

**The United Nations  
High Commissioner  
for Human Rights  
and  
International Humanitarian Law**

**Bertrand Ramcharan**

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**THE UNITED NATIONS  
HIGH COMMISSIONER  
FOR HUMAN RIGHTS  
AND  
INTERNATIONAL HUMANITARIAN LAW**

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## SUMMARY

*International human rights law and international humanitarian law are parallel and complementary branches of international law with their distinct and distinctive supervision arrangements. In the conflicts taking place in the world today, both the institutions of international humanitarian law and international human rights law are called upon to apply and uphold international humanitarian law.*

*The International Committee of the Red Cross has the lead responsibility internationally for watching over the implementation of international humanitarian law, while the United Nations High Commissioner for Human Rights, the Commission on Human Rights, its subsidiary bodies, and the human rights treaty bodies have the lead responsibility for overseeing the implementation of international human rights law.*

*Basic human rights are being violated on a widespread scale during armed conflicts, and international human rights law operates in parallel alongside international humanitarian law in situations of armed conflict. Violations of international humanitarian law, especially as regards civilians, women and children, are violations of basic human rights with which the High Commissioner for Human Rights must be concerned as part of her responsibilities for the worldwide promotion and protection of human rights.*

*Situations may arise increasingly when a High Commissioner for Human Rights is called upon to react to human rights violations in situations of armed conflict. In such situations, a High Commissioner is perforce required to address violations of international humanitarian law. This calls for the exercise of care and discernment on the part of the High Commissioner. Situations must be handled on the basis of principles, first of international humanitarian law, second of international human rights law, and principles of coexistence regarding institutions of international humanitarian law and international human rights law.*

*Specifically, it is fundamental that the High Commissioner be cognizant of and act in the spirit of the principles pervading international humanitarian law. Generally, it is imperative upon a High Commissioner to help discharge the duty of protection and the responsibility to protect.*

*Additionally, the International Committee of the Red Cross has developed, over the years, well considered professional approaches for interpreting and responding to breaches of international humanitarian law and the High Commissioner must be mindful of this in pondering how to approach any particular situation.*

*A set of operational principles of coexistence, outlined in this essay, could help to enhance complementarity and mutual support in the future. Of these, the principle of protection is paramount. The latter boils down to a simple proposition: whoever can help protect the victims of violations of international human rights or international humanitarian law has a duty to do so. This is the essence of the 'responsibility to protect,' which is a cardinal principle of contemporary international law and relations. Ultimately, the High Commissioner has a responsibility to protect in respect both to international human rights law and international humanitarian law.*

# **The United Nations High Commissioner for Human Rights and International Humanitarian Law**

**By Bertrand  
Ramcharan**

**I**nternational humanitarian law has been developed carefully for nearly a century and a half, primarily under the aegis of the International Committee of the Red Cross (ICRC). The ICRC has tended to its development and implementation with care and attention, with idealism and professionalism, method and discipline. Monitoring the implementation of international humanitarian law is *par excellence* the province of the ICRC. One must treat the efforts of the ICRC with respect, and with care and attention as a partner. This author has had occasion to see firsthand the dedication and professionalism of the ICRC and its operatives in the field. In 1988, when the ICRC was prevented from continuing its visits to prisoner of war camps in Iran and Iraq, this author accompanied a United Nations visiting mission that, over a month, visited the some seventy thousand prisoners of war in Iran and the some thirty thousand prisoners of war in Iraq. His respect for the ICRC and its officers was all the more increased by this experience.

Sadly, we are living through a period when international humanitarian law, international human rights law and international refugee law are all flouted with impunity. Civilians are targeted deliberately; rules of combat are ignored; people are detained and imprisoned outside of legal frameworks; some fourteen million have taken refuge; some twenty-four million have been internally displaced; and humanitarian, human rights, and refugee personnel are agonizing about how respect for the law can be restored.

The United Nations Security Council has sought to play its part in highlighting the protection of civilians, the protection of women, and

the protection of children.<sup>1</sup> Within frameworks laid down by the Security Council, programs have been established to help protect these and other categories of victims of violations of humanitarian, human rights and refugee law. Organizations and agencies of humanitarian law, human rights and refugee law have been putting heads together to examine how the protection challenges of the present time can be met. It is a time for respect of one another's province and simultaneously a time of mutual solidarity in favor of the protection of the victims of conflict.<sup>2</sup>

The ICRC works best when it is discreet. This is recognized widely and partner organizations should respect this. At the same time, many of today's combatants in civil wars in many countries are anything but disciplined or professional. Often they respect no ground rules. The plight of the victims of conflict can, and does, lead partner institutions to do whatever they can for their protection in cases of need. The ICRC needs whatever support it can get to address the problem of widespread violations of international humanitarian law. It requires the support of partner institutions, rendered thoughtfully. The United Nations High Commissioner for Human Rights, like the ICRC, has what is known in ICRC parlance as the right of initiative.

This essay examines when, and how, the High Commissioner for Human Rights might consider entering the scenario in the face of egregious violations of international humanitarian law. In order to set the background for the discussion, we look initially at contemporary challenges to the protection of civilians in armed conflicts.

### **Egregious violations of humanitarian law in the contemporary world**

The widespread violations of international humanitarian, human rights and refugee law around the world have led a number of international institutions to study the sources of the violations and to

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<sup>1</sup> See Bertand G. Ramcharan, ed., *Human Rights Protection in the Field*, Martinus Nijhoff, forthcoming, 2005.

<sup>2</sup> See Michael O'Flaherty, "We are Failing the Victims of War," in Ramcharan, ed., *supra* note 1.

recommend measures that might be taken to stem and reverse them. In this section we look at the thinking that has emerged from these efforts. An understanding of the nature and dimensions of the problems of implementation could help indicate how partners might be able to contribute to restored implementation.

*The roots of the problem of violations of International Humanitarian Law*

An ICRC study of the roots of behavior in war reached the conclusion that “supervision of weapons-bearers, strict orders relating to proper conduct and effective penalties for failure to obey those orders are essential conditions which must all be met if there is to be any hope of securing better respect for International Humanitarian Law. The ICRC will have to engage in a whole range of representations and activities, combined in a coherent effort of diplomacy, if it hopes to make progress in this regard.”<sup>3</sup>

Another conclusion reached by the ICRC in the same study was the following: “[W]e have to make international humanitarian law a judicial and political rather than a moral issue.”<sup>4</sup> A related ICRC publication spelled this out further as follows: “The study’s main lessons may be summarized by the following three points: (1) Efforts to disseminate IHL must be made a legal and political matter rather than a moral one, and focus more on norms than on their underlying values, because the idea that the combatant is morally autonomous is mistaken. (2) Greater respect for IHL is possible only if bearers of weapons are properly trained, if they are under strict orders as to the conduct to adopt and if effective sanctions are applied in the event they fail to obey such orders. (3) It is crucial that the ICRC be perfectly clear about its aims when it seeks to promote IHL and prevent violations: does it want to impart knowledge, modify attitudes or influence behavior? The ICRC must develop strategies genuinely aimed at preventing violations of IHL.”<sup>5</sup>

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<sup>3</sup> ICRC, *The Roots of Behaviour in War – A Survey of the Literature*, 2004, p. 110.

<sup>4</sup> *Ibid.*, p. 111.

<sup>5</sup> ICRC, *The Roots of Behaviour in War – Understanding and Preventing IHL Violations*, 2004, pp. 2-3.



## *IHL: A bedrock of principles and rules*

A December 2003 ICRC report came to the following conclusions: “First, the ICRC believes...that the four Geneva conventions and their Additional Protocols, as well as the range of other international IHL treaties and the norms of customary law provide a bedrock of principles and rules that must continue to guide the conduct of hostilities and the treatment of persons who have fallen into the hands of a party to an armed conflict. Second,...some of the dilemmas that the international community grappled with decades ago were, in general, satisfactorily resolved by means of IHL development. Today, the primary challenge in these areas is to either ensure clarification or further elaboration of the rules. Thirdly, international opinion – both governmental and expert, as well as public opinion – remains largely divided on how to deal with new forms of violence, primarily acts of transnational terrorism.”<sup>6</sup> One might offer the comment that IHL development only, as opposed to IHL implementation through stronger advocacy, would seem to be a somewhat overly optimistic way of presenting the problem.

### *The meaning of protection*

‘Strengthening Protection in War’, to which we referred above, is the title of a publication of the International Committee of the Red Cross that summarizes the reflections of four workshops of human rights and humanitarian organizations. The participants in the workshops considered that the concept of protection encompasses “all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law, and refugee law. Human rights and humanitarian organizations must conduct these activities in an impartial manner (not on the basis of race, national or ethnic origin, language or gender).”<sup>7</sup>

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<sup>6</sup> ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report submitted to the twenty-eighth International Conference of the Red Cross and Red Crescent, December 2003, pp. 5-6.

<sup>7</sup> ICRC, *Strengthening Protection in War*, 2001, pp. 20-21.

The participants in the workshops considered a protection activity to be any action which:

- prevents or puts a stop to a specific pattern of abuse and/or alleviates its immediate effects;
- restores people's dignity and ensures adequate living conditions through reparation, restitution, and rehabilitation;
- fosters an environment conducive to respect for the rights of individuals in accordance with the relevant bodies of law.

They recognized that "no single organization is able to meet the sheer diversity of protection needs as this requires a wide array of skills and means. It is therefore natural that various organizations operate in the same arena and often cater to the same beneficiaries, regardless of the situation."<sup>8</sup>

*Protection of civilians in armed conflict: UN Aide Mémoire*

The United Nations Aide Mémoire on the Protection of Civilians in Armed Conflict<sup>9</sup> set out an agenda for protection of civilians that includes the following:

- Prioritize and support the immediate protection needs of displaced persons and civilians in host communities through measures to enhance security for displaced persons, measures to enhance security for civilians who remain in their communities and for host communities living in or around areas where refugees or internally displaced persons take shelter.
- Facilitate safe and unimpeded access to vulnerable populations as the fundamental prerequisite for humanitarian assistance

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<sup>8</sup> Ibid, p. 28.

<sup>9</sup> United Nations Security Council, "Aide Mémoire: Annex to Statement by the President of the Security Council," *Protection of civilians in armed conflict*, 15 December 2003, S/PRST/2003/27.

and protection through appropriate security arrangements, engagement in sustained dialogue with all parties to the armed conflict, facilitation of the delivery of humanitarian assistance, compliance with obligations under relevant international humanitarian, human rights and refugee law, and counter-terrorism measures in full compliance with all obligations under international law, in particular international human rights, refugee and humanitarian law.

- Strengthen the capacity of local police and judicial systems to physically protect civilians and enforce law and order through deployment of qualified and well-trained international civilian police, technical assistance for local police, judiciary and penitentiaries, reconstruction and rehabilitation of institutional infrastructure, and mechanisms for monitoring and reporting of alleged violations of humanitarian, human rights and criminal law.
- Address the specific needs of women for assistance and protection through special measure to protect women and girls from gender based discrimination and violence, rape and other forms of sexual violence; implementation of measures for reporting on and prevention of sexual abuse and exploitation of civilians by humanitarian workers and peacekeepers; mainstreaming of gender perspective, including the integration of gender advisers in peace operations.
- Address the specific needs of children for assistance and protection through prevention of and putting an end to the recruitment of child soldiers in violation of international law, initiatives to secure access to war-affected children, negotiated release of children abducted in situations of armed conflict, effective measures to disarm, demobilize, reintegrate and rehabilitate children recruited or used in hostilities, specific provisions for the protection of children, including where appropriate, the integration of child protection advisers in peace operations, implementation of measures for reporting on and prevention of sexual abuse and exploitation of civilians by humanitarian workers and peacekeepers,

family reunification of separated children, and monitoring and reporting on the situation of children.

- Put an end to impunity for those responsible for serious violations of international humanitarian, human rights and criminal law through establishment and use of effective arrangements for investigating and prosecuting serious violations of humanitarian and criminal law; exclusion of genocide, crimes against humanity, and war crimes from amnesty provisions; referral of situations, where possible and appropriate, to international courts and tribunals.

One sees the need for complementarity of efforts in dealing with the problems of violations of international humanitarian, human rights and refugee law. There is a great deal more that needs to be done for the protection of civilians. The 2004 report of the United Nations High Level Panel on Threats, Challenges and Change discussed the protection of civilians and made recommendations for their better protection.

That panel's assessment was that, in many civil wars, combatants target civilians and relief workers with impunity. Beyond direct violence, deaths from starvation, disease and the collapse of public health dwarf the numbers killed by bullets and bombs. Millions more are displaced internally or across borders. Human rights abuses and gender violence are rampant. Under international law, the panel recalls, the primary responsibility to protect civilians from suffering in war lies with belligerents – state or non-state. International humanitarian law provides minimum protection and standards applicable to the most vulnerable in situations of armed conflicts, including women, children and refugees, and must be respected.

Humanitarian aid, the panel continues, is vital for helping governments fulfill their responsibility to protect civilians. It urges stronger donor support and support for the Secretary-General's ten-point plan of action for the protection of civilians in armed conflict. It recommends that particular attention be placed on the question of access to civilians, which is routinely and often flagrantly denied. The panel does not indicate how access can be improved.

The panel urges that particularly egregious violations, such as occur when armed groups militarize refugee camps, require emphatic responses from the international community including from the Security Council acting under Chapter VII of the Charter. It notes that although the Security Council has acknowledged that militarization is a threat to peace and security, it has not developed the capacity or shown the will to confront the problem. It urges that the Security Council implements fully resolution 1265 (1999) on the protection of civilians in armed conflict, though it does articulate how the Security Council should do this.

Of special concern to the panel was the use of sexual violence as a weapon of conflict. The panel urged that the human rights components of peacekeeping operations should be given explicit mandates and sufficient resources to investigate and report on human rights violations against women.

The panel observed that collective security institutions have proved particularly poor at meeting the challenge posed by large-scale, gross human rights abuses and genocide. This is a normative challenge to the United Nations: the concept of the state and international responsibility to protect civilians from the effects of war and human rights abuses has yet to overcome truly the tension between the competing claims of sovereign inviolability and the right to intervene. It is also an operational challenge: “the challenge of stopping a government from killing its own civilians requires considerable military deployment capacity.”<sup>10</sup>

Against this background, the Panel recommends that all combatants abide by the Geneva conventions. All Member States should sign, ratify and act on all treaties relating to the protection of civilians, such as the Genocide Convention, the Geneva Conventions, the Rome Statute of the International Criminal Court and all refugee conventions. Significantly, in a pattern that runs throughout the report, international human rights conventions are not mentioned explicitly.

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<sup>10</sup> Report of the United Nations Secretary-General’s High Level Panel on Threats, Challenges and Change, *A More Secure World – Our Shared Responsibility*, 2004, paragraph 36, [www.un.org/secureworld/report2.pdf](http://www.un.org/secureworld/report2.pdf).

Unfortunately, the recommendations of the Panel on Threats, Challenges and Change are largely recapitulatory. This raises the question of what, more concretely, could be done to protect civilians better in armed conflicts. The following issues would require urgent attention:

- development of a code on humanitarian access;
- designation of an international prosecutor-type person in every situation of armed conflict for the respect of humanitarian and human rights law;
- adoption of an international convention on the protection of internally displaced persons;
- protection of refugees and reinforcement of the regime of humanitarian asylum;
- prosecutorial attention to the issue of violence against women;
- development of a reporting and monitoring system for the protection of children;
- regular release of a civilian protection alert;
- improved monitoring through the designation of a Committee on the Protection of Civilians in Armed Conflict;
- development of presence on the ground with humanitarian observers available in every situation of armed conflict;
- better protection through peacekeeping, where classical methods of peacekeeping are not suitable, new methods should be developed; and
- better protection of humanitarian workers: a convention should be developed on the protection of humanitarian workers.

## *Protection of children in armed conflicts*

A Report of the Secretary-General submitted to the fifty-ninth session of the General Assembly in 2004 provided a Comprehensive Assessment of the United Nations system response to children affected by armed conflict (CAAC).<sup>11</sup> The report grouped recommendations for improving and sustaining efforts on CAAC into four categories, which constitute the medium-term strategic priorities for the United Nations system to improve its response to children affected by armed conflict:

- continued vigorous advocacy for children and armed conflict;
- an effective and credible monitoring and reporting system on child rights violations;
- enhanced mainstreaming of CAAC issues across the United Nations system; and
- improved coordination of CAAC issues across the United Nations system.<sup>12</sup>

On advocacy, the report concluded that there was continuing need for an SRSG-CAAC as an independent advocate reporting directly to the Secretary-General and recommended the introduction of appropriate mechanisms for measurement of progress against benchmarks established each year. The mandated functions of the SRSG-CAAC should focus on:

- integrating children's rights and concerns into the United Nations' peace and security, humanitarian and development agendas throughout all phases of conflict prevention, peace-building, peacemaking and peacekeeping activities;

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<sup>11</sup> United Nations General Assembly, "Report of the Secretary-General," *Comprehensive assessment of the United Nations system response to children affected by armed conflict*, 3 December 2004, A/59/331.

<sup>12</sup> *Ibid*, paragraph 46.

- unblocking political impasses to secure commitments from political actors on child protection on the national and regional levels and ensuring adequate follow-up to these commitments;
- ensuring the inclusion of children and armed conflict concerns in all relevant reports submitted to the Security Council by the Secretary-General;
- reporting child rights violations to relevant bodies, e.g. the Secretary-General, the Security Council, governments and regional mechanisms, and advocating the inclusion of appropriate measures in resolutions, e.g. sanctions, for actors who are violating CAAC norms and standards;
- producing an annual report to the General Assembly and the Commission on Human Rights, using inputs from key United Nations actors and featuring a high-level analytical assessment of the state of CAAC in all conflict situations (i.e. not just countries on the Security Council's agenda), progress in the United Nations system's advocacy, mainstreaming and coordination efforts on CAAC issues, and prioritized next steps for the United Nations system in improving its response to CAAC;
- providing proactive advocacy support to the Secretary-General, heads of agencies, special representatives, and other high-level United Nations officials, primarily through inter-agency committees such as the Executive Committee on Peace and Security (ECPS) and the Senior Management Group;
- co-chairing a coordination mechanism at United Nations headquarters on children affected by armed conflict;
- maintaining a high-profile public awareness on CAAC issues as required to achieve political advocacy objectives including cooperation with the Department of Public Information (DPI); and



- leading a collaborative process to produce the annual Secretary-General's report to the Security Council on CAAC. The report should focus on progress in the application of CAAC norms and standards including reporting on child rights violations in situations of conflict; suggestions for measures to ensure compliance to norms and standards; and high-level analysis of CAAC trends with recommendations on improvements to the United Nations system response, particularly with suggestions on how United Nations peace and security mechanisms can respond better to CAAC and progress on the development of a monitoring and reporting system for child rights violations.

The report urged that the advocacy role of the Emergency Relief Coordinator (ERC) and the High Commissioner for Human Rights should also be resorted to systematically in support of CAAC concerns and issues.<sup>13</sup>

The report urged that a robust monitoring and reporting system for child rights violations in conflict situations should be developed in three distinct stages:

- (i) developing an accepted, standardized and practical methodology to identify, document and verify child rights violations;
- (ii) setting up and coordinating of networks of actors on the ground to document child rights concerns; and
- (iii) establishing responsibilities and procedures for disseminating and leveraging the information.<sup>14</sup>

One also sees here active complementarity of efforts in the quest for protection of the victims of armed conflict.

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<sup>13</sup> Ibid, paragraph 51.

<sup>14</sup> Ibid, paragraph 52.

### *Protection of women in situations of armed conflict*

In its resolution 1325 (2000), the Security Council called upon all parties to armed conflict to respect fully all international law applicable to the rights and protection of women and girls, especially as civilians, in particular the obligations applicable to them under the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977, the Refugee Convention of 1951 and the Protocol thereto of 1967, the Convention on Elimination of All Forms of Discrimination against Women of 1979 and the Optional Protocol thereto of 1999, and the United Nations Convention on the Rights of the Child of 1989 and the two Optional Protocols thereto of 2000, and to bear in mind the relevant provisions of the 1998 Rome Statute of the International Criminal Court.<sup>15</sup> The Council further called on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict.<sup>16</sup>

We have here a whole range of activities involving the protection of women in armed conflict where partners have to work alongside the ICRC. The needs in this area are many and pressing.<sup>17</sup> So are the challenges of protecting refugees and displaced persons.

### *Protection of refugees*

The United Nations High Commissioner for Refugees published in 2002 an *Agenda for Protection* whose program of action has six goals:

- (i) strengthening implementation of the 1951 Convention and 1967 Protocol;
- (ii) protecting refugees within broader migration movements;

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<sup>15</sup> United Nations Security Council, Resolution 1325, October 31, 2000, S/RES/1325 (2000), paragraph 9.

<sup>16</sup> *Ibid*, paragraph 10.

<sup>17</sup> See Comfort Lamptey, "Protection of Women in Conflict and Post-Conflict Environments," in Ramcharan, *supra* note 1.

- (iii) sharing burdens and responsibilities more equitably and building capacities to receive and protect refugees;
- (iv) addressing security-related concerns more effectively;
- (v) redoubling the search for durable solutions; and
- (vi) meeting the protection needs of refugee women and children.<sup>18</sup>

The realization of this agenda presents many problems and challenges in practice.<sup>19</sup>

### *Protection of Internally Displaced Persons*

The United Nations Guiding Principles on Internal Displacement provide that national authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons (IDPs) within their jurisdiction. Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.

All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons. The Principles contain, in addition to general principles, guidance on protection from displacement (prevention), protection during displacement,

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<sup>18</sup> United Nations High Commissioner for Refugees, Annex IV to the Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, *Agenda for Protection*, 2002, A/57/12/Add.1, p. 29.

<sup>19</sup> See Kamel Morjane, "Protection of Refugees and Displaced Persons," in Ramcharan, *supra* note 1.

humanitarian assistance, and principles relating to return, resettlement and reintegration.

A Representative of the Secretary-General on Internally Displaced Persons monitors the implementation of the guiding principles and generally seeks to act for the protection of IDPs. The Special Representative is supported by the Office of the High Commissioner for Human Rights, which awards the High Commissioner a direct responsibility in this area. Furthermore, an inter-agency unit on IDPs has been established under the framework of the Office for the Coordination of Humanitarian Affairs to help promote better protection of IDPs. One sees here also the complementarity of efforts on behalf of the protection of victims of armed conflict.

#### *UN Field Operations: The 'Brahimi Report'*

The 'Brahimi Report' saw much room for complementarity in addressing problems of respect for human rights and humanitarian law in situations of armed conflict. Its key recommendations are listed below.

- The essential importance of the United Nations system adhering to and promoting international human rights instruments and standards and international humanitarian law in all aspects of its peace and security activities.
- Improving respect for human rights through the monitoring, education and investigation of past and existing abuses; providing technical assistance for democratic development; and promoting conflict resolution and reconciliation techniques.
- Addressing variables that affect peace implementation such as issues of ethnicity or religion or gross violations of human rights.
- Observing international standards for democratic policing and human rights.

- Integrating human rights specialists in peacebuilding missions.
- Upholding the rule of law and respect for human rights through team work on the part of judicial, penal, human rights and policing experts.
- Training military, police and other civilian personnel on human rights issues and on the relevant provisions of international humanitarian law.
- A doctrinal shift in the use of civilian police and human rights experts in complex peace operations to reflect an increased focus on strengthening rule of law institutions and improving respect for human rights in post-conflict environments.
- Meeting threshold conditions in the implementation of ceasefire or peace agreements, such as consistency with international human rights standards.

The Brahimi recommendations take the Office of the High Commissioner (OHCHR) into the heart of conflicts with a human rights mandate – alongside institutions such as the ICRC. The Memorandum of Understanding (MOU) between OHCHR and the United Nations Department of Peacekeeping Operations (DPKO) seeks to provide guidance on this.

*The MOU between OHCHR and DPKO*

The MOU in operation between OHCHR and the UN Department of Peacekeeping Operations also addresses the challenges of protection in situations of armed conflict. Paragraph 2 of the MOU urges that “the activities of human rights components of peacekeeping operations shall be based on international human rights standards, as defined in the relevant international treaties, declarations, guidelines and other instruments. In the implementation of their activities, whether of a monitoring or of a technical cooperation nature, and within the framework of their mandate, human rights components of

peacekeeping operations will seek to promote an integrated approach to human rights promotion and protection, paying due attention to civil, cultural, economic, political and social rights, including the right to development, and to the special needs of women, children, minorities, internally displaced persons and other groups requiring special protection.”

### *Principles of universal criminal jurisdiction*

The Princeton Principles of Universal Jurisdiction (2001) offered a recapitulation of international law that is relevant to the issue of impunity, which, as noted, has been identified as a key issue to be tackled if successful prevention of violations of international human rights and humanitarian law is to be achieved. According to the Principles:

- Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person accused of committing serious crimes under international law, provided the person is present before such judicial body.<sup>20</sup>
- Serious crimes under international law include piracy, slavery, war crimes, crimes against peace, crimes against humanity, and genocide.<sup>21</sup>

The High Commissioner for Human Rights has a duty to watch over these principles.

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<sup>20</sup> The Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, 2001, Principle 1 (2), p. 28, [www.princeton.edu/~lapa/publications.html](http://www.princeton.edu/~lapa/publications.html).

<sup>21</sup> *Ibid*, Principle 2 (1), p. 29.

## The United Nations High Commissioner for Human Rights

The preceding section has sought to highlight the principle of complementarity of efforts: different organizations all seeking, as best they can, to contribute to the protection of the victims of armed conflict. Indeed, “increasingly, the use of force during armed conflict is being assessed through the perspective of human rights law, as well as under international humanitarian law.”<sup>22</sup> A particular strength of the human rights process “has been the development of a strict accountability framework.”<sup>23</sup>

The confidential *modus operandi* of the ICRC has advantages. At the same time, it can lead to situations in which massive violations are taking place, monitored by the ICRC, which submits its reports to the State Party(ies) concerned while the situation persists. The rest of the world may not be aware of the violations taking place. The 2003-2004 atrocities in the Abu Ghraib prison in Iraq are a case in point. The policy issue that is thus joined is the following: how can the monitoring bodies of international human rights law and those of international humanitarian law work to greater advantage for the defense of human rights? Of relevance to this question are the Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the Commission on Human Rights on April 19, 2005.

Challenging issues are involved here. As Ken Watkin notes:

[I]ncorporation of human rights principles of accountability can have a positive impact on the regulation of the use of force during armed conflict. Given the close interface between these two normative frameworks in some types of armed conflict, their mechanisms of accountability will

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<sup>22</sup> Ken Watkin, “Controlling the Use of Force. A Role for Human Rights Norms in Contemporary Armed Conflict,” *American Journal of International Law* 98, 2004, p. 1. See also Hans-Joachim Heintze, “On the Relationship Between Human Rights Law Protection and International Humanitarian Law,” *Review of the International Committee of the Red Cross*, 856, December, 2004, pp. 789-814.

<sup>23</sup> Watkin, “Controlling the Use of Force,” p. 30.

inevitably need to be reconciled; but systems of accountability developed to regulate the use of force domestically cannot simply be transferred to the international humanitarian law context. Consequently, both states and human rights supervisory bodies may have to readjust their understanding of the role human rights law can play in enhancing the accountability framework regarding the use of deadly force in armed conflict. No gaps in the effort to apply appropriate norms of humanity can be allowed.<sup>24</sup>

The United Nations High Commissioner for Human Rights has been given the mandate by the United Nations General Assembly to act for the promotion and protection of all human rights, civil and political, economic, social and cultural, and the right to development.<sup>25</sup> International human rights law and international humanitarian law are parallel and complementary branches of international law with their distinctive supervision arrangements. The International Committee of the Red Cross has the lead responsibility internationally for watching over the implementation of international humanitarian law, while the United Nations High Commissioner for Human Rights, the Commission on Human Rights, its subsidiary bodies, and the human rights treaty bodies have the lead responsibility for watching over the implementation of international human rights law.

The fact of the matter, however, is that basic human rights are being violated on a widespread scale during armed conflicts and the International Court of Justice, in a recent advisory opinion, has confirmed that international human rights law operates in parallel alongside international humanitarian law in situations of armed conflict. Further, still, one can say that violations of international humanitarian law, especially as regards civilians, women and children, are violations of basic human rights with which the United Nations High Commissioner for Human Rights must be concerned as part of her responsibilities for the world-wide promotion and protection of human rights. In a 2005 incident involving the killing of a wounded

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<sup>24</sup> Watkin, "Controlling the Use of Force," p. 34.

<sup>25</sup> United Nations General Assembly, Resolution 48/141, *High Commissioner for the promotion and protection of all human rights*, December 20, 1993, A/RES/48/141.



Iraqi combatant in Falluja both the ICRC and the High Commissioner issued public statements illustrative of a *shared* concern for the principle of humanity and for the right to life, which is protected by international humanitarian law as well as international human rights law.

To put it at its minimum, it is evident that the United Nations High Commissioner for Human Rights and the ICRC will often be involved in giving expression to the principle of humanity in many same situations, as well as in seeking to protect the right to life in such situations. Coexistence is thus a matter of day-to-day reality and it is one of the purposes of this essay to explore how that coexistence is functioning in practice.

It is our submission that the fundamental principles of the Red Cross should guide the High Commissioner. Similarly, the fundamental principles of human rights should guide the ICRC as they guide the High Commissioner. Since widespread violations of human rights take place nowadays in armed conflicts, internal and international, the High Commissioner is expected to monitor the application of human rights law as well as humanitarian law in such situations.

The High Commissioner's duty of protection extends to persons detained or imprisoned in the context of armed conflicts. While the primary responsibility rests on institutions such as the ICRC, it is not exclusive responsibility.

In any situation of armed conflict the High Commissioner should cooperate closely with the ICRC. Where required, and in cooperation with the ICRC, the High Commissioner should extend protection if the ICRC has been prevented from doing so and if the High Commissioner is in a position to assist. One should, however, bear in mind, that for reasons of efficiency and discretion it may be better, in cases, to act under the aegis of the Secretary-General – even when it is the High Commissioner who is arranging the operation.

The High Commissioner should contribute, as appropriate, to the progressive development of international humanitarian law and fundamental standards of humanity.

To develop on these propositions, it is important to review the holdings of the International Court of Justice on the relationship between international humanitarian law and international human rights law.

### **Coexistence of International Humanitarian Law and International Human Rights Law**

In its Advisory Opinion of July 8, 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice held that

the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities.<sup>26</sup>

In a subsequent Advisory Opinion, on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court reaffirmed that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, "there are thus three possible situations: some rights may be exclusively humanitarian matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."<sup>27</sup>

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<sup>26</sup> International Court of Justice, Reports, 1996 (1), paragraph 25.

<sup>27</sup> International Court of Justice, Reports, 2000, paragraph 106.

It would be our submission that circumstances may arise in which the High Commissioner is called upon to exercise her role of protection in all three situations. We examine this proposition next in relation to three recent specific situations: the Guantanamo Prisoners, Iraq, and Colombia.

### *The Guantanamo prisoners*

Following the 2001-2002 war in Afghanistan, the United States placed into custody in Guantanamo over six hundred prisoners caught up in the war whom the US labeled 'enemy combatants' and chose not to consider as prisoners of war. Subsequently, other individuals would be taken from Iraq, following the war there in 2003, and from a number of places in pursuit of the 'war on terror.'

From the outset, the then High Commissioner for Human Rights, Mary Robinson, held publicly that the prisoners taken from Afghanistan were entitled to prisoner of war status. Subsequently, the ICRC would be granted access to the prisoners held there, would argue that the persons taken in Afghanistan were entitled to prisoner of war status, and would make public statements to that effect. The US authorities insisted on their position and US courts would hold, at one stage, that the persons detained in Guantanamo were entitled to access to American courts to determine their status. At base, issues of their fundamental human rights were involved.

The late High Commissioner for Human Rights, Sergio Vieira de Mello, stated publicly that, after a year in detention, the persons held in the Afghan war were entitled to be charged or released from Guantanamo. His was a statement of policy whose legal basis was not articulated.

During the some fourteen months during which this author exercised the functions of High Commissioner he had occasion to reflect on the role of the High Commissioner in such situations. True, the ICRC was visiting the prisoners; true, it was making statements about their situation and arguing for them to be accorded prisoner of war status. However, as a matter of conscience, could a High Commissioner for Human Rights remain on the sidelines in such a situation?

I considered that such a position would be untenable and therefore requested the US authorities for permission to visit the detainees. Parts of the administration were sympathetic, while parts were not. In the end a visit did not take place. This did not deter the author from being involved vis-à-vis the situation. Accordingly, at one point in time, I addressed a letter to the United States Assistant Secretary of State for Human Rights expressing concern over the situation of young persons detained in Guantanamo.<sup>28</sup> I also considered commenting publicly on the situation but since there was much public debate on it in the United States and abroad, and since the issues were being ventilated in the US courts with success, I considered that I would hold off for the time being. In my own judgment I always considered that a High Commissioner had the right to become involved in situations such as this.

### *Iraq*

Prior to the invasion of Iraq by Coalition Forces in March 2003, the situation of human rights in that country had been the subject of international concern for a number of years. Up to the session of the Commission on Human Rights in 2003 there had been a Rapporteur who had reported on the situation of human rights in that country. In 2003, the Rapporteur had been given the charge to look at past violations of human rights, namely before the invasion by Coalition Forces. At the 2004 session of the Commission, the principal coalition countries had decided to discontinue the mandate of the Rapporteur. At the time it was known that there were thousands of prisoners of war in Iraq who were being visited by the ICRC. However, their numbers and circumstances were known only to the detaining powers and, to some extent, to the ICRC.

The issue that arose was whether the situation was satisfactory and whether there was an issue of protection entailing the responsibilities of the High Commissioner. The author decided to invoke the right of initiative of the High Commissioner and to prepare and submit to the Commission on Human Rights a public report on the situation of human rights in Iraq. The report considered issues of international

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<sup>28</sup> See Bertrand G. Ramcharan, *A UN High Commissioner in Defense of Human Rights – No License to Kill or Torture*. Martinus Nijhoff, 2004, pp. 132-134.

human rights law as well as international humanitarian law. The drafting of the part of the report on international humanitarian law was entrusted to a lawyer who had previously served with the ICRC. The text of this part of the report was discussed informally with ICRC officials before issuance.

On the international legal framework applicable, the report took the following positions:

(i) International humanitarian law

“50. The situation in Iraq involves a military occupation to which international humanitarian law as well as the Hague Regulations of 1907 are applicable. Both the Third and the Fourth Geneva Conventions are also applicable to the conflict. The United States ratified the Geneva Conventions on 2 August 1955. The vast majority of POWs and civilian internees captured during major military operations have since been released. In the case of doubt about the status of an individual, a detainee’s case has to be considered by a competent tribunal, as required by Article 5 of the Third Geneva Convention. Those individuals who commit criminal offences in Iraq, including those suspected of anti-Coalition activities, are normally detained as “criminal detainees.” Those held by the Coalition forces fall within a process that requires a probable cause determination by a military attorney within twenty-one days of every detention. The Coalition Forces provide a second procedure that requires that the criminal detainee be brought before a Judge as soon as possible and in no instance later than ninety days from the date of detention. A criminal detainee has to be distinguished from a civilian internee who has not been found guilty of any infringement of the penal provisions enacted by the Coalition forces, but has been detained for “imperative reasons of security.” There has to be an individualized decision linking the detainee to a threat to security. According to the Commentary to the Fourth Geneva Convention, “there can be no question of taking collective measures: each case must be decided separately.” As a procedural safeguard in order to ensure that principles of humanity are respected, a security detainee should have the right of appeal and any decisions upholding detention should be reviewed every six months.

“51. The use of torture and other forms of physical and psychological coercion against any detainee to extract confession or intelligence-related information is a violation of international humanitarian law and is prohibited. Evidence that has been obtained through coercion cannot be used by the Coalition forces.

“52. Willful killing, torture, or inhuman treatment, if committed against detainees protected by international humanitarian law, constitutes a grave breach under the Geneva Conventions and therefore of international humanitarian law and is prohibited at any time, irrespective of the status of the person detained. Such acts might be designated war crimes by a competent tribunal. The requirement that protected persons must at all times be treated humanely is a basic pillar of the Geneva Conventions. The detaining authorities are bound to put in place all measures to preempt the use of torture as well as any inhuman and degrading treatment. All States parties are obliged to exercise jurisdiction to investigate, prosecute, and punish perpetrators.

## (ii) International Human Rights Law

“53. The prohibition of torture laid down in international humanitarian law with regard to situations of armed conflict is reinforced by the body of international treaty law on human rights. These laws ban torture both in time of peace and during armed conflict.

“54. Any practice of torture or other cruel, inhuman or degrading treatment or punishment violates international human rights standards to which both the United States and the United Kingdom are parties, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. There is an absolute prohibition of torture that is applicable in times of conflict as well as in times of peace. The Convention defines torture as any act that is intentional, that causes severe pain or suffering, that is used to obtain information or confession, to punish, intimidate or coerce, and that has been authorized by someone in an official position. In addition to Article 7 of ICCPR, which prohibits torture and cruel, inhuman or

degrading treatment or punishment, Article 10 specifically provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>29</sup>

One of the comments made in the publicly-issued report was that the situation of confidentiality that prevailed regarding the prisoners gave reasons for concern and that the High Commissioner needed to be in a position to satisfy his own conscience regarding the fate of the prisoners and other human rights issues in Iraq.

### *Colombia*

Colombia has had a protracted internal conflict that has lasted some five decades now. Abuses of human rights and humanitarian law are widespread, committed by Government and rebel forces as well as by their sympathizers. Pressure upon the Colombian Government over the human rights abuses in the country led it to conclude an agreement with the High Commissioner for Human Rights whereunder the High Commissioner reports annually to the Commission on Human Rights on the situation of human rights in that country. It has been inevitable for the High Commissioner to consider violations of human rights law as well as humanitarian law.

The 2004 report on the activities of the OHCHR field office in Colombia covers the national context and dynamics of the internal armed conflict; state policies and follow-up of international recommendations; breaches of international humanitarian law by armed actors; the human rights situation; the situation of particularly vulnerable groups; and has various annexes, one of them giving ‘Representative cases of human rights violations and breaches of international humanitarian law.’ Undoubtedly, it is a major protection document in and of itself, for Colombians.

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<sup>29</sup> United Nations Social and Economic Council, Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, *The Present Situation of Human Rights in Iraq*, June 9, 2004, E/CN.4/2005/4.

The report on Colombia submitted to the Commission on Human Rights in 2004 discussed the situation of particularly vulnerable groups including human rights defenders, ethnic groups, women, children, journalists, communities at risk, and others. The report contained specific recommendations by the High Commissioner for “prevention and protection,” including the following:

“107. The High Commissioner encourages the Social Solidarity Network, together with other government and State institutions, to put into practice, as soon as possible, preventive and protective actions and programmes that have been agreed upon with the communities at risk. With respect to displacement, the United Nations Guiding Principles should be strictly applied.

“109. The High Commissioner encourages the Procurator General to carry out, during the first semester of 2004, the pending review of military intelligence records concerning human rights defenders and organizations. This review ought to be carried out at least once a year.

“111. The High Commissioner encourages the Minister of Defence to develop, on the basis of the results of an independent study, in a comprehensive, systematic and operational way, the training in human rights and international humanitarian law of all members of the security forces.”

The emphasis on prevention in these recommendations is striking. The Colombia Office of the Office of High Commissioner for Human Rights is a veritable laboratory in the quest for human rights protection. During 2003, the OHCHR Office in Colombia carried out several field missions to conflict zones and forty-four sets of complaints were received, of which nine hundred and thirty-six cases were admitted. Field missions and the permanent presence in the branch offices in Cali and Medellin enabled the office in Colombia to follow up on the regional and local situation as well as to provide advice to the authorities and institutions of civil society in the field of human rights and international humanitarian law while accompanying local processes undertaken in the areas included in the mandate.



Additionally, although it is difficult to measure their impact, field missions fulfill the purpose of promoting preventive and protective measures for the communities. These visits, carried out mostly with the Colombian authorities, are made to zones in which the presence of the state has been traditionally weak or non-existent.

In the preceding discussion, the thrust of our submission has been that situations may arise increasingly when a High Commissioner for Human Rights is called upon to react to human rights violations in situations of armed conflict. In such situations, a High Commissioner is perforce required to address violations of international humanitarian law. This calls for the exercise of great care and prudence on the part of the High Commissioner. The International Committee of the Red Cross has developed, over the years, well considered and professional approaches for interpreting and responding to breaches of international humanitarian law and the High Commissioner must be mindful of this in pondering how to deal with any particular situation. Situations must be handled on the basis of principles, first of international humanitarian law, second of international human rights law, and principles of coexistence regarding institutions of international humanitarian law and international human rights law. We shall discuss each of these sets next.

### **Principles of International Humanitarian Law**

If, as we have argued at the beginning of this essay, a High Commissioner for Human Rights must do whatever she or he can to promote and uphold international humanitarian law as well as international human rights law, it is fundamental that the High Commissioner be cognizant of and act in the spirit of the principles pervading international humanitarian law. These are, as developed classically, the principles of impartiality, neutrality, independence, voluntary service, unity, and universality. The fundamental principles of the Red Cross have been the subject of an extensive literature and do not need further comment here.<sup>30</sup> By contrast, the fundamental

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<sup>30</sup> See, for instance, Jean Pictet, "The Fundamental Principles of the Red Cross: Commentary," ICRC, January 1979.

principles of international human rights law have never, so far, been expanded upon.

### **Principles of International Human Rights Law**

Pervading international human rights law, which is *par excellence* the domain of the High Commissioner, are fundamental principles of international human rights law that must be ever present in the mind of a High Commissioner – and indeed of the ICRC. A United Nations conference on “Bringing International Human Rights Law Home” held in Vienna in 2000, adopted a communiqué recommending that “all judicial officers be guided by international human rights instruments.” It urged, specifically, that “all citizens, especially judges and lawyers, must be aware of and responsive to international human rights law. Judges and lawyers have a responsibility to familiarize themselves with the growing international jurisprudence of human rights.” Surely, this precept would need to be ever present in the minds of all those called upon to uphold international human rights and humanitarian law in the world.

It bears mentioning, for instance, that Section 39(1) of the South African Constitution features the following provision:

- When interpreting the Bill of Rights, a court, tribunal or forum:
- a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - b. must consider international law; and
  - c. may consider foreign law.

There is guidance to be found from the international human rights treaty bodies on fundamental principles of human rights law such as universality, democratic legitimacy, justice, protection, legality, respect, ensure, equality and non-discrimination and remedy. We next address briefly each of these in turn.

#### *Universality*

The World Conference on Human Rights, held in 1993, expressed succinctly the legal consensus of the international community on the

universality of human rights as follows: “The universality of these rights and freedoms is beyond question.” It went on to say: “While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights.”

### *Democratic legitimacy*

The World Conference on Human Rights also declared that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. It emphasized that “the international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.”

Article 21, paragraph 3 of the Universal Declaration of Human Rights provides that the will of the people shall be the basis of the authority of government: “this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” Article 25 of the International Covenant on Civil and Political Rights states that “everyone shall have the rights and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his or her country.”

### *Justice*

The Human Rights Committee has invoked the justice principle on occasions. In *A. v. Australia*, for example, the Committee recalled that the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice.

Section 7 of the Canadian Charter of Rights and Freedoms states that “everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The Canadian Supreme Court has held that the phrase “principles of fundamental justice” allows the courts to review, from the perspective of substantive as well as procedural justice, laws infringing on life, liberty or security of the person. This means that the courts have the right to strike down laws that do not conform to the judicial view of what is fundamentally just. The principles of fundamental justice are considered “the basic tenets of our legal system” and relates to the “domain of the judiciary as guardian of the justice system.”

### *Protection*

In a report issued in 2001, the International Commission on Intervention and State Sovereignty elaborated on the core principles of the responsibility to protect. This ‘responsibility’ embraces three specific duties, noted below.

- The responsibility to *prevent*: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.
- The responsibility to *react*: to respond to situations of compelling human need with appropriate measures which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.
- The responsibility to *rebuild*: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.

### *Legality*

In General Comment No. 27, the Human Rights Committee provides general principles applicable in the interpretation of restrictions or limitation clauses. Where, for example, the expression ‘as provided by

law' appears, the law itself has to establish the conditions under which the rights may be limited. Further, the restriction must not impair the essence of the right, should use precise criteria and may not confer unfettered discretion on those charged with their execution.

In the same vein, a restriction must be legitimate and necessary: "Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected." The Committee puts particular emphasis on the fundamental principles of equality and non-discrimination whenever restrictions are made.

### *Equality and non-discrimination*

In its General Comment No. 18, the Human Rights Committee took the following approach to the term discrimination:

[T]he Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction, or preference which is based on any ground such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status, and which the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

### *Respect and ensure*

In today's world of pervasive terrorist threats, the Human Rights Committee has provided invaluable guidance on the balance to be struck between security and human rights. Referring to Article 4 of the International Covenant on Civil and Political Rights, the Committee declared in General Comment No. 29:

Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by Article 4, paragraph 1. During armed conflict, whether international or non-international, rules of international

humanitarian law become applicable and help, in addition to the provisions in Article 4 and Article 5, paragraph 1, of the Covenant, to prevent the abuse of a state's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If states parties consider invoking Article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.

### *Remedy*

Article 8 of the Universal Declaration of Human Rights states the fundamental principle that "everyone has the right to an effective remedy by the competent national tribunal." The World Conference on Human Rights emphasized that

every state should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development. In this context, institutions concerned with the administration of justice should be properly funded, and an increased level of both technical and financial assistance should be provided by the international community.

In its views under the Optional Protocol, the Human Rights Committee has consistently retained its position that in a case where a violation of the Covenant has been established through the Optional Protocol procedure, the state party in question has a legal obligation to provide an effective remedy.

### *Principles of interpretation*

The Human Rights Committee, operating under the International Covenant on Civil and Political Rights, has given extensive guidance

on principles of interpretation of human rights provisions. In views rendered on August 5, 2003, in a case submitted by one Roger Judge, the Human Rights Committee considered “that the application of human rights evolves and that the meaning of Covenant rights should in principle be interpreted by reference to the time of examination and not, as the state party has submitted, by reference to the time the alleged violation took place.”<sup>31</sup>

Mindful of the fundamental principles of international humanitarian law and the fundamental principles of international human rights law are what we would deem operational principles of coexistence.

### **Operational principles of coexistence**

Besides the substantive principles of international humanitarian law and international human rights law set out earlier, there are, we would submit, operational principles of coexistence that should guide both the High Commissioner for Human Rights and the International Committee of the Red Cross. We set out some of these next.

#### *The principle of prevention*

The aim of international law is to prevent conflicts by fostering the peaceful resolution of disputes. The rationale of both international human rights law and international humanitarian law is to prevent violations of their norms. Both the institutions of international human rights law and the institutions of international humanitarian law, therefore, have the shared objective of prevention. To what extent can the High Commissioner for Human Rights contribute to the prevention of violations of international humanitarian law? In part, by ensuring that reports of the Secretary-General and reports of the High Commissioner concerned with conflict prevention and the protection

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<sup>31</sup> United Nations International Covenant on Civil and Political Rights, Human Rights Committee, *Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights*, Judge v. Canada, October 20, 2003, Communication No. 829/1998.

of civilians pay special attention to the role of humanitarian law and human rights law in the prevention of conflicts and atrocities.

The High Level Panel of Independent Experts has urged the High Commissioner to submit annually a global report on human rights. Such a report would need to address the situation of international humanitarian law and what could be done to prevent violations thereof. In the preparation of this part of the report the High Commissioner would need to maintain close working relations with the ICRC.

To give this point additional emphasis, let us ask, would the ICRC be prepared to put out an annual report assessing the state of respect for international humanitarian law? Theoretically, it could. It already issues an Annual Report on its activities that gives a snapshot of the problems around the world. But would it be ready to be more pointed, to be even critical. Then let us ask whether a High Commissioner for Human Rights could possibly issue an annual thematic report without commenting on the state of respect for international humanitarian law?

This paper has brought out the necessity for complementarity of efforts. An annual High Commissioner's report would need to discuss respect for international humanitarian law. Ideally, it should be a vehicle for presenting the concerns of the ICRC and the wider Red Cross and Red Crescent movement. It is ordained that the High Commissioner and the Red Cross/Red Crescent movement shall intensify their cooperation in the future.

### *The principle of protection*

Protection of the victims of violations of international humanitarian law and international human rights law during situations of armed conflict is what must be uppermost in the minds of actors of both branches of law. It is this principle of protection that, we submit, is the governing principle in the relations between the High Commissioner and the International Committee of the Red Cross. Stated simply, whoever can help defend human rights or humanitarian law would be expected to play her or his part. The principle of protection would require a High Commissioner to be attentive to situations of gross violations of international humanitarian law.



As noted, protection is what can be done by those in a position to act to come to the aid of victims or potential victims. It is not clear how, in light of the traditional operating principles of the ICRC, it could help activate the justice principle in cases of need, or contribute in the quest to bring alleged perpetrators to justice. The general subject of the relationship between the ICRC and the Prosecutor of the International Criminal Court is beyond the scope of this paper. One can see, however, the High Commissioner for Human Rights helping to call for the prosecution of alleged perpetrators, gathering and providing evidence to the Prosecutor. The High Commissioner can thus be the triggering voice in cases of need. There are profound issues involved in these matters.

### *The principle of consultation*

As could be seen from the previous two sections, there is urgent and important business of advocacy, prevention and protection at hand. The principle of consultation would require an ongoing process of contacts and exchanges between the Office of High Commissioner and the International Committee of the Red Cross and exchanges on specific situations or issues, as required.

As to the former, there is a history of periodic consultations between the two institutions. Roughly once a year, meetings are held between the senior leadership of the two institutions. There are also ongoing working-level contacts. The process of consultations should be made more systematic and systemic. When I served as High Commissioner, President Kellenberger and I sought to find occasions to meet *tête-à-tête* for an exchange of experiences and views. I found these valuable. They were carried out in a spirit of solidarity and with absolute discretion. I believe that such meetings between the President of the ICRC and the High Commissioner would be one of the basic ways of enhancing cooperation in the future.

There is also a history of consultations on particular issues or situations. We related above how coordination was effected in the preparation of the High Commissioner's report on Iraq. Consultation must be carried out with great tact and discretion. In the heat of battle, it is essential that it not be publicized that the ICRC is providing views

or information. Often it is the only humanitarian agency that has access in a situation. That must not be jeopardized.

### *The principle of cooperation*

This paper has argued that the High Commissioner and the ICRC are destined to cooperate. Yet, cooperation could carry risks for the ICRC. If it is known that it is exchanging views or information with the High Commissioner that could jeopardize its work. One way of dealing with this would be for the High Commissioner and the President of the ICRC to have a confidential *aide-mémoire* on a set of principles of cooperation kept, between them. This is a matter of some delicacy. I believe, however, that it would be helpful to have a set of informal ground rules for cooperation. At the heart of these would be the principle of non-attribution: no hint should be given that the High Commissioner is voicing concerns of the ICRC.

The principle of cooperation would come into the picture particularly where both the ICRC and the Office of High Commissioner have field operations. Colombia is a case in point. There is already a record of good cooperation between the ICRC and the OHCHR field office in Colombia.

### *Principles of interpretation*

There are two basic principles of interpretation that are especially important. First, the High Commissioner should, in principle, rely upon existing interpretations of international humanitarian law and avoid statements of law that are at variance with the historically established views.

Second, interpretation must be distinguished from application. If the High Commissioner considers that there have been breaches of international humanitarian law, she should, while respecting the principle of consultation, be at liberty to so hold.

### *The justice principle*

As we have sought to argue above, where there are flagrant violations of international humanitarian law the High Commissioner for Human Rights has a duty to call for the perpetrators to be brought to justice. Indeed, the High Commissioner can, here, be particularly helpful since the methods of the ICRC, in particular, are discreet, and it may not wish to come out publicly against criminal violators of the law.

### *Principles of remedy and compensation*

A High Commissioner for Human Rights may also be in a position to call for remedies and compensation in particular situations. In doing so, the High Commissioner could be expected to be guided by the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the Commission on Human Rights in April 2005 by a recorded vote of forty to none.

There is a lengthy history to the adoption of these principles, going back several years and involving studies in the Sub-Commission on the Promotion and Protection of Human Rights and in the Commission on Human Rights. The principles have thus gone through a vetting process that is indeed historic. One of the central breakthroughs is that the document is concerned with international human rights law as well as international humanitarian law. There was powerful opposition to the competence of the Commission on Human Rights to address the latter. Yet that it did raises operational issues for the High Commissioner.

Whatever the formal status of the Principles, their content is significant. It is provided, for example that the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law includes the duty to take appropriate legislative and administrative and other appropriate measures to prevent violations; to investigate violations effectively, promptly, thoroughly and impartially, and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; to provide those who claim to be victims of a human

rights or humanitarian law violation with equal and effective access to justice, irrespective of who may ultimately be the bearer of responsibility for the violations; and to provide effective remedies to victims, including reparation.

Victims are defined as persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. A victim's right to remedies for gross violations of international human rights law and serious violations of international humanitarian law includes equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.

Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered.

We are here in the presence of great principles that must ever be present in the mind of the High Commissioner for Human Rights and, indeed, all actors in the human rights and humanitarian law movements. Justice for victims is indivisible. All must seek to advance it. The thrust of the Principles adopted by the Commission on Human Rights is to take the High Commissioner into the world of international humanitarian law.

### *Education and training*

It is natural that, in the normal course of things, the ICRC should concentrate on education and training regarding international humanitarian law, while the Office of High Commissioner should concentrate on international human rights law. But in a number of situations, in the midst of conflict, the Office of High Commissioner is increasingly being called upon to provide education and training with respect to international humanitarian law as well as international

human rights law. Colombia is a case in point, as we saw earlier. The ICRC has historically sought to keep its promotional activities in the area of international humanitarian law within its own purview so as not to become tainted by others. But there is room for cooperation, nevertheless.

For some years now, the United Nations has published a human rights passport: a reproduction of the Universal Declaration of Human Rights in passport form, with an introduction by the Secretary-General affirming basic rights for the holder, who inscribes her or his own name in the document. This 'passport' might include the basic principles of the Red Cross or a similar concise statement of the rights of the individual under international humanitarian law.

### *Capacity-building*

This is an area where there is need for a fundamental rethink in the ways in which the Office of High Commissioner and the ICRC function. The ICRC has a long and respectable tradition of dissemination of, and training in, international humanitarian law. The record of the United Nations in the dissemination of international human rights law and in the provision of training therein is not as solid as that of the ICRC. It therefore stands to reason that the ICRC must continue to be the lead agency with regard to the dissemination of, and training in, international humanitarian law.

Nevertheless, it is pertinent to note that the United Nations Secretary-General, as part of the program of reforms and revitalization of the United Nations has called upon the different agencies of the United Nations system to work with Member States on the enhancement of their national protection systems. By national protection system is meant the overarching constitutional, legislative, judicial, educational, preventive, and protective system of laws and institutions of a state.

The question arises for reflection whether international humanitarian law should not be alongside international human rights law when it comes to cooperation for the enhancement of national protection systems. This, we believe, is elementary and it gives rise to the question: how would the Office of High Commissioner and the ICRC cooperate when it comes to capacity-building?

## *Judicial protection*

The judicial protection of human rights in each country must be a basic part of the strategy of the Office of High Commissioner. This requires that the key norms of both bodies of law and the key jurisprudence be made available to domestic judges, in local language. There must be room for closer cooperation between the Office of High Commissioner and the ICRC in this domain. Judges, magistrates, lawyers, prosecutors, the police, and prison officials all need to be instructed in international humanitarian law as well as international human rights law.

## **Conclusion**

This essay has sought to explore the role of the United Nations High Commissioner for Human Rights in helping to promote and uphold international humanitarian law. It has argued that in the conflicts taking place in the world today, both the institutions of international humanitarian law and international human rights law are called upon to apply and uphold international humanitarian law. It considered cases where it was imperative upon a High Commissioner to help discharge the duty of protection, the responsibility to protect.

We have set out the fundamental principles of international humanitarian law that must inspire and guide a High Commissioner, as well the fundamental principles that pervade international human rights law. We then adduced a set of operational principles of coexistence that, we offer, could help to enhance complementarity and mutual support in the future. Of these, we consider that the principle of protection is paramount. It boils down to a simple proposition: whoever can help protect the victims of violations of international human rights or international humanitarian law has a duty to do so. This is the essence of the 'responsibility to protect,' which is a cardinal principle of contemporary international law and relations. Ultimately, the High Commissioner has a responsibility to protect in respect both to international human rights law and international humanitarian law.

## ABOUT THE SERIES

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The Occasional Papers Series of the Program on Humanitarian Policy and Conflict Research at Harvard University is a periodical publication on current important topical issues in the field of International Humanitarian Law (IHL).

Each essay focuses on a specific IHL issue, defines and describes the problem at hand, reviews and comments on the relevant aspects of the problem, sets it in the context of existing literature on the topic providing a summary of main positions and arguments, outlines a general argument or approach, and draws conclusions that would inform practical work.

The essays are written in a clear, concise, academic yet accessible style. The statements are authoritative and pithy, so as to inform the work of policy-makers and practitioners. The language and argument of the essays seeks particularly to address these groups.

The aim of the series is that a careful exploration of the facts and issues, and an insightful, forward-looking analysis will help to advance current difficult IHL issues. The purpose is to produce information and analysis that will clarify legal and conceptual issues, encourage solid thinking about international humanitarian law questions, and strengthen practical policy work.

## HPCR

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The Harvard Program on Humanitarian Policy and Conflict Research (HPCR) was set up in 2000 with a view to serve international organizations with research and policy input on humanitarian law, human security, and conflict management.

The Program is engaged in research and advisory services on conflict prevention strategies, the management of humanitarian crises and the protection of civilians in conflict areas. It advises international organizations, governments and non-governmental actors, and focuses on the protection of vulnerable groups, conflict prevention strategies, and the role of information technology.

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The Program rests on the joint efforts of Harvard University, the Federal Department of Foreign Affairs of Switzerland, and the Executive Office of the United Nations Secretary-General, and it seeks to cooperate closely with operational and academic institutions around the world.



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