authority" or a "legal basis" to intern and that internment can only be ordered on "permissible grounds" under international law. Finally, there was agreement that, leaving aside the issue of *habeas corpus* under IHRL, some form of review mechanism to initially and then periodically assess the lawfulness of internment (i.e. whether it is or remains necessary for security reasons and whether there is a legal basis) is required.<sup>9</sup> The burden of demonstrating the necessity of continued interment is on the interning authorities.

This framework for discussion reflected the logic that must govern any deprivation of liberty in order to meet the requirements of the IHRL prohibition of arbitrary detention (lawful authority and permissible grounds)<sup>10</sup> even though the

9 See below the summary of Session 3.

10 Article 9, para. 1, International Covenant on Civil and Political Rights (16 December 1966) (hereafter "ICCPR"); article 5, para. 1, European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950) (hereafter "ECHR").

implementation of those requirements needs to take into account the reality of armed conflict and the *lex specialis* constituted by the relevant IHL.

*There was prevailing agreement that any party to a NIAC has an inherent power or “qualified right” to intern persons captured. Internment is an exceptional measure that can only be ordered on certain grounds that must be stipulated in the legal basis for internment. The decision to intern must be reviewed initially to assess the lawfulness of internment and periodically to assess the continued necessity of internment.*<sup>11</sup>

## Permissible grounds for internment in NIAC

If there is an inherent authorization to intern under IHL the question arises as to what are the permissible grounds for internment in NIAC.

There was agreement that internment must meet a “necessity” standard in order to be lawful. However, it is more difficult to assess how this can translate into an objective, standard that can be implemented. “Necessity” gives expression to the fact that internment must be seen as an exceptional measure, as it removes an individual’s right to liberty recognized under both IHL and IHRL. While in some cases the necessity criterion is obviously fulfilled, there are many grey areas where it is not. In such cases, much depends on the specific context of the military operation at hand, on the available alternatives and – as argued by many – on a certain amount of “common sense”.

The most recurrent ground invoked for internment in NIAC – and probably the only permissible ground – is that of “imperative reasons of security”. The term is borrowed from the text of article 78 of GC IV – where it constitutes the ground for internment in situations of occupation; other legal provisions in different bodies of law are phrased in similar terms to reflect the same concept. The word “imperative” refers back to the “necessity” concept and the “reasons of security” refers to the type of ground allowing for the extraordinary measure of internment. It seems to be clear that this ground is acceptable under IHL, even in NIAC. However, it would probably not be acceptable under IHRL due to the lack of specificity, which begs the question of whether the interning State must derogate from its relevant human rights obligations for internment not to be considered arbitrary detention (art. 5, para. 1 ECHR, art. 9, para. 1 ICCPR).

11 For illustrative purposes, the provisions on internment of civilians in IAC or during occupation meet the above-mentioned test in the following way:

- Legal basis: explicit authorization to intern in art. 41, para 1, art. 78, para. 1, GC IV.
- Permissible grounds:
  - only if the security of the Detaining Power makes it absolutely necessary (art. 42, para. 1, GC IV) or if necessary, for imperative reasons of security (art. 78, para. 1, GC IV)
  - voluntary internment, when necessary (art. 42, para. 2, GC IV)
- Review mechanism: initial and periodic review in order to judge the (continued) legality of the internment (art. 43, para. 1 and art. 78, para. 2, GC IV).



The majority of operational experts argued that whilst it is easy to provide examples that clearly pass or fail the “imperative reasons of security” test, the borderline cases pose significant challenges as there is neither a concrete definition nor practical guidelines on what the concept of “imperative reasons of security” exactly means. State practice is of limited help, as it is difficult to establish an exhaustive list of specific activities that would in all circumstances fall within or outside the legal standard.<sup>12</sup>

What is clear is that internment must be necessary for security reasons, and not just convenient or useful for the interning power. A concrete example is that internment for the sole purpose of obtaining intelligence is impermissible. Also, a person may not be interned for the sole purpose of being exchanged against other persons in the hands of the adverse party or to be used as a “bargaining chip” in negotiations – such internment would amount to hostage-taking, which is explicitly prohibited under IHL in both IAC and NIAC. Finally, it is of crucial importance that internment not be used as an (disguised) alternative to criminal proceedings. Internment is conceived and implemented as a preventive measure and therefore may not be used to punish a person for earlier criminal acts. If a person is held solely on suspicion of involvement in criminal activity his or her deprivation of liberty will only be permitted if it is in accordance with the applicable criminal law procedure and relevant human rights law.<sup>13</sup> However, as internment is based on the threat posed by an individual, his or her past activities may well be an important factor in assessing whether the individual constitutes or may constitute a significant enough threat to the security of the interning Power to justify internment.

In the discussion, participants coalesced around a two-tiered test to assess whether an individual presents a sufficient threat to allow his or her internment. The first element of the test is whether, on the basis of his or her activity (which as such is not necessarily criminally prosecutable), it is “highly likely” or “certain” (the threshold is unclear) that he or she will commit further acts that are harmful (directly and/or indirectly, the threshold is unclear)<sup>14</sup> to the interning Power and/or to those whom the interning Power is mandated to assist or protect, such as the host nation, the civilian population or public order (the threshold is again unclear). The second element of the test is whether internment is necessary to neutralize the threat posed. It was stressed that if the interpretation of “imperative reasons of security” as the permissible ground for internment is too wide, there is a risk of abuse. The security threat must be assessed on an individual basis and the decision to intern (as distinct from the decision to capture) must be taken at a

12 Some governments were said to look at domestic law regulating the deportation of immigrants on national security grounds for guidance on the meaning of “imperative reasons of security” for internment in NIAC.

13 As to article 68 GC IV in the specific situation of occupation, see note 1, p. 381, footnote 21.

14 Some experts indicated that on the ground, their militaries looked for inspiration to article 78 GC IV and relied on similar criteria for interpreting the concept of ‘direct participation in hostilities’.

sufficiently high level of command to allow for an adequate assessment of both the threat and the necessity to intern in light of the context and available alternatives.

Experts stressed the importance of the continuous updating and verification of information that resulted in a threat assessment leading to internment. Ideally, this should be continuously ongoing, but must be done at least at every instance of review. The less the information is corroborated, the less certain is the continuing threat posed by an individual and thus the less justifiable is the continued internment. What must be avoided is that initial information on the existence of a threat (unless very clear and specific) remains in an internee's file without being corroborated or further updated.

*The experts were of the view that “imperative reasons of security” seems to constitute a permissible ground for internment taking into account the specific circumstances and given the available alternatives. Internment that is merely convenient or useful for the interning power, or internment for the sole purpose of information gathering, or undertaken in order to facilitate the exchange of detainees or negotiations is not lawful. Given that it is a preventive measure, internment should not be used as an alternative to criminal proceedings. The decision to intern must be taken on an individual basis and at a sufficiently high level of command to ensure an adequate assessment of the threat and of the necessity to intern. The information upon which threat and necessity assessments are based must be updated and verified throughout the duration of internment.*

## The legal basis for internment in NIAC

The distinction proposed by the ICRC between “legal basis” and “permissible grounds” for internment is supported by requirements flowing from general IHRL under which a deprivation of liberty may be ordered on the basis of lawful authority and on specified grounds permitting a restriction of liberty. The permissible grounds for internment in NIAC have been discussed above. What could be the lawful authority or the legal basis for internment?

### *International humanitarian law*

Treaty law applicable in NIAC (CA3 GC and AP II where applicable) does not provide an explicit legal basis for internment. It could be argued that such a legal basis exists in customary IHL.

### *International human rights law*

IHRL does not explicitly provide a legal basis for internment (or administrative detention as it is often called) based on security reasons; internment may thus constitute arbitrary detention and be in violation of IHRL.

- While the ECHR provides an exhaustive list of permissible grounds for deprivation of liberty (art. 5, para. 1), detention for security reasons is not on the list.

Therefore, some experts argued that any internment in a NIAC would – unless an explicit basis were anchored in IHL, the *lex specialis* in armed conflict – require lawful derogation by a State party from its obligation under article 5, paragraph 1, ECHR.

- Outside the ECHR framework, the situation is less clear as the ICCPR does not enumerate a list of permissible grounds for deprivation of liberty like the ECHR does. The Human Rights Committee (the monitoring body for the ICCPR, hereafter “HRC”) has not pronounced itself (yet) on the question of whether derogation from the right to liberty (art. 9, para. 1, ICCPR) is necessary for a State to be able to intern for security reasons in NIAC. It is likewise unclear whether it is the right to liberty of person that must be derogated from (article 9, para. 1) or only the right to judicial review (article 9, para. 4) where internment review would be conducted by a non-judicial body.
- To be noted that to be in conformity with IHRL (both ECHR and ICCPR), the grounds and procedure for internment (as for any other deprivation of liberty) must be prescribed by law and not be arbitrary.

### *Self-defence*

While some States have invoked the *jus ad bellum* concept of self-defence as a legal basis for internment, there was general consensus that such invocation is troublesome – if not outright invalid – under international law. For almost all experts it was clear that self-defence in its *jus ad bellum* sense does not constitute a legal basis for internment in NIAC.

### *Domestic law of the interning power*

A domestic law providing explicitly for the possibility of internment and spelling out permissible grounds and procedures governing it could constitute a legal basis for internment in a NIAC required under international law. However, several questions remain and this area requires more research in order to provide for clear answers.

- First, does the form of the legal instrument matter? Can an executive order be sufficient or must there necessarily be a legislative act? The answer is unclear, but there was an obvious preference (if not obligation) for a legislative act.
- Additionally, when States act abroad it is unclear whether their domestic law may be relied on as a legal basis for internment in NIAC when they are acting outside their territory.
- Third, any domestic legal basis relied upon by a State to intern in NIAC (whether in its own territory or in another country) must be in accordance not only with IHL but also with the State’s IHRL obligations. It remains unclear whether the State must derogate from its IHRL obligations when adopting such

a law. For ECHR signatory States, the ECHR appears to mandate derogation from article 5, paragraph 1, in order to implement internment in NIAC (or to introduce a system of administrative detention in peace-time). The ICCPR is less clear on this issue, and the HRC has not yet pronounced itself on the matter. There is, however, no recorded instance in which a State that interned in a NIAC abroad derogated from its IHRL obligations. Where a State acts at home it is more inclined to derogate from its obligations in order to provide for deprivation of liberty outside criminal proceedings (internment or administrative detention).

### *Domestic law of the host-State in a multinational forces-NIAC scenario*

The question arises as to whether the intervening State(s) can intern on the basis of the domestic law of the host State and if so under what conditions. The discussion during the meeting was not conclusive, but several important and interesting points were raised:

- Similar to what was noted above: can the legal basis for internment be an executive decision or does there need to be a specific legislative act?
- The issue of extra-territorial applicability of both domestic and international human rights law (see above) comes into play and informs the debate on the legal basis for internment in such a scenario.
- The issue of derogation is (further) complicated by the question of whether it is the host State or the interning State that has to (or not?) derogate from its IHRL obligations. The solution remains unclear.
- When third States are part of a multinational force that acts under the umbrella of an international or regional organization (e.g. UN, NATO, EU), issues of attribution arise. Are tasks associated with internment the responsibility of the interning State or of the international or regional organization or are they shared? And if they are incumbent on the organization, is that organization bound by IHRL (both international and regional?) and does it/can it derogate from IHRL in order to enact a legal basis for internment in NIAC? The answers to these questions involve issues that go well beyond the scope of the discussion at the expert meeting but are crucial in the debate on internment in MNF-NIAC. They will most likely be given different responses by the different organizations. Apart from raising these questions, the discussions focused more specifically on the United Nations Security Council (UNSC) since this body can take binding decisions on all States (under Chapter VII of the UN Charter).

### *UNSC Resolutions*

The experts agreed that a United Nations Security Council Resolution (hereafter “UNSCR”) under Chapter VII of the Charter could possibly constitute a legal basis

for internment when the measure of internment and the permissible grounds for it are explicitly mentioned in the resolution.<sup>15</sup> Some experts argued that the “all necessary measures” phrase commonly used in Chapter VII resolutions can constitute a legal basis for internment by multinational forces taking part in an armed conflict. However, other experts argued that the phrase is too vague to provide a legal basis for internment, i.e. to be interpreted as giving lawful authority. Human rights bodies are also unlikely to accept the latter but have made no pronouncements on the matter thus far. It was concluded that a Chapter VII UNSCR could possibly provide the legal basis for internment in NIAC. There was, however, no agreement on the level of specificity required of the language of such a resolution.

### *Bilateral agreements*

- Given the lack of clarity of international law and the novel scenario of MNF-NIAC in which the MNF interns persons who pose a security threat, instruments of a more operational nature have been relied on to deal with the issue on the ground. While some troop-contributing States have argued that a legal basis for internment may be provided for in bilateral agreements concluded with a host State, the validity of that argument was challenged by participants to the meeting. Moreover, it remains unclear whether in such a case, the host State, the troop-contributing state or both would need to derogate from their IHRL obligations to allow for internment.
- Bilateral agreements could take the form of a Status of Forces Agreement (“SOFA”). Some experts argued that SOFAs are not a direct source of law, but rather agreements on the extent to which the domestic law of the host State covers actions of the sending States’ forces. Others argued that, as bilateral treaties, SOFAs may create rights and obligations between the contracting parties, but that the latter are still subject to their obligations under general international law (including IHL and IHRL). It was accepted that, in common with bilateral agreements, a SOFA could not be used to circumvent States’ international obligations, and that although a SOFA is not an ideal legal vehicle for internment in NIAC it may have some utility as long as its provisions regarding internment are in accordance with international law. Therefore, for it to constitute an adequate legal basis for internment, the grounds and the procedure must not only be made explicit, but must also conform to the relevant IHL and IHRL.

15 The only example of such explicit wording is UNSC resolution 1546 (2004) and the letters attached to it in relation to the MNF in Iraq.

### *National Standard Operating Procedures (“SOP”)*

- It was agreed that although a SOP must always reflect the law it is not a source of law and therefore cannot provide the lawful authority or legal basis for internment. While it may specify the procedures or outline the practical implementation of internment, SOPs need to rely on another, pre-existing lawful authority providing a legal basis for internment (e.g. domestic law, explicit UNSCR, etc.).

### *What about non-State actors parties to a conflict?*

What is their legal basis for internment?

- As a party to an armed conflict a non-State armed group also has an inherent authorization to intern (see above). This is a direct consequence of the principle of equality of rights and obligations of the parties under IHL and has to be the starting point of the discussion. As equality of belligerents provides an incentive for non-State actors to respect IHL, it would be unhelpful to depart from this principle in the context of internment. *Note:* this means that – under IHL – a non-State armed group cannot be penalized for interning persons as long as the internment is otherwise in accordance with IHL. This does not, however, mean that such behaviour cannot be penalized under the domestic law of the relevant State.
- Domestic law or a UNSC resolution has never included a direct legal basis for a non-State actor to intern (or otherwise deprive of liberty for that matter) any person in a NIAC. Hence, as treaty IHL does not offer an explicit legal basis for any of the parties to a NIAC, the question as to how a non-State actor can exercise the inherent right to intern under IHL remains unanswered.

*Treaty IHL does not provide an explicit legal basis for internment in NIAC. IHRL does not provide for such a legal basis either and enacting a legal basis at the national level may very well require derogation from human rights obligations. Domestic law can provide a legal basis for internment if the grounds and procedure are explicitly provided for and are in accordance with IHL and the relevant IHRL. It is unclear whether a State’s domestic law can provide a legal basis for internment when its forces intern outside its territory. A UNSC resolution can provide a legal basis for internment but the experts disagreed on the level of specificity of wording that would be required for it to have this effect, particularly where the conditions of detention would otherwise be contrary to international law. There was no consensus on whether bilateral agreements and SOFA’s could provide a legal basis for internment in NIAC. A SOP and the law of self-defence however cannot constitute such legal basis. Finally, while they recognized that non-State actors party to a NIAC also have an inherent “qualified right to intern” under IHL, it remains unclear how this right could be translated into an actual legal basis to intern.*

## Additional remarks

It was argued by several experts that providing a legal basis for internment in treaty IHL would be the most adequate answer to the realities on the ground. The only other way to secure a legal basis would be to obtain a specific enabling UNSC resolution or an appropriate domestic legislative act, both of which may often be unavailable and difficult to obtain. Both the adoption of a UNSCR and the adoption of a legislative act take time and are burdened by political factors not necessarily related to the armed conflict. A standing IHL provision would have the additional benefit that, in being general, it would not fall prey to political factors unrelated to the concrete NIAC's in which it may be applied.

It was also clear from the discussions that there is an operational need to have a legal framework for internment in NIAC that ensures respect of States' obligations under both IHL and IHRL. The broad results of the meeting as summarized above thus need to be complemented by additional research (for example on customary IHL as a legal basis for internment in NIAC) and – if proven to be necessary – the adoption of new rules.

## Session 2 – The right to information and legal assistance for internees in NIAC

An internee has the right to be informed promptly, in a language he or she understands, of the reasons for his or her internment so as to be able to challenge its lawfulness. While admitting the legal and practical controversy, the ICRC's position paper<sup>16</sup> posits that an internee should also be allowed to have legal assistance. The second session of the Expert Meeting was dedicated to an analysis of the practical implications and concrete elements of these two procedural safeguards, compliance with which has proved difficult to ensure on the ground.

### The right to information: When? What? How? For whom?

While clear on the right of an internee to prompt information about the reasons for his or her internment, international law does not shed much light on the practical details of that obligation: what information must be released at what time, by whom and to whom? IHL offers very little guidance and whilst IHRL is clear in cases of criminal detention, it is much more difficult to assess the exact scope of obligations under IHRL in case of internment in NIAC, where the military necessity element has to be taken into account.

Participants accepted that under IHL an internee's right to full disclosure of all available information can be restricted for reasons of military necessity; and that it can probably be restricted under IHRL in the light of special circumstances

16 See note 1 above.

such as the existence of an armed conflict.<sup>17</sup> The question is how to strike a balance between the military's need to protect its means and methods of intelligence-gathering in practice, with an internee's right to know the reasons for internment so as to be able to challenge its lawfulness as soon as practically possible. Whilst the principle is clear, there is no certainty about how to implement the balance in practice. The debate during the meeting demonstrated how difficult it is and will be to forge agreement on these matters.

### *What's in the balance?*

From a government/military perspective, there are seemingly conflicting considerations. On the one hand, the need to protect intelligence sources and methods, suggesting the need to restrict the right to information. On the other hand, a more or less expansive international law obligation to provide internees with information necessary to effectively challenge the legality of their deprivation of liberty, suggesting the need to release all available information. According to some experts, experience has shown that providing internees with proper information makes them more cooperative with the authorities and thus contributes to the security of the interning authorities (in particular the guard forces) on the ground.

From an internee's perspective, the right to information is made up of three elements. First, there is the right to know why and on what grounds he or she is being held and what consequences he or she may face (internment or criminal prosecution, likely duration of the internment, etc.). These rights are inherent in the principle of humane treatment. Second, the right to information is directly linked to an internee's ability to challenge the lawfulness of his or her internment (to challenge of the veracity of the facts, i.e of the necessity to intern). Third, to avoid the danger of internment turning into actual disappearance, there is the related issue of informing family and/or friends of the internment.

The discussion focused on how security and intelligence interests (including the classification of information) must and can be balanced against internees' right to effectively challenge the lawfulness of internment.

### *When – what – to whom?*

The starting point for the discussion was that an internee is entitled to more information than that he or she is “a threat” or is “being held for imperative reasons of security”. The information on the reasons for internment must enable the internee to meaningfully challenge the legality of his or her internment and its continued necessity.

As to the “when” question, two indications were put forward. First, the principle is “as much as possible as soon as you can”; “as soon as you can” meaning

17 It was agreed that – depending on the nature of the restriction – a lawful derogation from relevant human rights instruments might be required.



that the information on the reasons for internment must be shared with the internee either immediately or as soon as withholding the information is no longer necessary to protect the source or method of intelligence-gathering on which the decision to intern was based. Secondly, the longer the internment lasts the more stringent the obligation to provide information becomes, meaning that length of time in internment shifts the balance in the internee's favour. However, the participants did not agree on what the timeframes were or what the sensitivity of the sources was.

As to the "what" question, there seemed to be consensus among the experts that the right to information could only be restricted where it was absolutely necessary for security reasons, the latter being understood largely as "to protect intelligence sources and methods". From there, the discussion quickly moved on to the issue of classified information, which will be dealt with below. All agreed that during the internment process all possible efforts must be undertaken to corroborate available information, update it and make it available to the authorities deciding on (continued) internment. As soon as a piece of information not previously shared can be shared without endangering security or intelligence-gathering, it must be shared with the internee and/or a person intervening in the process on the latter's behalf.

As to the "whom" question, it is clear that in principle the information must be released directly to the internee; he or she can then decide with whom to share it. As an alternative, when it is impossible to tell a detainee directly (for example because of a detainees' location, for security reasons or for the protection of intelligence sources), his legal representative should be provided with the information even if it cannot all be shared with the internee. Should this not satisfy the security or intelligence gathering necessities, at least the review body (for initial and periodic review) must have access to all information on the reasons for (continued) internment. The rationale that needs to guide decision-making is that whenever possible it is the internee who must be informed. Where it is a third person or body, the purpose is to ensure that the internee is not arbitrarily interned and is released as soon as justified reasons for his or her internment cease to exist. The system should be geared to fulfil that purpose.

### *Classified information: how to ensure that the balance is rightly struck?*

Much of the debate focused on intelligence and the issue of classified information. Experts tried to find the right balance between the need to classify information to protect sources and methods of intelligence-gathering and an internee's right to access the information on which internment is predicated in order to be able to meaningfully contest its veracity.

Two important remarks were made that should have an impact on the way in which the balance is struck. First, experience in some contexts has shown that "over-classification" is a problem on the ground. This was said to be the result of decisions made by staff in the field who opt to classify information when there is ambiguity over whether it should be classified or not, leading to inappropriate and

possibly unlawful withholding of information from internees. Secondly, in some contexts intelligence informing a decision to intern is often obtained from informants who exaggerate or provide untruthful information in order to settle personal or communal scores (the “vendetta problem”). It was accepted that this was especially likely in the early stages of a conflict where the tactical level human intelligence network is likely to be fragmentary.

Some experts pointed out that problems regarding classified information should not be blown out of proportion, given that in many NIACs the parties do not dispose of sophisticated intelligence and do not have a system of classification worthy of that name.

The following suggestions were made with regard to the issue of dealing with classified information in the framework of an internment procedure:

- When classification is necessary to protect a source of information, all necessary measures must be taken over time to make the information available to the internee or a legal representative without revealing the source (e.g. where there are multiple sources of information, through release of the information from the less sensitive source, or by implementing security measures to protect the source without withholding the information).
- Internment procedures should allow an internee or his or her legal representative to request declassification of information from an authority with the power to declassify it. It was noted that even if a significant proportion – or a majority – of requests are turned down this should not be taken to mean that the process is de facto ineffective.
- Classification as an obstacle to satisfying the internee’s right to information can be taken into account to a certain extent but is not without limits: the right to information is part of the absolute obligation of humane treatment and is an essential precondition for any internment review to be meaningful. It is up to the military authorities to come up with a way to demonstrate that the procedure adopted is in accordance with their obligations under international law.
- It was put forward by several experts that there exist ways of handling classified information in administrative or judicial review. Suitably developed, these procedures should be used as much as possible and should be developed in order to satisfy the requirements of IHL and IHRL.
- Enabling a review body to access classified information may well be an incentive for those who initially classify it to be more careful about collecting quality information and deciding whether it needs to be classified.

Apart from the protection of intelligence, reality also shows that the denial of the right to information may feature as part of an interrogation strategy. Acute psychological stress has been used to obtain information and some experts pointed out that “keeping the internee in the dark” as to the reasons for, the duration of, and the procedures governing internment significantly contributes to inducing a state of acute psychological stress. The legal implications of such conduct by detaining authorities were not discussed further, but raise important questions

with regard to the scope of the right to information as part of the obligation of humane treatment.

*A balance must be struck, but cannot contravene the law*

“As much as possible as soon as possible” seemed to be the standard suggested by operational military personnel for guiding the disclosure of information to internees. However, most experts agreed that the standard is too vague to satisfy existing legal obligations. Article 75, paragraph 3, AP I, applicable in IAC and arguably as a matter of customary law in NIAC, obliges the parties to an armed conflict to inform detainees and internees of the reasons for detention or internment. This is a firm obligation and not a recommendation; moreover, it is part of a set of fundamental guarantees protecting persons in the power of the adversary. The implementation of this obligation relies on the good faith of the interning power, but it is difficult to give exact and concrete guidelines on how the balance should be struck in a specific context. The measure of discretion enjoyed by interning authorities must not be used to shield acts characterized by bad faith.

One way of addressing the necessary balance proposed during the meeting was the idea of phasing in the release of information. Information provided to an internee at the time of capture or at the time of the internment could be more restricted (in line with security concerns) than information provided at the time of the initial and later on periodic review. The experts seemed to accept that the longer internment lasts, the less security constraints may be relied on to justify restrictions on an internee’s right to information.

There was agreement that procedures must be put in place to ensure that classification of information is properly carried out and, apart from this general principle, that at least when the legality and the continued necessity of an internment decision are reviewed (both at initial and periodic review) the review body should have access to all classified information or include at least one member with security clearance. Also, in case classified information is alleged to be incomplete or incorrect, or in case it is alleged that there is no need for classification, there should be a procedure to request de-classification by a competent authority. At least one expert suggested looking at how classified information is dealt with in court-martial proceedings to find inspiration for ways of addressing the issue. Israeli practice was mentioned, where the review body (which is judicial in nature), has access to all classified information and can order declassification when judged necessary to fulfil an internee’s right to information. It was also stressed that information should be shared to the extent possible with the internee’s legal representative, or an independent lawyer appointed by the interning power.

It was suggested to undertake a comparison with article 5 GC III tribunals that deal with the status determination of captured belligerents in international armed conflict. Some States have spelled out the exact procedures to be implemented in order to comply with this IHL obligation. It was also pointed out that inspiration could be drawn from the implementation by States of articles 42 and 78 GC IV (even though the practice is rather limited).

Finally, when the right to information of internees is restricted for reasons of military necessity, international human rights law will probably require that a State derogate from its relevant human rights obligations (art. 9, para. 2 ICCPR, art. 5, para. 2 ECHR).

*When discussing internees' right to information, many experts with a military background raised important practical obstacles, almost exclusively related to the protection of intelligence information, methods and sources. It was pointed out, however, that the protection of intelligence and the issue of classified information are limited to sophisticated armies, who are not the majority of parties to non-international armed conflicts around the world. The discussion did not resolve differences of opinion about the way in which the right balance between military necessity and an internee's right to information may be struck due to the range of practical considerations raised. Nevertheless, the legal obligation to promptly inform an internee of the reasons for his or her internment was underlined by all. Thus, more efforts will need to be made to find ways of addressing the practical obstacles that may in no case serve to justify violating an internee's right to information.*

## Legal assistance for internees in NIAC: When? What? How?

Most of the experts were of the view that internees should have legal assistance whenever this is feasible, both in terms of being informed and counselled on the legal framework governing internment and in terms of benefiting from the advice of a legal expert who could represent their interests in the internment review process.

However, practical obstacles to legal assistance based on insufficient resources were quickly put on the table. It was pointed out, for example, that interning powers often lacked qualified lawyers deployed with the armed forces and that in many contexts there were few qualified, competent and available local lawyers.

The general view was that legal assistance is important and should not be denied whenever its provision was possible. While it may be understandable that qualified legal assistance cannot be provided on the battlefield itself, access to a lawyer should be allowed and/or facilitated once a person has been transferred to an internment facility. If there are not enough competent and qualified lawyers available in the host country appropriate arrangements should be made to increase the availability of lawyers by training local lawyers or bringing in lawyers from the interning State, by allowing a single lawyer to represent more than one internee, by training relevant personnel on the procedural aspects of an internment regime so as to enable them to efficiently inform and assist internees, etc.

The availability of a legal representative could be a solution for the above-mentioned problem of disclosure of classified information. There are systems in which an internee is not granted access to such information, but where a lawyer with the necessary security clearance (and the necessary independence and

impartiality) enjoys access and can intervene on the internee's behalf. It was also pointed out that at least the internment review body must have access to all available information in order to be able to competently rule on the lawfulness of initial and/or continued internment.

*Internees should be provided with legal assistance in internment whenever feasible. When available, it should not be restricted without serious justification based on imperative reasons of security. Creative efforts should be made to address resource problems. The presence of a legal representative can also be part of a solution to the problem of how to handle classified information in internment review proceedings.*

### Right of the internee to appear in review proceedings

This issue was only very briefly touched upon. While there was agreement on the fact that an internee should have the right to personally appear in the review proceedings (physically or through video link for example), practical obstacles were quickly raised. Again, resource and security considerations were flagged – but so were certain creative solutions such as using videoconferences, taking the reviewers to the internees rather than the internees to the reviewers, etc.

*An internee should be given the possibility to personally appear in the internment review process. Efforts should be made to overcome practical obstacles to such participation.*

## Session 3 – Independent and impartial review of internment in NIAC

Independent and impartial review of the necessity of internment is the most important procedural safeguard against arbitrary detention.

As discussed above, parties to a NIAC may intern persons only for imperative reasons of security. Therefore, it is essential that the necessity of an internment decision be reviewed promptly after it is made, and periodically thereafter if the internment is continued. A review process is explicitly provided for in situations of international armed conflict (art. 43 GC IV) and occupation (art. 78 GC IV). IHL governing NIAC does not explicitly regulate internment review. However, it is submitted by the ICRC – and widely accepted – that at least an initial review and a six-month periodical review should be provided for.

The body that initially and then periodically reviews an internment decision must be independent and impartial. Against this background, in the third meeting session the experts discussed the nature, composition and other characteristics that a body charged with internment review in NIAC should have in order to fulfil the requirements of independence and impartiality.

On a preliminary note, some participants suggested that a distinction should be made between two different procedures for challenging the lawfulness of internment in NIAC:

- 1° Initial and periodic review of the (continued) necessity of internment for reasons related to the conflict, meaning that a person can only be lawfully interned as long as internment is necessary for imperative reasons of security. The organisation of internment review is an IHL obligation on the parties to an armed conflict.<sup>18</sup>
- 2° The right under IHRL for any person deprived of liberty to challenge the lawfulness of his or her detention (internment in the present case) without delay, before the courts of the detaining power. The process is initiated on the detainee's initiative. In the view of the UN Human Rights Committee, the right is non-derogable and thus a person cannot be denied the right to "habeas corpus".

The two forms of review were often mixed up in the discussion since they are similar and may be linked. For the purposes of this summary report they will be referred to as "internment-review" (1°) and "habeas corpus" (2°) and treated separately.

### Internment-review: the IHL paradigm

It was generally accepted by the experts that internment review must be carried out individually for every internee in a NIAC (initially and periodically if the internment is continued) and that the body carrying it out must be independent and impartial.

The questions for discussion therefore related to the nature of the review body and the characteristics it must have to be considered independent and impartial. Most experts resolved the matter by seeking inspiration in the law applicable to international armed conflict and occupation and thus applied an IHL paradigm. A number of experts, however, argued in favour of a human rights-oriented approach and thus an internment review that would bear more resemblance to a *habeas corpus* procedure.

### *Nature of the body*

In situations of international armed conflict and occupation an interning power can choose whether the internment review body is to be a court or an administrative board. IHL in NIAC does not provide explicit guidance on the matter.

18 It was submitted by a good number of experts that a State must derogate from art. 9, para. 1 ICCPR and/or art. 5, para. 1 ECHR in order to intern in a NIAC. The question of whether derogation is needed from art. 9, para. 4 ICCPR and/or art. 5, para. 4 ECHR is different, as it relates to the right of *habeas corpus*. Independent of an IHL required internment review the right to *habeas corpus* must be derogated from only if internees are not given the opportunity to exercise that right.

The advantages and disadvantages of both options: a judicial body – meaning a court – or an administrative body were discussed.

The main advantage of a court – in principle – is that it offers better guarantees of independence and impartiality and respect for essential procedural safeguards. The main disadvantage is that a court – in principle – is not accustomed to dealing with cases of security internment in a situation of armed conflict and that it is not feasible to expect military forces to collect evidence according to judicial standards in war. In practical terms, it may be difficult to bring internees before a court for security and/or logistical reasons in active theatres of war. Court proceedings can be and usually are slow.

The main advantage of an administrative body is that it can be (and in IAC and occupation is foreseen as being) set up specifically for the purpose of internment review, meaning that it can be adapted to the specific context and type of deprivation of liberty involved. The main disadvantage of ad hoc administrative bodies is that there is little, if any regulation, on their composition, powers and procedures making it difficult to ensure independence and impartiality as well as effective implementation of the necessary procedural safeguards.

The experts were of the view that the nature of an internment review body (judicial versus administrative) is less important than the fact that it must be independent and impartial. It was admitted that in some contexts courts were neither independent nor impartial and that, conversely, an administrative internment review body may live up to those standards. Nevertheless, the preference of many experts was that internment review should be carried out by a judicial body.

It was concluded that while there is no obligation for internment review to be conducted by a court, this task must be performed by a body that is independent and impartial. The reasons given by those who wished to retain the possibility of an administrative board were twofold. First, because of the balance that must be struck between military necessity and operational limitations in armed conflict on the one hand, and the rights of internees, on the other. In a NIAC, especially a MNF-NIAC, it will not always be possible to ensure that the courts of the interning power carry out internment review. Also, it would not always be appropriate given that court proceedings are time-consuming and may actually delay release. Secondly, the equality of rights and obligations of the parties to an armed conflict under IHL means that there must be an alternative to judicial review that could be utilized by non-State armed groups who are unlikely to have any – recognized – court system. Again, the important issue is that persons are not arbitrarily interned and that their internment is reviewed by a body that can effectively do so and order release as soon as internment is no longer necessary.

### *Independence and impartiality*

How can the independence and impartiality of an internment review body – whether judicial or administrative in nature – be ensured?

Several points were made:

- Transparency of the procedures and their implementation was said to be crucial;
- Most experts agreed that to be independent a review body should have direct decision-making power, i.e. not only have the power to continue internment but also to order release without that decision being subject to further confirmation by operational command. To address the command's possible concerns an appeal could be provided, but should be subject to the appellant bringing forward new and additional information that would justify continued internment;
- Access to all available information on a case is crucial for review to be meaningful. Security clearance for access to classified information related to a case should be given to at least one, if not all members, of the review body;
- Members of the review body should be appointed from outside the chain of operational command or at least be effectively independent from the latter's influence;
- The review body should be made up of permanent members and internment-review should be their only task. This would enable them to both understand the process itself and to ensure the effective functioning of the review mechanism;
- At least one of the review body's members should be a qualified lawyer.

### *Habeas corpus*: an IHRL-paradigm

Under international human rights law, any person deprived of liberty has the right to challenge the lawfulness of detention before a court without delay (art. 5, para. 4 ECHR, art. 9, para. 4 ICCPR). The right to judicial review of detention is often referred to as the right to “*habeas corpus*”.

Based on the premise that IHRL does not cease to apply in times of armed conflict an internee would, apart from IHL internment review as outlined above, also have the right to *habeas corpus* as a second legal avenue for challenging the lawfulness of internment. The participants did not, however, come to a consensus on this matter. The debate raised many interesting and important questions, but unfortunately there was not enough time to discuss them in more detail. The following is therefore a summary of the main positions and issues raised.

#### *The “yes” view*

Some experts argued that the right to *habeas corpus* remains fully applicable in armed conflict. Other experts were of the view that a State could only exclude the availability of this procedure by lawfully derogating from its obligations under IHRL in NIAC. Yet others argued that the availability of the right to *habeas corpus* for persons interned in a NIAC could be made dependent on the absence or the exhaustion of an IHL-based internment review. It remained unclear whether



derogation from the right to *habeas corpus* would be required in cases where the IHL internment review was available.

An additional question was posed in the specific context of an MNF-NIAC: if the right to *habeas corpus* exists, before which country's courts should the proceedings be brought? Some experts argued that the proceedings should be brought before the courts of the "host" State, i.e. in whose territory internment takes place. Others strongly rejected this option and argued that the proceedings should only be brought before the domestic courts of the State interning extra-territorially.

### *The "no" view*

A small minority of participants argued that IHRL does not continue to apply in times of armed conflict and that the right to *habeas corpus* is therefore not available to individuals interned.

A few experts opposed the extra-territorial applicability of IHRL in the specific context of a MNF-NIAC and argued that human rights, including the right to *habeas corpus*, do not apply to individuals interned in relation an armed conflict by a State acting outside its own national territory.

*Internment review by an administrative board or a court is mandatory under IHL. All parties to an armed conflict are obliged under IHL to set up a mechanism to review – initially and periodically – the lawfulness of internment. Whether administrative or judicial in nature a review body must be independent and impartial and allow the internee to mount a meaningful challenge to the lawfulness internment. While there are no formal rules on how to ensure the independence and impartiality of a review body several proposals were discussed that could be implemented on a case-by-case basis.*

*There was disagreement on whether the right of a person deprived of liberty – including internees in NIAC – to habeas corpus as provided for under international human rights law remains intact. If it does, the interplay between this procedure and internment review under IHL also raises legal and practical questions to which there are no clear answers.*

*As regards the practical implementation of an internment review procedure (sessions 2 and 3), the issue of both human and financial resources was raised, mainly by operational personnel. While experts were generally of the view that insufficient resources cannot serve to justify non-compliance with legal obligations, many stressed that the resource issue must be taken into account when designing an internment regime in practice. It was recommended that a feasibility evaluation be made whenever resource sensitive obligations are involved.*



## Reports and Documents

# Council of Delegates of the International Red Cross and Red Crescent Movement Nairobi, 23–25 November 2009

## Resolutions\*

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- Resolution 1** Towards the Implementation of the Memorandum of Understanding (MoU) and the Agreement on Operational Arrangements (AOA) between the Palestine Red Crescent Society (PRCS) and Magen David Adom in Israel (MDA)
- Resolution 2** Strategy for the Movement
- Resolution 3** Revision of National Society statutes
- Resolution 4** Policy on migration International Federation of Red Cross and Red Crescent Societies
- Resolution 5** Movement policy on internal displacement
- Resolution 6** Movement Strategy on Landmines, Cluster Munitions and other Explosive Remnants of War: Reducing the Effects of Weapons on Civilians
- Resolution 7** Preventing humanitarian consequences arising from the development, use and proliferation of certain types of weapons

\* The resolutions are available on the websites of the International Committee of the Red Cross ([www.icrc.org](http://www.icrc.org)), the International Federation ([www.ifrc.org](http://www.ifrc.org)) and the Standing Commission ([www.rcstandcom.info](http://www.rcstandcom.info)), in the sections devoted to the 2009 Council of Delegates.

- Resolution 8** Respecting and protecting health care in armed conflict and other situations of violence
- Resolution 9** Code for Good Partnership of the International Red Cross and Red Crescent Movement
- Resolution 10** Date and place of the Council of Delegates of the International Red Cross and Red Crescent Movement
- Resolution 11** Appreciation to the Kenya Red Cross Society

## Resolution 1

### TOWARDS THE IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING (MoU) AND THE AGREEMENT ON OPERATIONAL ARRANGEMENTS (AOA) BETWEEN THE PALESTINE RED CRESCENT SOCIETY (PRCS) AND MAGEN DAVID ADOM IN ISRAEL (MDA)

The Council of Delegates,  
*recalling* the MoU signed by PRCS and MDA on 28 November 2005, in particular the following provisions:

1. *MDA and PRCS will operate in conformity with the legal framework applicable to the Palestinian territory occupied by Israel in 1967, including the Fourth Geneva Convention of 1949 on the protection of Civilians in Time of War.*
2. *MDA and PRCS recognize that PRCS is the authorized National Society in the Palestinian territory and that this territory is within the geographical scope of the operational activities and the competences of PRCS. MDA and PRCS will respect each others' jurisdiction and operate in accordance with the Statutes and Rules of the Movement.*
3. *After the Third Additional Protocol is adopted and by the time MDA is admitted by the General Assembly of the International Federation of Red Cross and Red Crescent Societies:*
  - a. *MDA will ensure that it has no chapters outside the internationally recognized borders of the State of Israel;*
  - b. *Operational activities of one Society within the jurisdiction of the other Society will be conducted in accordance with the consent provision of resolution 11 of the 1921 International Conference;*

*taking note*, with appreciation for his work, of the report presented to the Council by Minister (Hon.) Pär Stenbäck, the Independent Monitor appointed by the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (International Federation) with the agreement of MDA and the PRCS upon request of the International Conference to monitor progress achieved in the implementation of the MoU and the AOA of 28 November 2005 between the PRCS and the MDA;

*recalling* Resolution no. 2 adopted by the Council of Delegates on 24 November 2007 concerning the implementation of the MoU and AOA between PRCS and MDA;

*recalling* Resolution no. 5 adopted by the 30th International Conference of the Red Cross and Red Crescent concerning the implementation of the MoU and AOA between PRCS and MDA;

*affirming* the importance of operating in accordance with international humanitarian law and with the Statutes, Rules, and Fundamental Principles of the International Red Cross and Red Crescent Movement;

*recalling* the obligation to respect and to protect health care personnel, including Red Cross and Red Crescent workers, their means of transport as well as medical establishments and other medical facilities at all times, in accordance with international law, and in particular international humanitarian law;

*reaffirming* the necessity for effective and positive coordination between all components of the Movement of Red Cross and Red Crescent for the full implementation of the MoU between the PRCS and MDA;

1. *regrets* that satisfactory progress in the implementation of the MoU by MDA has not been achieved, as observed by the Monitor;
2. *requests* MDA, as reported by the Monitor, that it fulfil its obligations under the MoU and conduct its activities in accordance with the provisions of resolution no. 11 of the International Conference of 1921 and the legal framework applicable to the Palestinian territory occupied by Israel in 1967, particularly those relating to geographic scope of the two National Societies and to urgently implement the provisions related to geographic scope;
3. *requests* the ICRC and International Federation to confirm the mandate of the Monitor as decided by the 30th International Conference of the Red Cross and Red Crescent and to continue to support and strengthen the monitoring of the implementation of the MoU and AOA;
4. *requests* the Monitor to report regularly on the progress of the implementation of the MoU, as he deems necessary;
5. *requests* National Societies to favourably respond to any request for help and support that the Monitor may ask of them in the fulfilment of his task up to the next Council of Delegates;
6. *requests* the ICRC and International Federation to arrange for the provision of a report on implementation of the MoU and AOA to the next Council of Delegates and through it to the International Conference;
7. *requests* National Societies to help MDA facilitate the implementation of the MoU, if appropriate.

## Resolution 2

### STRATEGY FOR THE MOVEMENT

The 2009 Council of Delegates,  
*recalling* Resolution 7 of the 2007 Council of Delegates on the Strategy for the Red Cross and Red Crescent Movement (Movement Strategy) and the further work called for in that resolution;

*appreciating* the consolidated report on the implementation of the Strategy by the components of the Movement;

*welcoming* the work undertaken on the Movement fora and Statutory bodies (Action 4) and the comprehensive reviews undertaken by the Standing Commission, in particular the findings regarding implementation by National Societies of decisions taken at past Movement meetings;

*further welcoming* the work on how to more effectively present the Movement's key messages for use and influence through RC/RC humanitarian diplomacy (Action 8);

*reaffirming* the validity of the existing rules governing the use of the emblems, notably those contained in the 1949 Geneva Conventions, their Additional Protocols and the 1991 Regulations on the use of the emblem by the National Societies, and *emphasizing* the vital importance of respect for those rules to guarantee the protective value of the emblems and access to people in need of protection and assistance and to strengthen the identity of the Movement,

*welcoming* the Study on Operational and Commercial and other Non-operational Issues Involving the Use of the Emblems (the Study) prepared by the ICRC, in consultation with States, National Societies and the International Federation,

*reaffirming* the validity of the Strategy and the importance and relevance of its strategic objectives;

1. *invites* all components of the Movement to complete the 10 actions in the Strategy for the Movement by 2011;
2. *calls on* the Standing Commission, the ICRC and the International Federation to take concrete steps to improve the dialogue with and the involvement of National Societies in the preparation of the 2011 statutory meetings in the interest of better ownership and implementation of the results of those meetings;
3. *further calls on* the International Federation and the ICRC, to enhance their monitoring mechanisms, involving their regional structures, for improved feedback from National Societies on the implementation of resolutions adopted by this Council and coming statutory meetings and to share the findings with the Standing Commission;
4. *invites* the Standing Commission to continue its work on reducing the complexities of the Movement fora in close consultation with National Societies, the ICRC and the International Federation and to present its proposals for change, as relevant, to the 2011 Council of Delegates;

5. *invites* National Societies to communicate to the Standing Commission and its working group their views and thoughts on options for better alignment of Movement fora;
6. *invites* the ICRC and the Federation to analyse the ‘Our World–Your Move’ campaign in relation to the expected results of Action 8 in the Movement Strategy to help guide all components on how to better communicate the Movement’s key messages;
7. *calls on* the Standing Commission, with the International Federation and the ICRC, to present to the 2011 Council of Delegates an evaluation of the achievement of the strategic objectives and the expected results in the ten actions of the Movement Strategy;
8. *requests* the Standing Commission to examine the necessity of and prepare a Strategic Framework for the Movement as a continuation of the present Strategy, as needed, taking into account experiences and lessons learnt from the evaluation and internal and external challenges facing the Movement;
9. *calls upon* components of the Movement to implement and promote the recommendations of the Study to enhance the implementation of the rules governing the use of the emblems.



## Resolution 3

### REVISION OF NATIONAL SOCIETY STATUTES

The Council of Delegates,

*recalling* Resolution 6 of the 2005 Council of Delegates, which adopted the updated Strategy for the International Red Cross and Red Crescent Movement (Movement) reinforcing the ambition to build an even stronger Movement through enhanced cooperation for effective humanitarian action throughout the world,

*reaffirming* Action 3 of the Strategy for the Movement, which calls on all National Societies to examine their statutes and related legal texts by 2010 and, where necessary, to adopt new constitutional texts, in accordance with the “Guidance for National Societies Statutes” (Guidance document) and relevant resolutions of the International Conference (Resolution 6 of the 22nd International Conference, Teheran 1973, and Resolution 20 of the 24th International Conference, Manila 1981),

*further recalling* Resolution 7 of the 2007 Council of Delegates, which urges all National Societies, as requested under Action 3 of the Strategy for the Movement, to examine and update their statutes and related legal texts by 2010, in accordance with the Guidance document and relevant International Conference resolutions,

*welcoming* the report of the Joint ICRC/International Federation Commission for National Society Statutes (Joint Statutes Commission), which summarizes the progress made, the experience gained and the work still to be undertaken,

*noting with concern* that despite the progress achieved, the Movement is still far from reaching its objective of ensuring that by 2010 the statutes of all National Societies comply with the minimum requirements set out in the Guidance document,

1. *draws* the attention of all components of the Movement, in particular their leadership, to the crucial importance of high-quality statutes and related legal texts for the National Societies’ ability to deliver effective services to people in need and to act in conformity with the Fundamental Principles,
2. *urges* National Societies to continue working closely with ICRC and International Federation delegations, to consult with the Joint Statutes Commission and to take the Commission’s recommendations into account in order to ensure that all National Societies have examined and updated their statutes and related legal texts by the end of 2010, as requested under Action 3 of the Strategy for the Movement and in accordance with the Guidance document and relevant International Conference resolutions;
3. *calls upon* National Societies which have not yet initiated or concluded a statute-revision process to take the necessary steps to fulfil the objective of Action 3 of the Strategy for the Movement on the basis of the Guidance document and the supplementary Advisory Notes;

4. *recommends* to National Societies undertaking a revision process that they be particularly attentive to the following issues identified by the Joint Statutes Commission as the issues most often at variance with the Guidance document in the National Society draft statutes:
  - a clear definition of the National Society’s relationship with the public authorities and its auxiliary status in the humanitarian field is needed, in respect for the Fundamental Principle of Independence,
  - a clear definition is needed of the governing bodies (composition, duties, procedures and rotation),
  - separation must be ensured between governance and management functions,
  - membership must be defined,
  - the branch structure must be clearly set out (how branches are created, what bodies govern them and the relationship between branches and headquarters);
5. *strongly encourages* National Societies undertaking a revision process to use the Guidance document as reference document, as well as the Advisory Notes drawn up by the Joint Statutes Commission, in particular Advisory Note No. 3 on the process of revising National Society statutes;
6. *invites* the International Federation and the ICRC to draw on the work of the Joint Statutes Commission in order to provide the next Council of Delegates with a comprehensive assessment of the fulfilment of the objective set in the Strategy for the Movement (Action 3) and to present the Council with recommendations on the most appropriate ways to continue the process of working with National Societies on their statutes after the 2010 deadline for Action 3 of the Strategy for the Movement has expired.

## Resolution 4

### POLICY ON MIGRATION

#### INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES

The Council of Delegates,

*underlining the Movement's* deep concern about the plight of tens of millions of migrants who live outside or at the margins of conventional health, social and legal systems, and whose humanitarian needs and vulnerabilities are growing due to the increasing exclusion, exploitation and the denial of their fundamental rights to which they are exposed,

*recalling* the acknowledgement by the 30th International Conference of the Red Cross and Red Crescent (Resolution 1 “Together for Humanity”, Geneva 2007) of the role of the International Red Cross and Red Crescent Movement, and in particular of National Societies of the Red Cross and Red Crescent, in providing protection and assistance to vulnerable migrants, irrespective of their legal status,

*recalling* the decision of the General Assembly of the International Federation of Red Cross and Red Crescent Societies (Federation), at its 16th session (Resolution 12, Geneva 2007), to develop a policy on migration for National Societies, noting that it will benefit from the specific role, experience and expertise of the International Committee of the Red Cross (ICRC) in restoring family links and other protection issues, in particular regarding persons deprived of their liberty,

*recalling* its request for the International Federation to report back on the policy,

*recalling* its request to the ICRC to develop guidelines for National Societies working or wishing to work in places where migrants are detained in consultation with National Societies and their International Federation and to report back at the next Council of Delegates,

1. *welcomes* the new Federation policy on migration, adopted by the Federation's Governing Board on 3 May 2009;
2. *commends* the policy for its focus on the need for humanitarian access for migrants, irrespective of their legal status, while at the same time recognizing the importance of the legal protection afforded to them under international human rights law, international humanitarian law and international refugee law;
3. *takes note* that the policy has benefited from the expertise of the ICRC in restoring family link and other protection issues and that the ICRC will contribute to its implementation in these fields, and as mentioned in the policy;
4. *takes note* of the guidelines for National Societies working or wishing to work in places where migrants are detained developed by the ICRC in consultation with National Societies and their International Federation;

5. *notes* with satisfaction the complementary nature of the Federation policy on migration and the Movement policy on internal displacement, proposed for adoption at this session of the Council, and the fact that therefore, together, these policies will strengthen the strategic response of the Movement to the humanitarian needs and vulnerabilities of a large spectrum of uprooted persons;
6. *reiterates* its call to the components of the Movement to give more prominence to the humanitarian consequences of migration at international, regional, national and local levels (Council of Delegates, Resolution 5, Geneva November 2007);
7. *requests* the International Federation, National Societies and the ICRC, in accordance with their respective mandates, to continue cooperating closely in implementing the policy and in coordinating within and beyond the Movement to support the provision of the necessary services and protection to vulnerable persons throughout the entire migration cycle, including return and reintegration.

## Policy on Migration

In 2007, the 16th General Assembly of the International Federation of Red Cross and Red Crescent Societies requested the Governing Board to establish a Reference Group on Migration to provide leadership and guidance and to develop a Federation policy on migration. The Council of Delegates welcomed this decision and highlighted the Movement-wide importance of the humanitarian consequences of migration. The 30th International Conference of the Red Cross and Red Crescent also underlined the humanitarian concerns generated by international migration. Its declaration *Together for Humanity* elaborated on the issue, acknowledging the role of National Societies in providing humanitarian assistance to vulnerable migrants, irrespective of their legal status.

The present policy on migration expands the scope of, and replaces the Federation policy on refugees and other displaced people. It builds on, and complements those resolutions of the Red Cross and Red Crescent Movement that relate to action in favour of refugees and internally displaced persons (see Annex). In order to capture the full extent of humanitarian concerns, the policy is deliberately broad. Therefore, while recognizing the specific rights of different categories under international law, it addresses the needs and vulnerabilities of, among others, labour migrants, stateless migrants, irregular migrants, as well as refugees and asylum seekers.

National Societies and the International Federation have a responsibility to ensure that their activities and programmes are carried out in compliance with this policy; that all staff and volunteers are aware of the rationale and content, and that all relevant governmental, intergovernmental and non-governmental partners are adequately informed about it.

## Policy Principles

Each National Society and the International Federation shall take into account and adopt the following approach on migration:

### 1. **Focus on the Needs and Vulnerabilities of Migrants**

The International Red Cross and Red Crescent Movement strives to adopt an integrated and impartial approach, combining immediate action for migrants in urgent need with longer term assistance and empowerment. It is therefore important that National Societies be permitted to work with and for all migrants, without discrimination and irrespective of their legal status.

### 2. **Include Migrants in Humanitarian Programming**

National Societies can opt for different approaches in assisting and protecting migrants. Some focus on migrants through special, targeted programmes or projects; others include migrants in their general humanitarian action, addressing the needs and vulnerabilities of the population in its diversity. Both approaches require sustained efforts by National Societies to guarantee impartiality and non-discrimination, taking into account the humanitarian needs of the host population.

### 3. **Support the Aspirations of Migrants**

Migrants have a legitimate claim to hope and opportunities to achieve their potential. They are also an important social, economic and cultural factor. Their skills, experience, and resilience can be a valuable contribution to their host communities. National Societies will consider migrants' own needs and interests, and support their social inclusion, integration, and their aspirations.

### 4. **Recognize the Rights of Migrants**

National Societies provide assistance and protection to migrants, irrespective of their legal status. Yet, the degree to which migrants are able to enjoy their rights is an important factor in assessing their vulnerability. By working with migrants to ensure that their rights are respected – including the right to the determination of their legal status – National Societies will also promote their social inclusion and their aspirations.

### 5. **Link Assistance, Protection and Humanitarian Advocacy for Migrants**

Assistance to migrants goes hand in hand with efforts to protect them against abuse, exploitation, and the denial of rights. In making these efforts National Societies will respect the migrants' own interest, and the imperative of doing them no harm. To enable migrants to overcome abuses and pressures, National Societies can provide legal advice, refer them to other relevant and competent organisations or entities, or undertake discreet or public forms of humanitarian advocacy.

### 6. **Build Partnerships for Migrants**

The humanitarian challenges of migration reach across borders, regions, and cultures. There is a Movement-wide responsibility for capacity-building, mutual support and coordination. Regional cooperation among National

Societies is equally essential. In working with external partners on migration, a common and principled approach of the Movement is indispensable.

**7. Work Along the Migratory Trails**

The Movement is in a unique position to help bridge the gaps of assistance and protection for migrants. National Societies in countries along the migratory trails will work together to optimise their humanitarian action, including the restoration of family links. This requires a focus on situations and conditions in which migrants all along their journey are especially susceptible to risks. National Societies may sensitize potential migrants about risks of migration, but must not seek to encourage, prevent or dissuade migration.

**8. Assist Migrants in Return**

Return to the place of origin is not the necessary end or solution of migration. Migrants may prefer to stay where they are, for an extended period or permanently. While providing counselling and informing migrants about their options, National Societies cannot and shall not decide what solution is the best, and must at all times maintain their impartiality, neutrality and independence. When migrants do return they face particular challenges; to assist and protect them, cooperation and agreement between National Societies in countries of destination and return is essential.

**9. Respond to the Displacement of Populations**

Armed conflicts and violence, natural or man-made disasters, but also development or relocation schemes can force populations to leave their homes, leading to accelerated and collective, even massive movements. The displaced populations might seek assistance and protection within their own country, or might find refuge across international borders. Displacement of populations and migration of individuals and groups are distinct but often interrelated phenomena; where they are interrelated, National Societies will strive for a coordinated action that covers both, the displaced and the migrants.

**10. Alleviate Migratory Pressures on Communities of Origin**

Migratory pressures on communities of origin can be related to social and economic distress; they can be linked to environmental degradation as well as natural or man-made hazards; and they can be due to persecution, armed conflict, and violence. By supporting disaster preparedness and building resilience at community level, National Societies contribute to alleviating pressures that can induce people to migrate against their will and desire.

## Policy Guidance

### Introduction

In engaging in the area of migration, National Red Cross and Red Crescent Societies have the purpose – individually and together with the International Federation and the ICRC – to address the humanitarian concerns of migrants in need throughout their journey. They strive to provide assistance and protection to them, uphold their rights and dignity, empower them in their search for opportunities and sustainable solutions, as well as promote social inclusion and interaction between migrants and host communities.

Working with and for vulnerable migrants is one of the long-standing traditions of the International Red Cross and Red Crescent Movement. It is rooted in its Fundamental Principles and universal character as well as in its volunteer and community basis. However, patterns and issues associated with migration change over time. We should, therefore, continually examine our ways of working with and for migrants to ensure that our action remains strong, coherent, and mindful of crosscutting issues. Our policy on migration is a living policy: it will be reviewed and, if necessary, revised as we evaluate its implementation.

Many migrants succeed in establishing themselves in their new communities, but others – those at the centre of our attention – face difficulties. They may lose the links with their families and communities. Outside their traditional support systems, they often are unable to access health and social services that respect their basic needs and dignity. They may be subject to human trafficking, sexual or labour exploitation. They may be deprived of their liberty and detained, as part of the migration process. Some risk persecution if they return to their countries of origin. Migrants also often face cultural and language barriers, discrimination and exclusion, or even violence. Women and children – especially unaccompanied and separated minors –, traumatised persons, people with physical and mental disabilities, and elderly persons are particularly vulnerable.

The approach of the Movement to migration is strictly humanitarian and based on the recognition of each migrant's individuality and aspirations. It focuses on the needs, vulnerabilities and potentials of migrants, irrespective of their legal status, type, or category.

In order to capture the full extent of humanitarian concerns related to migration, our description of migrants is deliberately broad: migrants are persons who leave or flee their habitual residence to go to new places – usually abroad – to seek opportunities or safer and better prospects. Migration can be voluntary or involuntary, but most of the time a combination of choices and constraints are involved. Thus, this policy includes, among others, labour migrants, stateless migrants, and migrants deemed irregular by public authorities. It also concerns refugees and asylum seekers, notwithstanding the fact that they constitute a special category under international law.

Migration within one country can lead to situations similar to international migration, especially if the migrants are subject to discrimination. For such situations, many recommendations of this policy will be useful. In other contexts, migration within one country is part of the general labour mobility, for example due to urbanization. In this case, support to migrants will fall under our general humanitarian action.

In contexts where migration is an important subject of domestic politics, there can be considerable pressure on National Societies to collaborate with governmental as well as non-governmental partners that have political rather than humanitarian objectives. The best way for National Societies to avoid or resist such pressure is to demonstrate that their work is based on an independent understanding of the migrants' own needs and interests, and rooted in the Movement's Fundamental Principles.

## **1. Focusing on the Needs and Vulnerabilities of Migrants**

- 1.1. The primary focus should always be on migrants whose survival, dignity, or physical and mental health is under immediate threat. Equally important are efforts to reduce the vulnerability of migrants, protect them against abuses, exploitation and the denial of rights, as well as to empower them to seek opportunities and sustainable solutions.
  - National Societies shall strive to combine their immediate response to the needs of migrants with programmes designed to reduce their vulnerabilities, and to protect and empower them.
- 1.2. The degree to which migrants have access to assistance, services and legal support is a key criterion in assessing their vulnerability. Those who lack access are especially susceptible to risks.
  - National Societies shall undertake sustained efforts to ensure that migrants have access to humanitarian assistance, essential services, and legal support. They shall strive to obtain effective and unconditional access to all migrants, irrespective of their legal status.
- 1.3. Migrants often face difficulties in obtaining permits to transit through countries, or to stay and work abroad. Many try to pass borders illegally, or they go into hiding from authorities when failing to legalize their status. At the same time, governments are increasingly implementing policies to curb irregular migration. To do so is the prerogative of governments as long as they act within accepted international standards. However, such policies tend to increase the vulnerability of irregular migrants, as they face obstacles in obtaining basic assistance and essential services.
  - National Societies shall take into account the needs and vulnerabilities of irregular migrants. To the extent possible, they shall take steps to respond to their needs, either through direct assistance, or referral, or humanitarian advocacy efforts.
- 1.4. The age and gender of migrants have an influence on their susceptibility to risks, as do other factors, such as their state of health, disabilities, national or ethnic origin, and cultural background.



- National Societies shall pay special attention to age, gender, and other factors of diversity that increase the vulnerability of migrants.
- 1.5. When collecting data on migrants, National Societies do so for the purpose of humanitarian assessment, planning and response. However, third parties might want to use the data for purposes that run counter to humanitarian principles, such as discriminatory policies.
  - National Societies should recognize that third parties might misuse information that they collect on migrants. Within the limits of national law, they shall ensure that the information remains within the humanitarian domain.

## **2. Including Migrants in Humanitarian Programming**

- 2.1. National Societies may choose to set up programmes that are specifically designed to address the needs and vulnerabilities of migrants. Programming should be based on vulnerability and capacity assessments using participatory approaches. If National Societies set up such programmes, it is crucial that they ensure transparency and avoid creating barriers between migrants and the general population.
  - When conducting programmes with a special focus on migrants, National Societies shall strive to integrate these programmes within their overall strategy for a general and non-discriminatory humanitarian response.
- 2.2. Alternatively, National Societies may choose to include migrants in their general humanitarian action. In this case, they may come under pressure to give preferential treatment to local communities, and might run the risk of overlooking the specific situation of migrants. In crises or emergencies, third parties might prevent migrants from receiving assistance.
  - National Societies shall take pre-emptive measures to ensure that migrants are included in general humanitarian action through a careful diversity approach, especially in times of crises and emergencies.

## **3. Supporting the Aspirations of Migrants**

- 3.1. Host communities can benefit from non-material values that come with migration, such as migrants' skills, experience and resilience, as well as cultural diversity. Moreover, many countries depend on migrants as part of their labour force. In turn, countries of origin may benefit from remittances transferred home by migrants. Yet, in spite of these benefits of migration, migrants often face suspicion, or even hostility and xenophobia.
  - By underlining the benefits that migrants bring to host communities and countries of origin, National Societies can help overcome barriers of exclusion and discrimination and reduce the potential for community tensions.

- 3.2. Public authorities, other institutions, and the general public may have assumptions about migrants that differ from what the migrants themselves see as their interests, needs and capabilities. Equally, migrants can have misperceptions or misunderstandings regarding the laws, customs and conditions in their host country. National Societies can reduce these gaps by promoting the participation of migrants in decisions that have an impact on their lives.
  - To the extent possible, National Societies shall involve migrants in participatory processes within their host communities. This will help ensure a response to their needs and aspirations that is mutually acceptable and beneficial.
- 3.3 Linguistic and cultural barriers can prevent migrants from representing their own needs, interests and aspirations effectively. They also might misunderstand the role of the International Red Cross and Red Crescent Movement in their host country, and mistrust its national staff. By adopting policies to ensure the diversity of their staff and volunteers, National Societies can overcome such barriers and support social inclusion.
  - To the extent possible, National Societies shall integrate members of migrant communities as staff and volunteers into their ranks.

#### 4. Recognizing the Rights of Migrants

- 4.1. Legal considerations are an essential element in determining the vulnerability of migrants, and in securing adequate access for them to assistance and services. Moreover, legal considerations are important when designing strategies to empower migrants and support them in establishing realistic and positive prospects for themselves.
  - National Societies shall develop a thorough understanding of migrants' rights as a key element for responding to the vulnerabilities of migrants, and for their empowerment.
- 4.2. No migrant is without rights. National legislation is a source of these rights, but it falls under the overall framework of international bodies of law: (a) international human rights law, which defines the rights of all human beings; (b) international humanitarian law, which protects, among others, civilians in situations of armed conflict, including migrants; (c) international refugee law, which sets out the specific rights of asylum seekers and refugees as a distinct legal category. All three bodies of law include or recognize the principle of *non-refoulement*, which prohibits the expulsion or removal of persons to countries where there are reasons to believe they will be subjected to persecution, torture or other forms of cruel, inhumane or degrading treatment, or to arbitrary deprivation of life.
  - In their work with and for migrants, National Societies shall respect the relevant national and international law. They also have a role in promoting the rights of migrants and sensitizing partners, counterparts and

the public to the principle that no migrant is without rights, regardless of his or her legal status.

- 4.3. States have the right to regulate migration in their domestic legislation and through administrative policies and practices. At the same time, they are required to respect, protect, and fulfil the rights of migrants. This obligation includes measures to safeguard access to the asylum system, as well as action against discriminatory and exploitative practices, such as the exclusion of migrants from services and assistance responding to their basic needs. It may also concern governments whose migrant citizens abroad, or diasporas, are discriminated against or exploited.
  - If necessary and appropriate, National Societies shall remind or call upon public authorities to take action against discrimination and exploitation of migrants.

## 5. Linking Assistance, Protection and Humanitarian Advocacy for Migrants

- 5.1. Protection is a crosscutting concern. When National Societies encounter situations where migrants are at risk, there is a range of measures that can contribute to their protection. These include direct assistance, legal advice, referrals to relevant organisations, and different forms of advocacy. In order to identify the adequate measures, it is important for National Societies to understand and analyse the various risk factors.
  - In their efforts to protect migrants, National Societies shall take care to choose those measures that they are best suited to undertake. They will ensure that these measures do no harm and maximize the benefits to migrants.
- 5.2. There are circumstances that expose migrants to heightened and acute risks to their physical integrity and well-being. This is the case when they are subject to *refoulement*, sexual and labour exploitation, and human trafficking. It may also be the case when migrants are in the hands of people smugglers. National Societies encountering such cases may require special support and guidance from the International Federation or the ICRC which will assist them to develop their capability to respond.
  - The International Federation and the ICRC shall provide guidelines and advice to National Societies working in situations of heightened and acute risks to migrants.
- 5.3. An increasing number of migrants are unaccompanied minors or minors separated from their families. Without family links or appropriate care arrangements, they are at high risk of abuse and exploitation. Their rights may be violated, and their prospects for a secure and productive future are often dim. These minors are of special concern to the Movement.
  - National Societies shall cooperate and engage in the protection of unaccompanied and separated minor migrants, including through efforts to restore their family links. To the best of their capacities, they shall support them in building a viable future for themselves.

- 5.4. Migrants who are detained in the course of the migratory process may be exposed to heightened risks. Under certain circumstances and conditions, National Societies may contribute to improving their treatment and conditions of detention. However, National Societies should ensure that their work for migrants in detention is carried out in the migrants' interest, and thus does no harm.
  - National Societies choosing to initiate activities for detained migrants, such as the provision of specific services or monitoring of detention conditions, shall follow guidelines developed for this purpose under the lead of the ICRC.
- 5.5. The National Society of the country hosting migrants is usually in a privileged position to conduct advocacy on their behalf. Humanitarian advocacy can take the form of discreet interventions with authorities or private parties; or of public statements, messages, or campaigns. Whatever form it takes, it should always be carefully targeted and reflect the concrete situation of those on whose behalf it speaks.
  - National Societies shall base their advocacy on behalf of migrants on concrete experience that they, or other components of the Movement, have gained in working with and for the migrants of concern.
- 5.6. A National Society may need other National Societies or external partners, to support its advocacy on behalf of migrants in its country. The International Federation plays an important role in supporting such advocacy interventions and in carrying out advocacy activities on migration at the global level.
  - National Societies can call on other National Societies, the International Federation or external partners to support their advocacy on behalf of migrants. Where several components of the Movement are concerned by a common migration issue, a coordinated approach on advocacy is essential.

## **6. Building Partnerships for Migrants**

- 6.1. Several components of the Movement may be present in a country where a National Society is providing assistance and protection for migrants. Even where only one National Society is present, work on migration issues usually implies crossborder and interregional relations with other National Societies. It is important to make good use of Movement-wide networks and platforms to optimise National Societies' action on migration.
  - In undertaking their assistance and protection efforts on behalf of migrants, National Societies, the International Federation, and the ICRC shall make use of available Movement mechanisms to build partnerships and seek consent among each other.
- 6.2. For a coherent global response to the humanitarian consequences of migration, National Societies require adequate capacities, in terms of dedicated expertise, staffing, structures, and other resources.

- A global and effective system of support and partnership, specifically dedicated to migration issues, should be built under the lead of the International Federation to support capacities of National Societies on migration.
- 6.3. Governments increasingly coordinate their national migration policies at a regional level. The humanitarian aspects of regional policies are of direct concern to National Societies, and often require coordination within regional groups. However, regional policies have an inter-regional and global humanitarian impact. Consequently, regional cooperation of National Societies requires that they also consult and cooperate with National Societies beyond their region, in line with the universal character of the Movement.
  - Regional groups of National Societies working together on migration shall consult and cooperate with National Societies beyond their region, in order to share relevant interregional and global humanitarian concerns.
- 6.4. Domestic institutions as well as international organizations may have mandates to assist and protect specific categories of migrants in a country or region. It is important for National Societies to design a strategy by which, within their capacities, they add value to the overall response, while acting within humanitarian principles and maintaining their independence.
  - National Societies shall take into account the roles and mandates of other organizations or institutions that provide assistance and protection to migrants. When working together with them, National Societies shall respect Movement policies and principles concerning external cooperation.

## 7. Working Along the Migratory Trails

- 7.1. Understanding the conditions all along migratory trails is important to ensure assistance and protection for migrants where they are most in need and at risk. Therefore, National Societies need to collect and exchange information, and establish an integrated picture of the conditions of migrants as they move.
  - National Societies along migratory trails shall strive to exchange information about the conditions and risks for migrants in the countries concerned, and to integrate the information to facilitate the assessment of their needs and vulnerabilities.
- 7.2. Work with migrants in transit is a challenge for National Societies, as these migrants tend to be particularly vulnerable to abuses and exploitation. Their very survival can be at stake. As these migrants are transient, it is critical for National Societies to assess their needs and take effective humanitarian action.
  - It is a priority for the International Federation to strengthen the capacities of National Societies to work with migrants in transit.

National Societies in countries of transit shall identify their requirements for support.

- 7.3. Support in establishing community linkages is part of National Societies' overall engagement in promoting the social inclusion and integration of migrants. Isolation and the lack of community linkages increase their vulnerability. The links of migrants with their families and communities at home are often weakened and sometimes entirely lost. The worldwide family links network of National Societies and the ICRC is often the last resort for restoring family links between the migrants and their families.
  - It shall be a priority for National Societies, in working together, as well as with the ICRC, to take action for restoring the family links of migrants.
- 7.4. In some cases, migrants enter countries without presenting themselves at official border crossings. As public authorities have intensified their efforts to prevent such irregular migration, migrants of different origins and profiles are often detained in groups. They tend to be treated as part of a clandestine or irregular "mixed group", rather than as individuals with specific needs, vulnerabilities and rights, including the right to seek asylum.
  - National Societies shall recognize and support the right of each member of mixed migrant groups to be considered on an individual basis. They should strive to assist each of them in seeking the opportunity to assert their individual claims through adequate procedures.
- 7.5. People deciding to migrate in search of safety and new places to live and work need to know about the risks of migration, which for irregular migrants can be life threatening. Migrants' hopes for opportunities abroad may also be inflated and unrealistic. Raising the awareness of potential migrants about the risks of migration, and of conditions in countries of destination, can prevent human suffering. However, many migrants may have no choice but to travel by irregular means. As a matter of principle, National Societies must not seek to prevent migration: whether to migrate or not is a personal decision. It is also important that National Societies avoid the perception that they are acting under governmental policies to encourage, prevent or dissuade migration.
  - National Societies may raise the awareness of potential migrants concerning the risks of migration, particularly irregular migration. However, they must avoid becoming instruments of governmental policies, aimed at preventing migration as a whole.

## **8. Assisting Migrants in return**

- 8.1. Returning migrants will often face challenges, particularly in terms of their reintegration – but they also can contribute to the development of countries of return. When working with and for them, National Societies are only concerned with the returnees' own needs and interests. At all times, they must maintain their impartiality, neutrality and independence. National

Societies in countries of destination and return should cooperate, both in preparation of returns, and in receiving the returnees. Activities by National Societies may include predeparture counselling and support as well as reintegration assistance and monitoring of conditions after return.

- Assistance and protection for returning migrants, before and after their return, shall be based on the agreement of the returnee. Cooperation between National Societies in countries of departure and countries of return is essential, and may include formal partnership agreements for the benefit of returnees.
- 8.2. It is within the prerogative of States to regulate the presence of migrants, and if they are deemed irregular, to expel or deport them. However, governments must ensure that such coercive acts are executed in due respect of international law, including the principle of *non-refoulement*. National Societies are under no obligation, as auxiliaries to public authorities or otherwise, to have a role in coercive acts or migration control. In fact, their direct participation may endanger the neutrality and humanitarian identity of the Movement.
- National Societies shall avoid participation in expulsions or deportations of migrants. However, with the prior consent of both, those who will be forcibly removed and the National Society in the country of return, they may respond to humanitarian needs. In such cases, stringent programming conditions must be respected.

## 9. Responding to the Displacement of Populations

- 9.1. Situations of displacement of populations are often linked to migration. People in displacement may not be in a position to return or to stay where they have sought refuge. Thus, they may take the path of migration to reconstruct their lives elsewhere. For both, displaced populations and migrants, National Societies play an essential humanitarian role. This can involve individual action as well as action in partnership with the ICRC, the International Federation, or other National Societies. It is important to adopt a coordinated approach that considers displacement of populations and migration as challenges that are distinct but interrelated.
- Requirements for the response to situations of displacement of populations are different from those related to migration. However, all components of the Movement, as the contexts require, shall strive for a coordinated action that covers both, displaced populations and migrants.
- 9.2. In situations of internal displacement, i.e. displacement of populations within a country, national legislation is a source of law that guarantees assistance and protection for the affected populations. However, national legislation does not always foresee the extraordinary circumstances of internal displacement. Public authorities can be overstretched and weakened. In such situations, it is especially important for National Societies to base their

work on international human rights law and – for situations of armed conflict – international humanitarian law, both of which are reflected in the *Guiding Principles on Internal Displacement*. To facilitate the work of National Societies, the International Federation and the ICRC shall provide the necessary guidance.

→ National Societies providing assistance and protection in situations of internal displacement shall refer to the relevant international legal and normative frameworks, and follow the guidance of relevant Movement standards and policies.

9.3. Displacement within a country may precede the displacement of refugees or disaster victims across international borders. On either side of the border, the circumstances and humanitarian needs of the displaced populations will be different. Crossborder coordination is essential in order to ensure that relief provided on either side of the border aims at durable collective solutions. The primary level of cross-border coordination shall be within the Movement; the secondary level shall be with external actors, in line with Movement policies and principles concerning external cooperation.

→ In contexts where an association exists between internal displacement and displacement across international borders, National Societies shall aim at a humanitarian response that is coordinated under a cross-border strategy.

## **10. Alleviating the Migratory Pressures on Communities of Origin**

10.1. In situations of armed conflict and other violence, international humanitarian law defines the rules that limit the effects of conflict and protect people and their homes. The humanitarian intervention of National Societies, in coordination and partnership with the ICRC with its specific mandate under the Geneva Conventions and the Statutes of the Movement, can reduce the risks of the displacement of populations, as well as the onward migration that may ensue.

→ To alleviate migratory pressures due to armed conflict and other violence, National Societies shall cooperate with the ICRC, and support its mandate under international humanitarian law.

10.2. Social and economic distress, as well as the lack of services and prospects for development, are major causes of migration. Humanitarian advocacy may encourage governments to take measures for improved services and economic development. However, the comparative advantage of National Societies lies in their contribution to the resilience of communities through volunteer based work. This may involve, among other activities, programmes for food security and income generation, programmes for health and education, or humanitarian relief.

→ When contributing to the reduction of migratory pressures in countries in economic and social distress, National Societies shall focus on



strengthening the resilience of people through action at community level.

- 10.3. Environmental degradation, coupled with population growth, makes living conditions in many places increasingly precarious, particularly for the poor. The threat of natural or man-made disasters can induce people to migrate in search of safer places. By preparing for such hazards and increasing the resilience of the population, National Societies and the International Federation contribute to alleviating pressures which compel people to migrate.
- As a key strategy to reduce migratory pressures on disaster-prone communities, National Societies and the International Federation shall focus on disaster risk reduction and disaster preparedness.

## Policy Annex

This policy addresses issues and contains concepts that may require further commentary and background. The documents listed in the Annex include Movement resolutions, Federation policies, Federation and ICRC guides and handbooks, resolutions adopted by regional statutory conferences, regional meeting recommendations, as well as a selection of relevant international legal instruments.

### Policy on Migration Annex

The policy on migration addresses issues and contains concepts that may require further commentary and background. The documents below are therefore intended to assist the reading of the policy. It is, however, not an exhaustive list of all texts that may of relevance when providing assistance and protection to migrants.

### Movement Resolutions

- Together for Humanity, Resolution 1, 30th International Red Cross and Red Crescent Conference, 2007
- Specific nature of the Red Cross and Red Crescent Movement in action and partnerships and the role of National Societies as auxiliaries to the public authorities in the humanitarian field, Resolution 2, 30th International Red Cross and Red Crescent Conference, 2007
- International Migration, Resolution 5, Council of Delegates, 2007
- Restoring Family Links Strategy (and Implementation Plan) for the international Red Cross and Red Crescent Movement (2008–2018), Resolution 4, Council of Delegates, 2007
- Promoting respect for diversity and non-discrimination – A contribution to peace and friendship between peoples, Resolution 3, Council of Delegates, 2005
- Implementation of the Seville Agreement, Resolution 8, Council of Delegates, 2005

- Promote respect for diversity and fight against discrimination and intolerance, Resolution 9, Council of Delegates, 2003
- Movement action in favour of refugees and internally displaced persons and minimum elements to be included in operational agreements between Movement components and their external operational partners, Resolution 10, Council of Delegates, 2003
- Movement action in favour of refugees and internally displaced persons, Resolution 4, Council of Delegates, 2001
- The Movement’s policy on Advocacy, Resolution 6, Council of Delegates, 1999
- Agreement on the organization of the international activities of the components of the International Red Cross and Red Crescent Movement (The Seville Agreement), Resolution 6, Council of Delegates, 1997
- Principles and action in international humanitarian assistance and protection, Resolution 4, 26th International Conference of the Red Cross and Red Crescent, 1995
- The Movement, refugees and displaced persons, Resolution 7, Council of Delegates, 1993
- The Movement and refugees, Resolution 9, Council of Delegates, 1991
- The Movement and refugees, Resolution XVII, 25th International Conference of the Red Cross, 1986
- International Red Cross aid to refugees, Resolution XXI, 24th International Conference of the Red Cross, 1981

### **Federation Policies**

- Health policy, 15th Session of the General Assembly, International Federation of Red Cross and Red Crescent Societies, 2005
- Psychological support policy, 7th Session of the Governing Board, International Federation of Red Cross and Red Crescent Societies, 2003
- Social welfare policy, 12th Session of the General Assembly, International Federation of Red Cross and Red Crescent Societies, 1999
- Disaster preparedness policy, 12th Session of the General Assembly, International Federation of Red Cross and Red Crescent Societies, 1999
- Gender policy, 12th Session of the General Assembly, International Federation of Red Cross and Red Crescent Societies, 1999
- Emergency response policy, 11th session of the General Assembly, International Federation of Red Cross and Red Crescent Societies, 1997

### **Federation and ICRC Guides and Handbooks**

- Enhancing protection for civilians in armed conflict and other situations of violence, ICRC, 2008
- Interagency guiding principles on unaccompanied and separated children, ICRC, 2004
- Assistance to asylum seekers in Europe – A guide for National Red Cross and Red Crescent Societies, International Federation of Red Cross and Red Crescent Societies, 2003

- Restoring family links: a guide for National Red Cross and Red Crescent Societies, ICRC, 2001
- Strengthening Protection in War: A Search for Professional Standards, ICRC, 2001

### **Resolutions Adopted by Regional Statutory Conferences**

- Johannesburg Commitments, 7th Pan African Conference of Red Cross and Red Crescent Societies, 2008
- Guayaquil Commitment, XVIII Inter-American Conference of the Red Cross, 2007
- The Istanbul Commitments, 7th European Regional Red Cross and Red Crescent Conference, 2007
- The Santiago de Chile Commitment, XVII Inter-American Conference of the Red Cross, 2003
- The Manila Action Plan, VIth Asia Pacific Regional Red Cross and Red Crescent Conference, 2002
- Berlin Charter and Plan of Action – Migration, VIth European Red Cross and Red Crescent Regional Conference, 2002

### **Recommendations Adopted by Other Regional Meetings**

- Strasbourg Recommendations, Seminar on Migration, Unaccompanied Minors and Forced Returns, French Red Cross and the Council of Europe, 2009
- Palermo Recommendations, International Meeting on Gender and Migration in the Mediterranean, Italian Red Cross and the Red Cross and Red Crescent Centre for Cooperation in the Mediterranean, 2008
- Final Report, European Open Forum on Return, Swedish Red Cross and the Red Cross/EU Office, 2006

### **Regional Guidelines**

- Return: Policy and Practice – A guide for European National Red Cross and Red Crescent Societies, Platform for European Red Cross Cooperation on Refugees, Asylum Seekers and Migrants (PERCO), 2008
- Guidelines on the reception of asylum seekers, Platform for European Red Cross Cooperation on Refugees, Asylum Seekers and Migrants (PERCO), 2001

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## International Legal Framework – A Selection of Relevant International Instruments

This is a selection of universal legal instruments that may be relevant when working with migrants. It does not include regional human rights and refugee law instruments.

### ***International Human Rights Law***

#### *Migrants*

- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990
- Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), 2000

#### *Stateless Persons*

- Convention on the Reduction of Statelessness, 1961
- Convention relating to the Status of Stateless Persons, 1954

#### *Other Specific Groups*

- Convention on the Elimination of All Forms of Discrimination against Women, 1979
- Convention on the Rights of the Child, 1989
- Convention on the Rights of Persons with Disabilities, 2006

#### *General*

- International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social and Cultural Rights, 1966
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (see in particular Article 3 on *non-refoulement*)

### ***International Humanitarian Law***

- Geneva Convention relative to the Treatment of Prisoners of War, 1949
- Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977

## ***International Refugee Law***

- Convention relating to the Status of Refugees, 1951
- Protocol relating to the Status of Refugees, 1967

## Resolution 5

### MOVEMENT POLICY ON INTERNAL DISPLACEMENT\*

The Council of Delegates,

*expressing* its deep concern about the plight of tens of millions of persons who are forcibly uprooted and other persons and communities affected by displacement as a result of armed conflict, violations of international humanitarian law and human rights, and natural or human-induced disasters,

*recalling and reaffirming* the commitment of the components of the International Red Cross and Red Crescent Movement (Movement) to improving protection and assistance for refugees and internally displaced persons (IDPs) as expressed in the resolutions adopted by the International Conference of the Red Cross and Red Crescent (Resolution XXI, Manila 1981; Resolution XVII, Geneva 1986; Resolution 4A, Geneva 1995; and Goal 2.3 of the Plan of Action of the 27th International Conference, Geneva 1999) as well as the resolutions adopted by the Council of Delegates (Resolution 9, Budapest 1991; Resolution 7, Birmingham 1993; Resolution 4, Geneva 2001; and Resolution 10, Geneva 2003),

*recalling* that international human rights law and international humanitarian law, within their respective spheres of application, protect all persons affected by displacement, such as IDPs themselves and resident and host communities, and that in the event of armed conflict, civilians, including those affected by displacement, are protected as such by international humanitarian law, *stressing* the importance of respect for these laws in preventing displacement,

*emphasizing* the protection that national law can provide and encouraging all components of the Movement, in accordance with their mandates, to take appropriate measures to support States in their effort to incorporate international humanitarian law and human rights law in their national law and practice applicable to IDPs, and recognizing that the Guiding Principles on internal displacement constitute an important international framework that can give guidance for that purpose,

*recognizing* that a common approach strengthening the Movement's global response will enhance its image and position within the humanitarian community,

*noting* that the General Assembly of the International Federation in 2009 endorsed a Policy on migration that had been adopted by its Governing Board and that the policy set out below complements that policy,

*recognizing* the effort of the African Union in adopting the Convention for the protection and assistance of internally displaced persons in Africa.

1. *adopts* a Movement policy on internal displacement that consists of the following 10 principles:

\* The Movement policy on internal displacement has been published in the *International Review of the Red Cross*, Vol. 91, No. 875, pp. 593–611.

- We in the International Red Cross and Red Crescent Movement,
- i. serve all those affected by internal displacement – the people actually displaced, host communities and others – and make decisions according to the most pressing needs for humanitarian services
  - ii. make full use of our privileged access to communities at risk as well as to decision-makers
  - iii. seek to prevent displacement while recognizing people’s right to leave of their own accord
  - iv. support the safe, voluntary and dignified return, relocation or local integration of IDPs, on the basis of our independent assessment of their situation
  - v. seek to empower individuals and communities. We do this by ensuring their participation in the design and implementation of our programmes, and by helping them to exercise their rights and by providing access to available services
  - vi. coordinate with the authorities and all others concerned. Whenever necessary, we remind them of their obligations, as set out in the applicable normative framework
  - vii. as National Societies and auxiliaries to our authorities, support those authorities in meeting their responsibilities in the humanitarian field as far as our resources and capacities allow and provided we can do so in full compliance with the Fundamental Principles and in keeping with the mission and Statutes of the Movement
  - viii. seek to limit the extent to which we substitute for the authorities, in discharging their responsibility to meet the needs and ensure the well-being of the population within the territory under their control
  - ix. give priority to operational partnerships within the Movement and strive to play our complementary roles, shoulder our responsibilities and marshal our expertise to the full
  - x. coordinate with other entities on the basis of their presence and abilities on the ground, the needs to be met, the capacities available, and the possibilities for access, while ensuring that we remain (and are perceived as remaining) true to our Fundamental Principles;
2. *requests* all the components of the Movement to implement this policy when responding to the needs of people affected by displacements, or when backing other components of the Movement in doing so;
  3. *requests* the ICRC, in coordination with the International Federation, to report to the Council of Delegates in 2011 on the implementation of this policy;
  4. *invites* the ICRC and the International Federation to give due consideration to including this topic as part of the overall agenda for the 2011 International Conference of the Red Cross and Red Crescent in order to bring to the attention of States the challenges encountered in meeting the humanitarian needs of persons affected by internal displacement.

## Resolution 6

### **MOVEMENT STRATEGY ON LANDMINES, CLUSTER MUNITIONS AND OTHER EXPLOSIVE REMNANTS OF WAR: REDUCING THE EFFECTS OF WEAPONS ON CIVILIANS**

The Council of Delegates,

*expressing renewed deep concern* about the widespread and preventable death and injury caused during and after armed conflicts by landmines, cluster munitions and other explosive remnants of war,

*noting* that the similar effects of landmines, cluster munitions and other explosive remnants of war call for similar humanitarian responses, including establishing and implementing international norms, reducing the risk to affected communities of the dangers posed by such weapons, and providing comprehensive assistance to victims,

*expressing satisfaction* at the substantial progress made in anti-personnel mine destruction, awareness and clearance since the entry into force in 1999 of the Convention on the prohibition of Anti-Personnel mines, yet concerned that a significant number of States Parties have found it necessary to apply to extend the deadlines for mine clearance and that some States Parties have fallen behind in meeting the deadlines for stockpile destruction,

*warmly welcoming* the adoption on 30 May 2008 of the Convention on Cluster Munitions,

*recalling* Resolution 10 of the 1999 Council of Delegates adopting the Movement Strategy on Landmines, Resolution 11 of the 2003 Council of Delegates extending the Movement Strategy on Landmines through 2009 and the activities listed therein to cover all explosive remnants of war, and Resolution 8 of the 2007 Council of Delegates on international humanitarian law and cluster munitions,

*recognizing* the historic development of international humanitarian law and of practices in the fields of risk reduction and victim assistance since the 1999 Movement Strategy on Landmines was adopted,

*commending* the commitment and perseverance of all the Movement's components that have been involved in the implementation of the Movement Strategy on Landmines since 1999,

*noting with appreciation* the report to the Council of Delegates prepared by the ICRC on progress made in implementing the objectives set out in Resolution 8 of the 2007 Council of Delegates on international humanitarian law and cluster munitions,

1. *adopts* the Movement Strategy on Landmines, Cluster Munitions and Other Explosive Remnants of War: Reducing the Effects of Weapons on Civilians, which replaces the 1999 Strategy and its 2003 extension;
2. *urges* all the Movement's components to implement the Strategy, in particular by:
  - a. continuing to develop, promote and implement the norms of international humanitarian law that now form a comprehensive international



- legal framework for preventing and addressing the human suffering caused by mines, cluster munitions and other explosive remnants of war;
- b. taking flexible, appropriate, coordinated and integrated action to reduce the impact of weapon contamination through data gathering and analysis, risk reduction, risk education, and survey and clearance;
  - c. providing victims of weapons with comprehensive assistance in the form of emergency and continuing medical care, physical and functional rehabilitation, psychological support and social reintegration, economic inclusion, and development and promotion of national legislation and policies that advocate effective treatment, care and protection for all citizens with disabilities, including survivors of weapon-related accidents;
3. *requests* that all the Movement's components carry out periodic self-assessments on their implementation of the Movement Strategy and that they provide this information to the ICRC for monitoring and reporting purposes;
  4. *invites* the ICRC to monitor implementation of the Movement Strategy and to report, as necessary, to the Council of Delegates on the progress made based on the reports submitted to it by the Movement's components and information obtained from other sources, said report to include pertinent recommendations.

## **Movement Strategy on Landmines, Cluster Munitions and other Explosive Remnants of War: Reducing the Effects of Weapons on Civilians**

### **Vision**

The aim of this strategy is to ensure that civilians will no longer be affected by weapons that cause suffering and injury after the cessation of hostilities.

To achieve this vision, all the components of the International Red Cross and Red Crescent Movement (Movement) are committed to an approach that integrates the following activities: the development, promotion and implementation of legal norms, operational activities for alleviating the effects of these weapons and assistance to survivors.

This can be achieved by mobilizing the unique capacities of all the components of the Movement, while ensuring effective coordination and cooperation with relevant external actors.

### **Executive summary**

Landmines, cluster munitions and other explosive remnants of war (ERW) continue to cause suffering long after the end of conflicts. Significant developments in applicable norms and in operational practice since the adoption of the 1999–2009 Movement Strategy on Landmines have made a new strategy necessary.

The new Movement Strategy builds, strengthens and mobilizes the capacities and resources of all the components of the Movement, and ensures effective coordination and cooperation with all relevant actors. It sets out the roles, responsibilities and guiding principles, and the actions required, of the different components of the Movement.

The Strategy commits the Movement to continuing the development, promotion and implementation of the norms of international humanitarian law that now form a comprehensive international legal framework for preventing and addressing the human suffering caused by mines, cluster munitions and other ERW. The Movement played a vital role in the adoption and promotion of these norms; and it will remain actively engaged in ensuring that the commitments of these instruments are kept and their potential to save lives realized.

Flexible, appropriate, coordinated and integrated action is necessary in order to reduce the impact of weapon contamination. Not only mines, cluster munitions and other ERW, but also stockpiles of ammunition and small arms and light weapons pose a threat. Taking established guiding principles into account, the Movement's components will, depending on the situation, implement the following activities, either separately or in combination: data gathering and analysis, risk reduction, risk education, and survey and clearance. The Movement implements these activities during, before and after conflicts and in rapid-onset emergencies in which weapon contamination poses a threat.

Greater efforts are required to provide comprehensive assistance to victims of weapons. Assistance to survivors will be implemented through an integrated and multidisciplinary approach with the aim of providing the widest possible opportunities for full and effective participation and inclusion in society, for education and employment, and for access to essential services. Victim assistance activities include emergency and continuing medical care, physical and functional rehabilitation, psychological support and social reintegration, economic inclusion, and development and promotion of national legislation and policies that advocate effective treatment, care and protection for all citizens with disabilities, including survivors of weapon-related accidents.

## **Section 1: Background and approaches**

### **1.1 Introduction**

The issue of landmines enabled the humanitarian community to begin the process of comprehensively tackling the impact and long-term effects on civilians of mines, ERW and other weapons.<sup>1</sup> Since the adoption of the first Movement Strategy in

1 The Council of Delegates first began calling for legal and humanitarian action to address the human costs of the use of landmines in 1993 (Resolution 3). By this time, the widespread use of anti-personnel mines in armed conflicts was causing what the ICRC termed an "epidemic" of landmine deaths and injuries. Most casualties were among civilian populations, and most of them occurred after the fighting had

1999, a great deal more has been learnt about the human costs of abandoned or unexploded weapons. These insights have provided the basis for significant developments in those areas of international humanitarian law that deal with such weapons, in operational activities to alleviate the consequences of weapon contamination for civilians, and in efforts to convert States' victim assistance commitments into tangible benefits for the victims themselves. All the components of the Movement, together with other humanitarian actors, have played a role in promoting international norms, in intervening to secure compliance, in reducing the effects on civilians, and in assisting victims. National Societies, with their community-based networks and unique status within affected countries, continue to play a crucial role in national strategies for dealing with the consequences of weapon contamination.

The Strategy reinforces the Movement's commitment to develop, promote and implement the norms of international humanitarian law that now form a comprehensive international legal framework for preventing and addressing the human suffering caused by mines, cluster munitions and other ERW. The Strategy calls for a flexible, multidisciplinary approach to reduce the consequences of weapon contamination and to strengthen efforts to provide comprehensive assistance to victims, using the capacities and resources of the Movement for action. It aims to build, strengthen and mobilize the capacities and resources of all the components of the Movement, and to ensure effective coordination and cooperation with all relevant actors.<sup>2</sup>

## 1.2 Scope

The Strategy presents Movement policy in support of international norms prohibiting or regulating the use of weapons that kill and injure despite the end of hostilities. It also reflects the Movement's operational approach to alleviating the consequences of weapon contamination and to providing support for, and assisting in the social reintegration of, survivors and their families. The Strategy does not cover every aspect of the Movement's efforts to protect civilians from being harmed by weapons and provide assistance for victims. As its title suggests, the Strategy's focus is on landmines, cluster munitions and other ERW. However,

ceased. In 1995, the Council called for the Movement to work for a total ban on anti-personnel mines, which, from a humanitarian viewpoint, it considered "the only effective solution" (Resolution 10). During this same period, the ICRC and National Societies began engaging in efforts to prevent casualties, primarily through mine awareness activities and by strengthening their work in physical rehabilitation. The ICRC, many National Societies and the International Campaign to Ban Landmines (ICBL) campaigned publicly for a ban on anti-personnel mines. This led to the signing of the Convention on the Prohibition of Anti-Personnel Mines (Mine Ban Treaty) in Ottawa in December 1997.

- 2 The Movement's components, and National Societies in particular, discussed their experiences in carrying out such activities at a Movement meeting on weapon contamination held in Siem Reap in Cambodia in January 2009. The National Societies represented at the meeting were from Afghanistan, Angola, Australia, Azerbaijan, Burundi, Cambodia, Colombia, France, India, Iran, Jordan, Laos, Lebanon, Morocco, Nepal, New Zealand, Norway, Tajikistan and Yemen. The discussions at this meeting have informed this new Movement Strategy.

the activities devoted to reducing the harm done by weapon contamination and providing assistance to victims also cover a broader range of weapons.

The Strategy is not time-bound. It aims to provide a long-term framework that will be updated when necessary.

### 1.3 Movement approach

#### 1.3.1 *Roles and responsibilities*

The ICRC continues to implement activities based on need, both directly and in association with national authorities and National Societies during armed conflicts and other situations of violence. It also provides expertise, advice and support to National Societies who wish to launch programmes in this area of need. The ICRC also plays a leading role in the development of relevant international norms as well as in monitoring and promoting their implementation.

**National Societies**, as the key Movement actors in their domestic contexts, will direct their efforts towards the promotion of legal norms, incident reduction and data gathering. They also play an important part in providing various forms of victim assistance, based on needs and capacities. Their auxiliary role to their public authorities in the humanitarian field and their grassroots networks make them uniquely qualified to contribute to national strategies for tackling the effects of weapon contamination. Depending on the context, those National Societies that work internationally support and cooperate with the National Societies of affected countries, in coordination with the ICRC and the International Federation.

The **International Federation** provides the necessary organizational development support for National Societies in areas such as resource mobilization and financial and human resources management, and assists them in incorporating programmes covered by this Strategy in their development plans. The International Federation also includes work in this field in its own disaster-preparedness and emergency response mechanisms. Its presence in relevant international forums will create opportunities for National Societies to present their experiences, in support of Movement positions.

#### 1.3.2 *Guiding principles for Movement action:*

The Movement seeks to alleviate the consequences of weapon contamination through a flexible, multidisciplinary approach, which will continue to evolve in step with experience and best practice.

- *Fundamental Principles of the Red Cross and Red Crescent Movement* – The Movement's components ensure that they promote effective assistance for and protection of the victims of armed conflict and other situations of violence on the basis of the Fundamental Principles of the Red Cross and Red Crescent Movement.

- *Multidisciplinary approach* – The Movement’s ability to promote and disseminate international norms, curb the harm done by weapon contamination and provide assistance to victims is based on the broad range of skills, capacities and resources at its disposal. Any approach to planning and implementing activities must use all these resources in combination.
- *Flexibility, appropriateness and adaptability of approach* – Activities must be appropriate to the situation. They must be reviewed and adapted, changing or ending when necessary.
- *Complementarity with other actors* – It is essential for the Movement to ensure complementarity internally and with the plans and activities of external actors.
- *Adherence to international standards and tools* – Even as they maintain their independence, Movement activities should comply with international standards such as the International Mine Action Standards.
- *Developing national capacities* – For the long-term sustainability of national efforts to reduce the harm done by weapon contamination, it is essential that Movement action include measures to ensure accessibility of persons with disabilities to services and infrastructure. Where national disability services and mine action authorities exist, the Movement must work with them and reinforce their capacities. In their absence, the Movement must consider developing and implementing new structures appropriate to the context, ensuring that support is provided for the affected population.
- *Equal and non-discriminatory access to health care, rehabilitation services and initiatives for socio-economic reintegration* – The Movement should seek to ensure that everyone in need of health care, rehabilitation, and socio-economic reintegration has access to such services solely on the basis of need and regardless of social, religious, ethnic considerations and regardless of the cause of injury or disability. Special attention must be paid to vulnerable groups.

## Section 2: Movement activities

### 2.1 Promoting international norms

The current framework of international norms in this field reflects an historic development in humanitarian law. It is also evidence of the success that the Movement’s advocacy has had in this field. Taken together, customary norms of humanitarian law, Protocol I additional to the four Geneva Conventions of 1949, the Convention on the Prohibition of Anti-Personnel Mines, Amended Protocol II and Protocol V to the Convention on Certain Conventional Weapons, and the Convention on Cluster Munitions now constitute a comprehensive international legal framework for preventing and dealing with the human suffering caused by mines, cluster munitions and all other explosive munitions used by armed forces or non-State armed groups. The objective of protecting civilians and affected communities will be reached only when these norms are universally accepted and implemented by armed forces and non-State armed groups. The ICRC continues to

monitor the development of new weapons and the consequences of their use and to call for action whenever that is required. The Convention on the Prohibition of Anti-Personnel Mines, the Convention on Cluster Munitions and Protocol V on Explosive Remnants of War all contain direct references to the role of the Movement. This attests to the importance of the Movement's contribution in treaty promotion and implementation at the global, regional and national levels. In addition, the International Conference of the Red Cross and Red Crescent has, since 1999, repeatedly addressed the aim of strengthening the protection of civilians from the indiscriminate use and effects of weapons.<sup>3</sup>

**The Convention on the Prohibition of Anti-Personnel Mines:** This treaty has had a marked impact throughout the world on the use, transfer and production of anti-personnel mines, confirmation that these weapons are being stigmatized and that the anti-personnel mine ban is well on the way to achieving universal observance. The evidence suggests that where there is compliance with the Convention, lives and livelihoods are being preserved in large numbers. There has been a dramatic decrease in the use of anti-personnel mines since the adoption of the treaty. However, the landmines that remain are a major threat and cause immense suffering among civilian populations in many parts of the world. Despite the destruction of millions of mines, as of 2008 several States had been unable to meet their deadlines for the destruction of stockpiles. Also in 2008, most States whose deadline for clearing landmines was 2009 found it necessary to request extensions of two to ten years. States' compliance with deadlines will continue to require close monitoring.

**Amended Protocol II to the Convention on Certain Conventional Weapons:** It is difficult to assess the effectiveness of this instrument. Of the States party to Amended Protocol II, several have not used anti-personnel mines, anti-vehicle mines or booby-traps since the Protocol entered into force. Reporting on the use of mines by other States Parties has been minimal. During the meeting of States Parties held in November 2008, a new Group of Governmental Experts was established to review the status and operation of Amended Protocol II in 2009. Unfortunately, during meetings of States Parties, substantive issues have not been addressed in any detail.

3 In 2003, the 28th International Conference adopted the Agenda for Humanitarian Action. General Objective 2 of the Agenda was to "strengthen the protection of civilians in all situations from the indiscriminate use and effects of weapons and the protection of combatants from unnecessary suffering and prohibited weapons through controls on weapons development, proliferation and use". Resolution 3 of the 30th International Conference in 2007 reaffirmed "that the right of the parties to an armed conflict to choose methods and means of warfare is not unlimited and that it is prohibited to employ weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering". This resolution called on "all States to increase their efforts to strengthen the protection of civilians against the indiscriminate use and effects of weapons and munitions". It also recognized "the need to urgently address the humanitarian impact of explosive remnants of war and cluster munitions, including through rigorous application of existing rules of international humanitarian law and additional national and international actions that will minimize the harmful effects of these munitions on civilians and on assistance to victims".

**Protocol V to the Convention on Certain Conventional Weapons:** States that are party to this treaty have begun developing standard forms that may be used by all States Parties for reporting on their implementation of the Protocol, and by States affected by ERW to request assistance in clearance activities. So far, however, States Parties have not begun to consider solutions to the problem of ERW in affected States, which should be a primary concern.

**The Convention on Cluster Munitions:** The Convention will enter into force once it has been ratified by 30 States. The process of implementing it will then formally get under way: this will include annual meetings of States Parties, the establishment of reporting mechanisms, efforts to support clearance and victim assistance, and monitoring by civil society organizations (including through Landmine Monitor annual reports). A number of national and regional meetings are being planned in order to facilitate understanding of the Convention's provisions and to encourage States to adhere to the Convention as soon as possible.

### *2.1.1 Movement action*

The Movement has played a crucial role in the adoption and promotion of the norms of humanitarian law. By remaining engaged it can make vital contributions to the task of ensuring that the commitments in these instruments are kept and that their potential to save lives is realized.

On the **Convention on the Prohibition of Anti-Personnel Mines** and the **Convention on Cluster Munitions**, the Movement's principal goals are to:

- achieve universal adherence;
- monitor compliance with the treaties' prohibitions as well as with their clearance and stockpile destruction deadlines and their commitments to victim assistance;
- make special efforts to promote States Parties' compliance with clearance and destruction deadlines when the deadline for a particular State is approaching or has passed;
- ensure that States Parties adopt domestic legislation providing for the implementation of the treaties and for the prosecution and punishment of those who violate the treaties' provisions;
- as appropriate, stigmatize the use of anti-personnel landmines and cluster munitions, wherever it may occur;
- document, where feasible, the use of anti-personnel mines and cluster munitions and their consequences; consider appropriate action to be taken in such instances with government officials, non-State actors and the media; promote adherence by the State and non-State actors concerned to the relevant norms of humanitarian law; and urge an end to the use of these weapons;
- achieve – with regard to the Convention on Cluster Munitions – the maximum number of signatures before the Convention's entry into force and rapid ratification by signatory States and accession by non-signatories;

- ensure, after the Convention’s entry into force, that States Parties focus urgently on their commitments to promote clearance and victim assistance; and provide international assistance, particularly for those States Parties most affected by cluster munitions.

On **Amended Protocol II** and **Protocol V to the Convention on Certain Conventional Weapons**, the Movement’s principal goals are to:

- achieve increased adherence to both Protocols;
- monitor compliance with the Protocols’ prohibitions and commitments;
- ensure that States Parties adopt domestic implementing legislation, as needed;
- urge, with respect to Protocol V, States Parties to ensure that their armed forces are in a position, and required, to record and share information on all explosive ordnance used;
- urge States Parties to ensure that the Protocol’s implementation addresses the effects of all existing and future ERW, with a focus on their clearance and victim assistance commitments.

On **all the above-mentioned treaties**, the Movement’s efforts will include:

- regular dialogue with government officials, members of parliament and armed forces;
- making other humanitarian actors and the media sensitive to the importance of these treaties;
- raising awareness among the media and the general public, on important dates associated with these treaties, of their importance and the obstacles to their implementation;
- providing support for national programmes and international assistance for the implementation of clearance, stockpile destruction and victim assistance obligations;
- organizing, at the national, regional and international levels, seminars and workshops to promote increased adherence and implementation;
- ensuring that work on behalf of victims under the treaties mentioned above is consistent with the Convention on the Rights of Persons with Disabilities.

### ***2.1.2 Mutually reinforcing roles and responsibilities within the Movement***

The ICRC will continue to:

- play an important role in monitoring and promoting the universal acceptance and implementation of these treaties on behalf of the Movement;
- provide technical and legal expertise, communications materials and other support for Movement efforts in the areas of dissemination and advocacy;
- remind parties to armed conflicts of their obligation to comply with humanitarian law as it applies to landmines, cluster munitions and other ERW, and,



- when a party to an armed conflict is a State party to one or more of the above treaties, invoke the relevant treaty prohibitions and commitments;
- document, where feasible, the effects of landmines, cluster munitions and other ERW; and make confidential oral and written representations to local, national and regional authorities of parties to a conflict who control any area where these weapons pose a threat to civilians (the ICRC may also mobilize States, regional organizations or other components of the Movement in these efforts);
  - monitor and participate in negotiations for new international norms for regulating the use of weapons, in order to ensure that the existing legal framework is strengthened and not undermined;
  - mobilize States, international organizations and humanitarian actors in promoting the development, implementation and universal acceptance of these treaties.

Whenever appropriate, **National Societies** will:

- intervene with their national authorities to ensure that their States – if party to the Convention on the Prohibition of Anti-Personnel Mines and the Convention on Cluster Munitions – respect their deadlines for the destruction of stockpiles and for clearance;
- carry out activities to raise awareness among the general public and national political leaders of the effects of mines, cluster munitions and other ERW, and of the solutions provided in the relevant instruments of humanitarian law;
- promote accession by their governments to relevant international treaties and the faithful implementation thereof by their national authorities;
- promote the adoption of domestic legislation and practical measures to implement those treaties;
- engage in and promote discussions on the national level with the authorities concerned and with military officials, and support programmes and develop partnerships to provide assistance for victims under relevant international instruments, including commitments to such treaties as the Convention on the Rights of Persons with Disabilities;
- intervene with their national authorities to ensure that adequate resources are provided for supporting the implementation of treaty commitments, both in affected States and in States able to provide assistance;
- follow up with their national authorities on the implementation of commitments and pledges adopted at International Conferences of the Red Cross and Red Crescent.

The **International Federation** will:

- promote the National Societies' role, as auxiliary to their public authorities in the humanitarian field, in implementing relevant global and regional instruments, such as the Convention on the Rights of Persons with Disabilities, the International Covenant on Economic, Social and Cultural Rights and other human rights and health treaties;

- discuss, with the ICRC and National Societies, the promotion and communication of Movement positions on subjects covered by the Strategy.

## 2.2 Preventing accidents and reducing the effects of weapon contamination

Activities to prevent accidents and alleviate the effects of weapon contamination can be implemented alongside other activities that provide support for victims (including physical rehabilitation, surgical care and activities to improve economic security). These can include data gathering and analysis, risk reduction, risk education and survey and clearance. The context determines the nature, composition and specific objectives of the activities to be carried out.

The nature of the threat posed by weapons varies with the context. In addition to mines, cluster munitions and other ERW, unsecured stockpiles of ammunition and small arms and light weapons also pose a threat. ‘Weapon contamination’ is the umbrella term used to describe operational activities aimed at reducing the effects of such weapons.

Humanitarian action to reduce the effects of weapon contamination on civilians began in 1988, when such activities were first undertaken in Afghanistan. Its techniques and strategies have been evolving constantly, with growing flexibility, professionalism and accountability. Organizations that work in this area have, from the beginning, dealt with weapon contamination that has humanitarian consequences, and not only with weapons that are regulated or prohibited by specific treaties.

The Movement has played an important role in these activities, its various components acting in accordance with their respective mandates. National Societies have taken advantage of their grassroots networks, developing data gathering and working in communities to change behaviour and act as a link with clearance agencies. The ICRC, the International Federation and National Societies working internationally have provided funding for activities. In 1997, the ICRC established a full-time “Mine Action Sector” based in Geneva, in response to the Movement’s request that it become the lead organization in this field. It has since supported mine action activities in more than 40 countries. Besides developing the ability to intervene directly, the ICRC has done much to support National Societies, particularly in the field of capacity building.

### 2.2.1 *Movement action*

The Movement implements risk reduction activities during, before and after conflicts, and in rapid onset emergencies where weapon contamination poses a threat. It seeks to curb the effects of weapon contamination by employing a flexible, multidisciplinary approach, which is still evolving in step with experience and best practice. Community liaison is an essential element of all aspects of risk reduction: National Societies operating in affected countries are in the best position to play

that role. Bearing in mind the guiding principles set out above, the following kinds of activity can be implemented either separately or in combination, depending on the situation:

**Data gathering and analysis** – Collecting and analysing data<sup>4</sup> from weapon-contaminated areas is the basis of all planning for reducing risks caused by weapon contamination. It is also a critical activity that strengthens access to survivors and informs the development and application of norms based on field realities. When it is analysed, this information contributes to the identification of dangerous areas, and makes it possible to plan and prioritize activities related to surveying, clearance, risk reduction and risk education. Such data can also be the source of important information for locating and providing support for survivors. As grassroots organizations with a presence in virtually every country, National Societies are often uniquely placed to gather this data in the short and in the long term. In the short term, they often do this as an operational partner of the ICRC; in the long term, they do so as an integrated component of an overall national mine action strategy normally led by the government. Data gathering and analysis must be coordinated with other actors to ensure interoperability and compatibility.

**Risk reduction** – Often, in countries where the economy and society have been disrupted by war, people in areas contaminated by weapons have to continue to farm, collect water and firewood, graze livestock, or travel. Clearing affected areas would, of course, be the ideal solution, but the consequences of contamination can be alleviated in the short term by providing safer alternatives through economic security and water and habitat programmes that specifically take contamination into account. As these activities can also benefit survivors, consideration must always be given not only to the prevention of new accidents, but also to the provision of support for survivors and to facilitating their social reintegration. Activities to this end, though of many different kinds, typically involve the establishment of safe areas, the provision of new sources of water on non-contaminated ground and of alternative sources of food or fuel, and the implementation of micro-credit projects. The aim is to prevent persons in contaminated areas from having to take risks in order to survive or live as normally possible, and to ensure that survivors receive support for their social reintegration and for normalizing their lives as far as possible.

**Risk education** – Risk education includes raising awareness in emergencies, undertaking activities aimed at effecting long-term changes in behaviour and ensuring that communities have a central role in determining clearance priorities. All these activities can also benefit survivors. Raising awareness is carried out as a stand-alone activity primarily during emergencies when little data exists and the level of knowledge among people is extremely low. This would be the case typically in periods immediately after the end of conflict, when displaced populations tend

4 Data on incidents, the presence of ERW, mapping of minefields, types of munitions, and so on.

to return to their homes rapidly and casualty figures are at their highest. In all other situations, awareness-raising activities should be community-based and linked to risk reduction. Given that it is designed to target those civilians most at risk, any method of raising awareness must give careful consideration to cultural and social factors and to the nature of the threat. Interactive, community-led approaches have been found to be the most effective. Community liaison is an extension of this community-based interaction. Red Cross and Red Crescent volunteers are uniquely qualified to communicate the problems of their communities to mine action operators.

Community liaison is, like data gathering, a characteristic element in the long-term role that a National Society should play as an integrated component of a sustained national mine action strategy.

***Survey and clearance*** – When technical surveys or clearance is required, the Movement will mobilize personnel with accreditation or certification in accordance with International Mine Action Standards, or National Mine Action Standards where they exist.<sup>5</sup>

### *2.2.2 The different components of the Movement will strengthen and coordinate their efforts to:*

- support and develop national capacities and strategies aimed at curbing the effects of weapon contamination, reintegrating victims in their communities and providing support for survivors;
- ensure that risk reduction priorities take into account national and community development goals;
- ensure that the threat posed by weapon contamination is taken into account and acted on when natural disasters occur in contaminated areas; in such situations, the ICRC may provide technical support for field assessment and coordination teams and others;
- ensure that operational experience is shared internationally and activities coordinated, particularly in the areas of data, risk reduction and risk education;
- foster preparedness planning and encourage the provision of support for capacity building and the exchange of experience and expertise among National Societies working on weapon contamination in their own countries;
- provide – with the ICRC taking the leading role – expertise in weapon contamination during emergencies in which weapon contamination is an issue;
- foster an intra-Movement approach to dealing with issues related to weapon contamination.

5 Where technical surveys or small-scale clearance are necessary in order for the ICRC to work safely, clearance is generally conducted by accredited clearance operators. Where no accredited operator is available, the ICRC may carry out short-term technical surveys, explosive ordnance disposal, small-scale clearance tasks and marking. This may be the case where the ICRC has sole access to a contaminated area, or in emergency-response situations. The aims are to protect Movement staff, ensure safe access for assistance and protection activities and protect the population.

## 2.3 Providing assistance for victims

Assistance for victims of landmines, cluster munitions and other ERW should be implemented through an integrated and multidisciplinary approach. The aim of such an approach should be to a) reduce the number of people who die of their injuries through better access to emergency and medical care and b) remove – or reduce as much as possible – the factors that limit the social integration of persons with disabilities, including survivors of weapon-related accidents, so that they may achieve and maintain the highest possible level of independence and quality of life: physically, psychologically, socially and economically. Besides access to essential services, persons with disabilities should have the same opportunities as other citizens, for full and effective participation and inclusion in society, and for education and employment. Survivors of weapon-related accidents – those directly affected by weapons – are a sub-group of the larger community of persons with disabilities. The problems they face are similar to those faced by persons who are disabled in other ways.

The implementation of victim assistance commitments by States party to the Convention on the Prohibition of Anti-Personnel Mines provides important lessons in how to structure work in this field. Since the first Review Conference of the Convention on the Prohibition of Anti-Personnel Mines, held in Nairobi in 2004, the idea of ‘victim assistance’ has acquired a sharper definition, within a framework for addressing the rights and needs of mine victims and other persons with disabilities. The framework includes the establishment of national focal points for victim assistance and the development of specific measurable and time-bound objectives for achieving the aims of the Nairobi Action Plan and for improving the daily lives of mine survivors and other persons with disabilities. The rights and needs of survivors<sup>6</sup> of accidents related to weapon contamination and the rights and needs of other persons with disabilities are identical under the UN Convention on the Rights of Persons with Disabilities. Support for the needs and rights of persons with disabilities is an area in which the Movement should play a more prominent role.

The Convention on the Rights of Persons with Disabilities and its Optional Protocol, which entered into force on 3 May 2008,<sup>7</sup> mark a significant shift in attitudes and approaches to persons with disabilities. This treaty requires that persons with disabilities be regarded not as objects of charity in need of medical treatment and social protection, but as persons with rights, who are capable of claiming those rights and making decisions that affect their lives based on their free and informed consent and of being active members of society.

6 Victims are those who, either individually or collectively, have suffered physical or psychological injury, economic loss or substantial impairment of their fundamental rights through acts or omissions related to the use of weapons. Survivors are persons who have survived a weapon-related accident.

7 As of January 2009, 44 States have ratified the Convention and 26 States have ratified its Optional Protocol.

Victim assistance does not require the development of new fields or disciplines; but it does require that existing health care, rehabilitation and social services, and legislative and policy frameworks be adequate to meet the needs of all citizens. Assistance for survivors should be viewed as part of a country's overall public health and social services framework. However, within that framework care must be taken to ensure that survivors and other persons with disabilities receive the same opportunities – for health care, social services, a life-sustaining income, education and participation in the community – as everyone else.

Victim assistance must be understood in a broader context of development or underdevelopment. Countries do not have the same capacities; many are not in a position to offer adequate amounts of care and social assistance to their people, as a whole, and to persons with disabilities in particular. In affected countries, a political commitment to assist survivors of weapon-related accidents and other persons with disabilities is essential, but ensuring the achievement of concrete results may require addressing broader development concerns.

### *2.3.1 Movement action*

Activities within victim assistance deal with emergency and continuing medical care, physical and functional rehabilitation, psychological support and social reintegration, economic inclusion, and development and promotion of legislation and policies that advocate effective treatment, care and protection for all citizens with disabilities, including survivors of weapon-related accidents.

The activities described below could be carried out by the ICRC with the support of National Societies and/or by National Societies in their own countries with the support of the ICRC and/or the International Federation.

Participating National Societies are encouraged to explore possibilities for partnerships with operating National Societies.

**All the components of the Movement should, depending on the context, and their capacities and resources, seek to contribute to the following activities, as part of a comprehensive approach:**

**Emergency and continuing medical care:** Emergency and continuing medical care covers such issues as emergency first aid and ensuring access to health care facilities, and appropriate medical care (including competent surgical management and pain treatment). The aims are to establish and enhance the health-care services needed to respond to the immediate and still-existing medical needs of those who have been injured in a weapon-related incident, by increasing the number of health care workers and improving health care infrastructure and by ensuring that health care facilities have the equipment, supplies and medicines necessary to meet minimum standards.

**Physical and functional rehabilitation:** Physical rehabilitation may be described as the provision of assistive devices such as prostheses, outhouses, walking aids and wheelchairs along with appropriate physical therapy. It also includes activities aimed at maintaining, adjusting, repairing and replacing the

devices as needed. Physical rehabilitation focuses on helping a person regain or improve his or her physical abilities; functional rehabilitation consists of all the measures that are taken to help a person with a disability recover his or her ability to carry on activities or fulfil roles that he or she considers important, useful, or necessary, and may target issues such as sight and hearing.

**Psychosocial support:** This takes the form of psychological support and efforts to achieve social reintegration/inclusion. It includes activities that assist victims to overcome traumatic experiences and that promote their social well-being. These activities may include participation in community-based peer support groups, in associations for persons with disabilities and in sporting and related activities; and, where necessary, professional counselling. Suitable psychosocial support can make a significant difference in the lives of survivors of weapon-related accidents and the families of those who have been killed or injured.

**Economic reintegration:** Economic reintegration/inclusion activities consist mainly of providing education and vocational training and developing sustainable economic activities and employment opportunities in affected communities. Survivors' prospects depend largely on the political stability, and the economic situation, of their communities. However, enhancing opportunities for economic inclusion contributes to the capacity for self-reliance of survivors and their families and to community development as a whole. It is important to integrate such efforts in the broader context of economic development and of attempts to ensure significant increases in the number of economically reintegrated victims.

National Societies, as auxiliaries to their public authorities in the humanitarian field, will actively participate in forums and coordinating bodies whose aims are to develop, implement and/or monitor services provided for persons with disabilities, including survivors of weapon-related accidents.

### *2.3.2 The different components of the Movement must strengthen and coordinate their efforts to:*

- ensure that operational experience in the area of victim assistance is shared and activities better coordinated in order to improve the Movement's ability to mount a comprehensive and integrated response to the needs of survivors and their families;
- increase access to appropriate medical care, rehabilitation services and socio-economic reintegration initiatives, giving survivors and their families the same opportunities – for full and effective participation and inclusion in society, for education and for employment – as other citizens;
- support awareness-raising programmes at the community level for reducing the threat of discrimination, marginalization and denial of access to services, education and employment, which increase the suffering of survivors, their families and their communities, and which impede economic and social development;
- improve the quality of the medical care and rehabilitation services being provided and ensure that survivors have access to services that meet their particular needs;

- develop national capacities for the provision of services, in order to ensure their long-term availability, as most survivors will need these services for the rest of their lives;
- support National Society partnerships with other relevant actors, including through supporting the building of capacity in National Societies to function as an effective auxiliary to the various public authorities which will often be involved at the national level;
- support the drafting of laws and policies that address the needs and fundamental human rights of persons with disabilities, including survivors of weapon-related accidents, and ensure effective rehabilitation.



## Resolution 7

### PREVENTING HUMANITARIAN CONSEQUENCES ARISING FROM THE DEVELOPMENT, USE AND PROLIFERATION OF CERTAIN TYPES OF WEAPONS

The Council of Delegates,

*reiterating* its continuing concern about the direct, indirect and long-term effects of weapons use on civilians, in particular during hostilities in urban areas and the use of explosive area weapons in densely populated areas,

*alarmed* by the widespread and preventable death and injury to civilians caused by the unregulated availability of conventional arms,

*recalling* Resolutions 1 and 3 of the 28th and 30th International Conferences of the Red Cross and Red Crescent respectively, in which States recognized that, in light of their obligation to respect and ensure respect for international humanitarian law, adequate measures to control the availability of arms and ammunition are required so that they do not end up in the hands of those who may be expected to use them in violation of international humanitarian law,

*recalling* the ICRC's 2002 "Appeal on Biotechnology, Weapons and Humanity" reminding the political and military authorities and the scientific and medical communities, industry and civil society of potentially dangerous applications of biotechnology and other developments in the life sciences,

*gravely concerned* by the continuing threat posed by the potential proliferation or use of nuclear weapons and *welcoming* States' increased focus on nuclear disarmament on the international agenda,

*regretting* that only a small number of States have carried out their obligation to ensure the legality of new weapons, means or methods of warfare under international law, despite Final Goal 2.5 of the Agenda for Humanitarian Action adopted during the 28th International Conference of the Red Cross and Red Crescent, which stated that: "In light of the rapid development of weapons technology and in order to protect civilians from the indiscriminate effects of weapons and combatants from unnecessary suffering and prohibited weapons, all new weapons, means and methods of warfare should be subject to rigorous and multidisciplinary review",

1. *calls upon* the components of the International Red Cross and Red Crescent Movement (Movement) to encourage States to pursue a comprehensive approach to reducing the human cost of arms availability, including through national and regional measures, the implementation of the UN Programme of Action on Small Arms and Light Weapons, and the adoption and implementation of an international arms trade treaty regulating transfers of all conventional arms and ammunition;
2. *encourages* National Societies, to the extent possible in their own contexts, to actively raise public awareness of the human costs of unregulated arms availability and to promote a culture of non-violence;

3. *calls upon* States, the scientific and medical communities, industry and civil society to continue to monitor developments in biotechnology and the life sciences and to take all necessary steps to ensure that these benefit humanity and are not used for hostile purposes;
4. *calls upon* States to ensure the faithful implementation of relevant treaties related to biological and chemical weapons and to adopt stringent national legislation to ensure that the norms prohibiting biological and chemical warfare are respected;
5. *calls upon* States to continue their efforts towards the elimination of nuclear weapons with determination and urgency;
6. *calls upon* all components of the Movement to help ensure that decisions of the 31st International Conference contain clear proposals for action to address means and methods of warfare that pose particular hazards to the civilian population;
7. *encourages* all components of the Movement to remind States of their obligation to ensure the legality of new weapons, means or methods of warfare under international law;
8. *invites* the ICRC, in consultation with the International Federation, to report during future sessions of the Council of Delegates, as it deems necessary, on developments in the areas identified in this resolution.

## Resolution 8

### RESPECTING AND PROTECTING HEALTH CARE IN ARMED CONFLICT AND OTHER SITUATIONS OF VIOLENCE

The Council of Delegates,

*continuously aware* that the origin and very identity of the International Red Cross and Red Crescent Movement (Movement) are rooted in care for the wounded and sick, through providing them with immediate and practical relief while upholding the laws that protect them, and that concern for respecting and protecting health care must therefore always be at the heart of the Movement's concerns,

*aware also* of the uniqueness of the Movement's role in providing health care and humanitarian relief for victims of armed conflicts and other situations of violence,

*deeply alarmed* that the wounded and sick in armed conflict and other situations of violence do not receive the care and protection that they require, and frequently are denied health care through deliberate action or omission, or owing to serious disruptions in the provision of care and the delivery of medicines, medical equipment and other medical supplies,

*equally alarmed* at the frequent attacks committed against health care workers, facilities and transports, including those of the components of the Movement, and expressing in this regard its admiration for the unrelenting commitment of the staff and volunteers of the National Societies who give first aid and other health care to the wounded and sick,

*deploring* the misuse of medical establishments and other medical facilities and of the distinctive emblems to carry out military operations that place civilians, the wounded and sick, and health care personnel in danger,

*emphasizing* the importance of upholding at all times the rules of international humanitarian law and international human rights law,

*recalling* in situations of armed conflict the prohibition of attacks directed at civilians or civilian objects, the prohibition of indiscriminate attacks, the principle of proportionality in attack, the obligation to take all feasible precautions in attack as well as against the effects of attack, and to protect and spare the civilian population,

*recalling* the obligation to respect and to protect health care personnel, including Red Cross and Red Crescent workers, their means of transport, as well as medical establishments and other medical facilities at all times, in accordance with international law,

*recognizing* the importance of health care personnel having access to any place where their services are required,

*emphasizing* that national implementation, training and education are prerequisites if States and their armed and security forces are to comply with international humanitarian law and international human rights laws, *highlighting* the importance for all State armed forces and organized armed groups of ensuring

that the relevant norms are implemented in military practice, *stressing* that the enforcement of relevant international legal regimes (in particular through the effective prosecution of relevant international crimes such as attacks on medical staff, transports and units) is required to put an end to impunity and to encourage future respect,

*recalling* the protective value of the distinctive emblems recognized by the Geneva Conventions and, where applicable, their Additional Protocols and *reaffirming* the obligation of parties to armed conflict to recognize, uphold and respect the emblems in all circumstances,

*bearing in mind* previous relevant resolutions on protecting health care and humanitarian relief and protecting the delivery of those services, in particular Resolution 12 on “Humanitarian assistance in situations of armed conflict” of the 1991 Council of Delegates, Resolution 2 on “The emblem” and Resolution 8 on “Peace, international humanitarian law and human rights” of the 1997 Council of Delegates and Resolution 3 on “Reaffirmation and implementation of international humanitarian law: Preserving human life and dignity in armed conflict” of the 30th International Conference of 2007,

*emphasizing* the importance of the Fundamental Principles of the Red Cross and Red Crescent Movement in providing the necessary framework for action to help the wounded and sick in armed conflict and other situations of violence,

*stressing* the need for effective coordination among all those involved in delivering health care in order to allow safe passage for ambulances and other health services and supplies,

1. *calls upon* all parties to armed conflicts and all actors involved in other situations of violence to respect and ensure respect for health care personnel, premises and means of transport, and to take all measures to ensure safe and prompt access to health care;
2. *calls upon* all components of the International Red Cross and Red Crescent Movement to take determined action and to bring their combined influence to bear should access to health care and its safe and prompt delivery be endangered or impeded in armed conflict or other situations of violence, and to adopt plans of action to ensure the protection of health care to the greatest extent possible;
3. *calls upon* the ICRC, with the assistance of the International Federation, to support the National Societies’ efforts to gain safe access to the wounded and sick and to others in need of health care in armed conflict and other situations of violence in order to meet their health needs and other vital requirements;
4. *calls upon* the ICRC, with the assistance of the International Federation and National Society partners, to contribute to strengthening the capacity of National Societies in countries affected by armed conflict and other situations of violence to provide health care to the wounded and sick;
5. *calls upon* the ICRC, the International Federation and National Societies to continue supporting and strengthening the capacity of health care facilities and personnel around the world;

6. *invites* the ICRC, in accordance with its mandate to protect and assist victims of armed conflict and other situations of violence, to continue to collect, if the circumstances permit, specific information on incidents impeding and endangering access to and delivery of health care, and to make representations to the parties to the conflict in order to remove any restrictions on the safe and prompt provision of healthcare;
7. *calls upon* the ICRC and National Societies, with the assistance of the International Federation, to increase their efforts to promote, disseminate and support the national implementation of humanitarian law and human rights obligations to respect and protect health care in armed conflict and other situations of violence;
8. *urges* the ICRC and the National Societies, with the assistance of their International Federation, to encourage and support governments in the adoption of relevant national implementation measures in their domestic law and practice – including legislation, regulations, administrative orders and practical measures – to ensure identification of medical personnel and facilities, protection of the distinctive emblems, dissemination and training in the field of international humanitarian law, and national repression of serious violations of relevant international norms in their domestic courts consistent with international law;
9. *urges* the ICRC and National Societies to encourage and support all armed forces in ensuring implementation of the relevant international humanitarian and human rights law into military doctrine and practice;
10. *calls upon* National Societies, the ICRC and the International Federation to intensify efforts to ensure that the health care needs of the most vulnerable people are heard by those in a position to strengthen care for them and to ensure that the ability of civil society, in particular local communities, to strengthen health care is recognized;
11. *encourages* the ICRC, as well as National Societies with the support of the ICRC and the International Federation, to develop and promote campaigns to heighten the awareness of concerned authorities, armed and security forces, and local communities of the need for health care in armed conflict and other situations of violence and of the obligation under international law to respect and protect medical personnel, their transport and medical facilities;
12. *requests* the ICRC, in consultation with National Societies and the International Federation, to present a report, with recommendations, on the issue of health care in armed conflict and other situations of violence to the 31st International Conference of the Red Cross and Red Crescent in 2011.

## Resolution 9

### CODE FOR GOOD PARTNERSHIP OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT

The Council of Delegates,

*recalling* Resolution 3 of the 2007 Council of Delegates, which welcomed the Code for Good Partnership initiative and encouraged all components of the Movement to further develop this Code,

*welcoming with appreciation* the adoption of the Code for Good Partnership by the 2009 General Assembly of the International Federation of Red Cross and Red Crescent Societies,

*taking note with appreciation* of the consultation with National Societies and work conducted by the task force members, in particular of the Colombian Red Cross, Finnish Red Cross, Indonesian Red Cross, Mozambique Red Cross, Netherlands Red Cross, Swedish Red Cross, the International Federation, and the ICRC to develop this Code,

*reaffirming the importance* of the Code to complement already existing policies, to improve and strengthen the Movement as a whole and each Movement component individually, to set commitments and minimum standards of behaviour in working together more efficiently and effectively,

*bearing in mind* the need to continuously promote the Code to ensure implementation, accountability and compliance towards the stated commitments,

1. *urges* National Societies, the International Federation and the ICRC to adopt the “Code for Good Partnership of the International Red Cross and Red Crescent Movement”;
2. *urges* National Societies, the International Federation, and the ICRC to state their individual and collective commitment to implement the Code and to participate in the monitoring and compliance mechanism;
3. *calls upon* all components of the Movement to report back and share experiences in complying with the Code to the next Council of Delegates;
4. *invites* the task force members to consider any further comments on the Code to ensure its implementation and compliance.

### Code for Good Partnership of the International Red Cross and Red Crescent Movement

#### Preamble

Respectful behaviour is key to successful partnerships which are needed to ‘prevent and alleviate human suffering wherever it may be found’.<sup>1</sup> This Code for Good

<sup>1</sup> Preamble of the Statutes of the International Red Cross and Red Crescent Movement, *adopted by the 25th International Conference of the Red Cross in Geneva in 1986, amended in 1995 and 2006.*

Partnership (the Code) sets out commitments and minimum standards of behaviour in partnerships. By adhering to this Code, components of the International Red Cross and Red Crescent Movement (the Movement) commit to strengthen their partnerships, and work together more efficiently and effectively.

The Code builds on the Fundamental Principles, the Statutes of the Movement and its policy framework, taking into account the specific mandates and nature of the Red Cross and Red Crescent National Societies as auxiliaries to their public authorities in the humanitarian field and the mandates of the ICRC and of the International Federation.

In the spirit of mutual respect, Movement components will apply this Code to all their partnerships to realize a common goal. The partners recognize that more can be achieved by combining their different capacities and having shared and individual responsibilities.

Institutional partnerships are ultimately about relationships between people. Successful implementation requires that all staff and volunteers understand and adhere to it. Leaders have a particular role to act responsibly by following and promoting the Code.

The Code is a practical and dynamic tool that facilitates continuous learning and development.

Commitment to implement the Code, includes participating in its monitoring and compliance mechanism, and sharing experiences.

The Code has been adopted by the Council of Delegates. Each component of the Movement will subsequently record its individual commitment to practical steps it will take to implement and further develop the Code.

## **Commitment one: Respect and empower vulnerable people**

Respecting the needs and dignity of vulnerable people in all our activities

### *Indicators*

- Vulnerable people are recognized and empowered as stakeholders, and their needs and capacities are key to prioritizing our activities.
- The active participation of vulnerable people is sought in all stages of programme planning and implementation.
- National and local networks are strengthened to support the people and communities.

### **Commitment two: Practice diversity and cultural sensitivity**

Diversity, cultural awareness and sensitivity are key to making partnership work.

#### *Indicators*

- Behaviour in partnerships values diversity, cultural awareness and sensitivity respecting Fundamental Principles.
- Differences in organizational cultures are recognized and respected as far as they are compatible with the Fundamental Principles.

### **Commitment three: Ensure integrity**

Integrity enables good partnership and effective programming.

#### *Indicators*

- Partners comply with Movement resolutions and their own declared objectives, policies, rules and regulations in full accordance with the Fundamental Principles.
- Partners ensure legal compliance, effective governance, responsible fundraising and strong financial oversight.
- Openness and transparency are demonstrated regarding strategies, financial and human resources management, communications, and service delivery.
- Accountability towards beneficiaries, affected populations, the public and donors is actively promoted.

### **Commitment four: Work together as partners within the Movement**

Working in partnership is a collective and individual responsibility strengthening all components of the Movement.

#### *Indicators*

- The different mandates of Movement components and the role of each National Society in its own country are respected and mutually supported.
- Partners work within a common Movement policy framework and implement the statutory and operational decisions.
- Partners establish and actively participate in coordination and communication mechanisms at different levels.
- Partners' capacities are mutually strengthened, improving the capacity of the Movement.



## **Commitment five: Cooperate with actors outside the Movement**

Cooperation with actors outside the Movement is sought when it improves the lives of vulnerable people and is in compliance with the Fundamental Principles of the Movement.

### *Indicators*

- Partners dialogue and coordinate with actors outside the Movement, in particular with the respective States, taking into account the specific nature of the Red Cross and Red Crescent National Societies as auxiliaries to the public authorities in the humanitarian field.
- Partners engage with actors outside the Movement to influence decision-makers and the public on the basis of the Fundamental Principles.
- Partners build relations outside the Movement to mobilize resources to improve the lives of vulnerable people.

## **Implementing the Code**

The implementation process, which includes the following elements, consists of a continuous cycle:

### **Commitment**

Each Movement component expresses its political will to adhere to this Code and to allocate resources to enable the application, monitoring, reporting and learning. Movement components that endorse this Code are recognized as being “committed to the Code for Good Partnership”.

### **Application**

In applying the Code, each Movement component considers the following steps at organizational level:

- The Code is reflected in organizational strategies, policies, programmes and services.
- The Code becomes an integral part of human resource management, including staff and volunteers regulations, job descriptions, briefing and training to all staff and volunteers.

For each partnership arrangement, partners apply the Code context specific. In doing so, the following actions, among others, are taken:

The Code is:

- applied in all Movement dialogue and negotiations,
- used to recognize the different capacities of partners,
- used to strengthen the skills and capacities to work in partnership,

- integrated in any Movement cooperation and coordination mechanism,
- explicitly incorporated in all agreements between Movement partners,
- integrated into all meetings and initiatives taken by Movement partners,
- promoted in cooperation with external partners.

## **Monitoring and compliance mechanisms**

The Code serves as a framework for this process and provides indicators to analyse and review the partnership. Impact assessment is based upon regular and systematic monitoring of partnership performance against this Code.

Partners define monitoring and compliance mechanisms and adapt them to different contexts and needs of their partnerships.

Monitoring is a voluntary process to ensure continuous improvement and organizational learning through review of achievements against objectives as set in agreements. Monitoring entails self-monitoring, dialogue, peer review and other forms of review.

Problems related to lack of compliance of the Code should be resolved among the partners, and advice may be sought from peers.

## **Reporting, learning and development**

The partners carry out reporting as stated in their partnership agreement. The purpose of reporting is to share good practices among the Movement, including through a website.

Committed partners constitute a task force at a global level to support the implementation of the Code by advancing continuous learning and development. The task force, among others, promotes the Code, collects good practices and experiences, publishes lessons learnt, and lists good practitioners.

The International Federation has a specific responsibility to support its members in implementing the Code. The International Federation and the ICRC will compile reports on the implementation of the Code to each Council of Delegates.

## **Resolution 10**

### **DATE AND PLACE OF THE COUNCIL OF DELEGATES OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT**

The Council of Delegates of the International Red Cross and Red Crescent Movement,

*decides* to meet in Geneva, Switzerland on dates to be determined by the Standing Commission of the Red Cross and Red Crescent Movement and falling between 10 November and 2 December 2011.

## Resolution 11

### APPRECIATION TO THE KENYA RED CROSS SOCIETY

The Council of Delegates,  
*meeting* 150 years after the Battle of Solferino, which gave birth to the Red Cross and Red Crescent,  
*gathered* in Nairobi for the first ever Council of Delegates organized in Africa,  
*expresses* its deep gratitude and appreciation to the Kenya Red Cross Society, and in particular to its volunteers, staff members, Governor Mr Paul Birech, and Secretary-General Mr Abbas Gullet, for their wonderful hospitality and for their unfailing contribution to the success of the International Red Cross and Red Crescent Movement meetings held in Nairobi on 17–25 November 2009.

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