



PROGRAM ON HUMANITARIAN POLICY
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Turning the Stranger into a Partner:

**The Role and Responsibilities of Civil Society in
International Humanitarian Law
Formulation and Application**

Thematic Brief

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Introduction

This paper examines the relationship between the legal framework of international humanitarian law (IHL) and civil society actors operating in conflict situations. Attention is paid to assessing the manner in which the latter can play a role in strengthening the humanitarian dimension of the former. Brief introductory comments are warranted so as to situate the debate, in which non-governmental organizations (NGOs) operating in a conflict zone are adopted as the primary unit of analysis.

IHL is the field of public international law which regulates the conduct of hostilities, namely restricting the means and methods of warfare available to parties to the conflict, and laying out protections afforded civilians and those no longer taking part in hostilities (*hors de combat*). State-centric in its development, the central tenets of IHL are found in the Hague Regulations of 1907, the four Geneva Conventions of 1949 and the two Protocols Additional to the Geneva Conventions of 1977. It is the right of sovereign states to decide which treaty-based international legal obligations they adopt regarding the legal regulation of the conduct of armed conflicts, however a number of legal provisions of IHL have attained the status of customary international law, and are thus binding on all parties to the conflict. This raises questions in regards to the status of non-state actors under international humanitarian law. The legal position of such actors, which for the purpose of this paper will focus on international organizations and non-governmental organizations, warrants close examination.

It is against this legal backdrop, that most textbooks dealing with IHL are concerned primarily with the *substance* of the norms composing this legal framework, as well as with the *process* through which states, sometimes under the auspices of an intergovernmental organization, come to agree upon a certain legal rule. Under such an approach, international law may seem to take place at the highest diplomatic echelons of states, while being subsequently applied to all parties, both state and non-state, on the ground.

In the development of international law, states have agreed upon the establishment of intergovernmental organizations, most prominently the United Nations (UN), with its many specialized agencies. A number of these agencies play a prominent role in unstable environments, be it before, during, or after an armed conflict. Additionally, some states themselves have created state-controlled agencies (for example the creation of USAID by the American government) for which a central objective is to provide humanitarian assistance in conflict zones. Instead of focusing upon these ‘classic’ state actors which give shape to the formulation and implementation of IHL in some sort of a “stubborn persistence of the state-

centered view of international law,”¹ this paper will focus on civil society, an often overlooked actor which has a role to play, not only in zones of armed conflict as such for their work on the ground, but also vis-à-vis the *legal* norms that are applicable in such an environment. As neither a state nor an intergovernmental organization, and as a significant portion of civil society, NGOs have a key role to play, both normatively speaking and as demonstrated by past experience. Indeed, NGOs are often indispensable operational partners for the implementation of the programs initiated by other actors, including the UN.² A natural question which follows is thus whether NGOs are also actors in their own right under IHL.

This paper’s central purpose is to provide a general overview of engagement with IHL by NGOs. The question is raised in terms of the *opportunities*, and sometimes even of *rights*, which IHL affords NGOs as regards the provision of protection to victims of an armed conflict. Concomitantly, the constraints IHL imposes regarding the framework under which NGOs work is examined.

Given the fact that the IHL framework has provided for a unique legal position – both in terms of rights and responsibilities – for the International Committee of the Red Cross (ICRC) and, to a somewhat lesser extent, to National Red Cross Societies, Section I of this paper will set out the basic elements necessary to understand the unique position of the Red Cross family. Building upon that, Section II will demonstrate how ‘non-Red Cross NGOs’ have a complementary role to play in relation to the functions of the ICRC, when it comes to influencing respect for, and attempting to promote further development of, IHL protection mechanisms. This analysis will, first, require an assessment of what role such NGOs have been attributed by states in IHL treaties, thus allowing a subsequent concentration on the rights and constraints NGOs face when wishing to provide humanitarian assistance or medical services in an environment where IHL applies.

As it will follow from this analysis that classic IHL imposes some constraints on the modes of actions that are acceptable for NGOs wishing to derive rights directly from IHL, Section III will seek to analyze, from the legal point of view, what happens when NGOs speak out about what they observe on the ground. Firstly, this can take place through the issuance of reports to ensure word gets out to the world about the situation on the ground. Here the real challenge will be for NGOs, most of which are accustomed to human rights law discourse, to acknowledge and incorporate IHL mechanisms and discourse. Apart from attempting to create awareness among public opinion by such reports, NGO-

¹ Chayes, Abram and Chayes, Antonia Handler. “*The New Sovereignty. Compliance with International Regulatory Agreements*,” Harvard University Press, 1995, 250 & foll.

² Beigbeder, Yves. “*The Role and Status of International Humanitarian Volunteers and Organizations. The right and duty to humanitarian assistance*,” Martinus Nijhoff Publishers, 1991, 61.

authored reports can also be used when approaching states and criminal tribunals. Therefore, a second part of this section will provide past examples demonstrating that even 'small' NGOs with a limited staff, can have an impact. This can be done by sharing their experience with states or tribunals in support of the adoption of new international law with a humanitarian inspiration, or to consider the prosecution of egregious violations. Similarly, NGOs wishing to promote the cause of IHL can play an important role by engaging with the belligerents themselves.

Based upon such analysis of the theory and practice demonstrating the links between NGOs and IHL, this paper will then identify areas which NGOs could consider for incorporating in their work awareness of the relevancy and utility of the IHL framework. As this is a paper written from a legal perspective, some of the challenging ethical and practical dilemmas NGOs find themselves confronted with in any setting of armed conflict will only be dealt with to the extent they are relevant to their position under IHL. A second limitation of this paper is that it only deals with international humanitarian law, not with the national law of the area in which NGOs are working. In practice, that law is of clear significance for any organization active in a conflict zone.

As to this paper's intended audience, it has been primarily written for NGOs operating in an environment where an *armed conflict* exists. The condition of a situation of armed conflict is the legal requisite triggering the application of IHL. Thus, the audience will include NGOs which do have experience in working in the area of development cooperation and find themselves exposed to situations that are far removed from any peace-like condition, and are thus confronted with the need to shift from development work to humanitarian aid. What can these NGOs expect from IHL, not only as a mechanism that provides protection for the NGO staff, but also as a tool with which they can engage in order to protect victims of an armed conflict?

Additionally, for the purpose of this paper, the intended audience is not NGOs such as Médecins Sans Frontières which, by virtue of their activities, already possess a long-standing expertise in the provision of humanitarian aid during situations of armed conflict, and have thus gained an operational familiarity with the relevant tenets of IHL. Nor is this paper's focus on those NGOs, such as Human Rights Watch or Amnesty International, which have, in their analysis and discourse, acquired expertise with IHL, a legal framework which maintains a great degree of separation vis-à-vis human rights law.

This paper will, however, identify some of the elements that can be found in the practice of the ICRC and those NGOs mentioned above, to the extent they can practically inspire and inform the work of other NGOs. Eventually, this should lead to providing such NGOs with a basic understanding of how the existence of an armed conflict and concomitant application of IHL affects their humanitarian

action, with the law offering renewed opportunities as well as imposing new constraints.

I. The role of the ICRC and of National Red Cross Societies

The four Geneva Conventions of 1949³ and their two Additional Protocols of 1977,⁴ form the core of IHL. In these universally ratified treaties, the ICRC is mentioned explicitly a number of times, having been granted by states a special institutional and privileged status for the supervision of IHL implementation. For this purpose, the ICRC prioritizes the interests of the victims of armed conflict, and acts as an impartial intermediary between the fighting parties. This position is unique, in that some of IHL's provisions in which the ICRC is mentioned, give the latter a monopoly on the exercise of certain rights.

In addition to its mandate of protecting and assisting the victims of an armed conflict and of providing humanitarian assistance in conflict zones (both of which can be exercised when certain conditions are respected), the second pillar of the ICRC's activities which are of relevance to this paper, concern the organization's work in the field of IHL development.

Driving force behind the development of certain treaties

While its contribution to the development of, and role in, the 'Law of the Hague' (which outlines those provisions of IHL concerned mostly with the restrictions on the means and methods of warfare) has been more modest⁵, the ICRC, as an organization with purely private origins, has played a driving role behind the development of the 'Law of Geneva,' which includes those IHL provisions concerned with the protection of civilians and wounded or sick soldiers.⁶ Under the 'Law of Geneva,' the ICRC is afforded a customary right of initiative in matters of

3 First Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Second Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Third Convention relative to the Treatment of Prisoners of War; Fourth Convention relative to the Protection of Civilian Persons in Time of War. All are dated 12 August 1949. For their full text, see www.icrc.org/ihl

4 First Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Second Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. Both are dated 8 June 1977. For their full text, see www.icrc.org/ihl

5 However, the Statutes of the International Red Cross and Red Crescent Movement, Article 5.2(g), adopted in 1986, do not limit the ICRC's competence for the development of IHL to the Law of Geneva.

6 For an overview of the ICRC's origins and the role it has played in the past for the adoption of most IHL treaties, see Bugnion, François. "The International Committee of the Red Cross and the Development of International Humanitarian Law," *Chicago Journal of International Law*, 2004, 191 – 215.

protection and assistance.⁷ While it seemed at the end of the nineteenth century to be concerned mostly with the fate of wounded soldiers, the organization has come to work also for the benefit of civilians.

While the ICRC continued to play a significant role in the process leading to the adoption of some of the more recent treaties which have a humanitarian inspiration, ‘ordinary’ NGOs have gradually taken on an important role in providing expert information to states (see Section III of this paper).⁸

All this is a unique feature in international law, in that the ICRC is a private, national, Swiss association which enjoys Swiss legal personality, but which has an international scope of activities and is recognised by governmental authorities as having a special status and expertise in the field of IHL.⁹ Thus, the ICRC has not only been mandated by states to exercise oversight of the correct implementation of IHL in a number of respects, it will often also maintain a confidential dialogue with states, drawing upon its privileged role, which provides it with more direct access to the highest governmental channels than what most NGOs generally have access to, even if said access sometimes occurs indirectly, such as through the National Red Cross Society in that country.

ICRC: A special position, but no monopoly for all areas for which it is mandated

As will be examined further under Section II, a number of provisions of IHL black letter law explicitly name the ICRC and detail certain rights afforded it (which are sometimes subject to the consent of the belligerents). However, this is without giving the ICRC any monopoly on these activities; this is most prominently the case so far as the ICRC’s role of providing humanitarian relief is concerned.

Examples of such activities over which the ICRC has no monopoly can be found in two provisions which are contained in all four Geneva Conventions, such as common Article 3 (applicable to non-international armed conflicts) and common Article 9 (applicable to international armed conflicts).¹⁰ The Geneva Conventions stipulate explicitly that the ICRC has the right to offer its services to the

7 Kalshoven, Frits and Zegveld, Liesbeth. “*Constraints on the Waging of War: an Introduction to International Humanitarian Law*,” ICRC, 2001.

8 For an overview of the role it has played in the process leading to the adoption of the 1997 “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction” (commonly referred to as the “Ottawa Convention”) and in the 1998 Rome Statute establishing the International Criminal Court, see Dörmann, Knut and Maresca, Louis. “The International Committee of the Red Cross and its Contribution to the Development of International Humanitarian Law in Specialized Instruments,” *Chicago Journal of International Law*, 2004, 217 – 232.

9 For a comprehensive overview, see Haug, Hans. “*Humanity for All. The International Red Cross and Red Crescent Movement*,” Henry Dunant Institute, 1993.

10 In the Fourth Geneva Convention, this is Article 10.

belligerents, but only mentions the latter organization as an *example*, as these articles grant the same right to “an impartial humanitarian body”¹¹ or to “*any* impartial humanitarian organization” (emphasis added).¹² These articles will be addressed under Section II, as they provide opportunities for all NGOs to derive certain rights directly from IHL treaties.

The fact remains that some provisions of IHL treaties provide the ICRC with virtually *exclusive* rights; additionally, and most markedly in Geneva Conventions I and II, the National Red Cross (Red Crescent, Red Lion and Sun) Societies have equally been granted certain rights which other non-Red Cross NGOs are not afforded. It is the National Societies which are the Red Cross Movement’s basic units, adopting a role supporting the national public authorities and, under the conditions of the Geneva Conventions, to provide relief to victims of armed conflict. While legally speaking, these National Societies often are registered as ordinary NGOs in their respective jurisdictions, their privileged links with the government and unique position vis-à-vis the framework of IHL, often provide them a quasi-official organizational role that other NGOs arguably do not possess.¹³

The specifics of a certain provision must be examined in order to assess the conditions and parameters for the provision of the concomitant right.¹⁴ For example, the Third and the Fourth Geneva Conventions (which apply only to international armed conflicts) grant the ICRC certain rights for visiting Prisoners of War and civilian detainees, respectively. Some of these rights are, in contrast with the ICRC’s more general humanitarian activities, not subject to the consent of the Parties to the conflict.¹⁵

Similarly, the first few articles of all four Geneva Conventions provide for a system of “Protecting Powers” which, in the minds of the drafters in 1949, would be another state appointed to supervise another state’s interests under IHL. However, this system has virtually ceased to be used after the Second World War. Using the provisions in the IHL treaties which recognize the right of the ICRC to act as a substitute to the Protecting Powers-system, by holding a position similar to that of

11 Common Article 3.

12 Common Article 9.

13 Beigbeder, Yves. “*The Role and Status of International Humanitarian Volunteers and Organizations. The right and duty to humanitarian assistance*,” Martinus Nijhoff Publishers, 1991, 71 – 73.

14 Of particular help in this respect can be the Commentary, addressing each article, to each of the Conventions and Protocols. See www.icrc.org/ihl

15 See AP I, Article 81, para. 1

a Protecting Power,¹⁶ the ICRC has been asked on a number of occasions in the past to fulfil such functions.

In most general terms, Article 81 of the First Additional Protocol enshrines a general duty, incumbent upon “the parties to the conflict” to enable the ICRC to carry out the “humanitarian functions” assigned to it by IHL, some of which can, however, only be exercised *subject to the consent of the parties*; this is a crucial issue for all non-Red Cross NGOs.

Additionally, quite a number of provisions of the core treaties of IHL¹⁷ address special protection granted to the emblems of the Red Cross family: the Red Cross, Red Crescent and, since the Third Protocol Additional to the Geneva Conventions,¹⁸ the Red Crystal, all having equal status. Given the highly protective value such emblems offer in the realities of an armed conflict (for example for medical personnel and facilities), the Geneva Conventions exclude non-ICRC and Red Cross actors from using it. Thus, in practical terms, this means that NGOs outside the Red Cross family will not be authorized to use any of the “distinctive emblems” (the abuse of which warrants penal sanctions) and that, while different NGO emblems may receive recognition by belligerents, IHL ascribes no legal value to them.

Finally, it should be noted that the ICRC and its staff operate often under agreements granting them privileges and immunities; while not always going so far as full diplomatic immunity.¹⁹ Virtually always being regulated under an *ad hoc*-scheme, and subject to state consent, such features are not afforded to ordinary NGOs, which only benefit from the general protection under IHL afforded civilians.

The Fundamental Principles: Opportunities and Constraints

While an in-depth treatment of the modes of actions by which the Red Cross-family functions is beyond the scope of the present contribution, one aspect of its work merits highlight, namely the fundamental principles by which all of its

16 While Articles 10 (Geneva Conventions I, II and III) and 11 (Geneva Convention IV) stipulate that states would be obliged to accept the ICRC’s offer in case no system of “Protecting Powers” can be arranged, in practice, consent of the parties concerned has proved necessary. Articles 5 and 6 of the First Additional Protocol (1977) have been adopted in an attempt to overcome the practical difficulties in implementing all this. See Kalshoven, Frits and Zegveld, Liesbeth.

“*Constraints on the Waging of War: an Introduction to International Humanitarian Law*,” ICRC, 2001, 140 – 142.

17 See, for example, the First and the Second Geneva Conventions, Chapter VI on the “Distinctive Emblem”

18 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, 8 December 2005.

19 McDowell, Joshua. “The International Committee of the Red Cross as a Witness before International Criminal Tribunals,” *Chinese Journal of International Law*, 2002, 158 – 182, especially 174 – 175.

members' work is guided. For the purpose of the present paper, most important among these are the principles of *impartiality* (towards victims), *independence* (towards states and their governments) and *neutrality* (towards belligerents).²⁰

As will be seen under Section II, the requirement of impartiality is often enshrined in IHL treaties as being a precondition to the right of organizations other than the ICRC to offer their humanitarian assistance. For the Red Cross Movement, it means that no discrimination shall take place as to which victims receive assistance: only the needs of victims can justify such discrimination.

The principle of independence mandates the Red Cross Movement to maintain its autonomy vis-à-vis all states and their governments.

Quite crucially, for all of its work, even in the most complex and volatile of environments, all member of the Red Cross Movement need to abide by the principle of neutrality:

In order to continue to enjoy the confidence of all, the Red Cross may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.²¹

Virtually throughout anything it does, the ICRC respects strictly these principles, which in turn can considerably limit its scope of action. Sometimes, this even jeopardizes being able to deliver assistance. For example, when negotiating access so as to deliver humanitarian assistance, the ICRC has a reputation of being unwavering when it comes to respect for its seven fundamental principles. Rather than considering violating these principles, there have been examples of the ICRC suspending its assistance or withdrawing altogether²² (due to such circumstances as failure of a belligerent party to agree to respect them), thus leaving certain victims without assistance. Sometimes, other relief organizations have stepped in and provided assistance when strict adherence by the ICRC to such requirements as ensuring that the assistance provided not serve to further the belligerents' political objectives, has resulted in their inactivity.²³

20 The other four principles are humanity, voluntary service, unity and universality. See the Statutes of the Red Cross Movement.

21 Jean Pictet, "The Fundamental Principles of the Red Cross: commentary" Jan 1, 1979.

<http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5MJE9N>.

22 Beigbeder, Yves. "*The Role and Status of International Humanitarian Volunteers and Organizations. The right and duty to humanitarian assistance*," Martinus Nijhoff Publishers, 1991, pages 147 – 178 on "Challenges to the Dogma (of the ICRC)" and "The Influence of External Events on the Dogma".

23 Forsythe, David. "International Humanitarian Assistance: the Role of the Red Cross," *Buffalo Journal of International Law*, 1996 – 1997, 235 – 260, especially 240 – 245.

While the Fundamental principles of the ICRC can act as a constraint on its scope of manoeuvre, the limits of the ICRC's activities can provide an opportunity for action by other NGOs. Provided they respect such requirements of IHL as impartiality,²⁴ this leads to a relationship of complementarity. At the same time, the fact that the ICRC is not alone in the field, can make it challenging for its principles to be respected: other organizations working in the area may be willing to work with the belligerents on terms that the ICRC would eschew. Undoubtedly, the ICRC's principles exist for good reason, and many NGOs rightly apply most of the aspects involved in the principles. However, there are certain areas where the ICRC's mandate - for example its refusal, in principle, to publish its findings - is clearly too narrow to cover the full spectrum of activities required by a complex war environment.

Humanitarian action and testimony before international criminal tribunals

A further aspect requiring analysis in relation to the ICRC, which can be of practical importance and concern to non-Red Cross NGOs, concerns the issue of whether the ICRC and other NGOs can be called upon to testify before a domestic or international criminal proceeding (for example where alleged war criminals are prosecuted).

Indeed, given their intimate knowledge of what has happened on the ground, NGOs are often uniquely equipped to provide independent testimony about certain events. Subsequently, a question arises concerning the provision of testimony regarding certain areas where the ICRC maintains an exclusive right, such as visiting prisoner-of-war camps. Can an ICRC delegate who may have witnessed abuses be called to testify in front of a court of law?

Obviously, having to do this could endanger seriously the special position of the ICRC. Limited self-governed exceptions of 'going public' under extreme circumstances notwithstanding, the ICRC has always kept confidential the information it has acquired by having been granted access to certain areas or facilities. A link can be drawn between the granting of such privileged access and the conditions under which the states have granted the ICRC such access, which is by trusting the latter's working methods of keeping information confidential. Conversely, the questions arises as to whether the international community's higher interest mandates that the most egregious international crimes be prosecuted, based upon as complete a judicial record of the events as possible. Along those

²⁴ Mention can be made here of a book which is highly critical of the relationship between the intervention of NGOs in conflict zones and their alleged prolonging (unwillingly) the armed conflict by aiding belligerents in a way that does more harm than good. While an assessment of such controversial views goes beyond the scope of the present paper, it does show that the ICRC's principles are there for good reasons. See Pérouse de Montclos, Marc-Antoine, "*L'Aide Humanitaire, Aide A la Guerre?*," Editions Complexe, 2001.

competing interests, the ICRC confines itself to confidential persuasion and, in principle, refrains from public denunciation,²⁵ be it voluntary or through providing testimony in front of a criminal tribunal.

On this issue, the situation of ICRC staff is unique under the current state of the law.²⁶ After the ICRC had, through its own statements, attempted to ensure that its confidential working methods be maintained and its staff immune from having to testify in front of an international criminal tribunal, the International Criminal Tribunal for the former Yugoslavia recognized²⁷ that the ICRC had a right under customary international law to not disclose information.

Whereas the Rome Statute establishing the International Criminal Court (ICC) did not touch upon this issue, the ICC's Rules of Procedure and Evidence did,²⁸ by providing for immunity for information acquired by ICRC delegates in the exercise of their official functions.²⁹ However, the ICC can admit evidence if³⁰ the same information has also been collected by another organization in the field, and independently from the ICRC.

In sum, two essential points should be highlighted as regards this issue:

First, as for the issue of whether ICRC delegates can be forced to provide testimony in front of a *domestic* tribunal, no uniform answer can be given. Most often, this will have been regulated in the agreement between the ICRC and the host government..

Second, the immunity from providing testimony does not extend to non-Red Cross NGOs. Thus, the latter will need to take into account throughout their work that they can be compelled to appear as witness in front of a domestic or international criminal proceeding. This issue will be examined in detail under Section III.

In contrast with the ICRC, and while being aware that it can possibly be a strain on the NGO's relationship with the belligerents in terms of being granted access to provide humanitarian assistance, an NGO in question will have the opportunity to

25 Bonard, Paul. "*Modes of Action Used by Humanitarian Players: criteria for operational complementarity*," ICRC Publication, 1999.

26 For a comprehensive treatment, see McDowell, Joshua. "The International Committee of the Red Cross as a Witness before International Criminal Tribunals," *Chinese Journal of International Law*, 2002, 158 – 182.

27 Judgment in the case of Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic and Simo Zaric, July 1999. IT-95-9-PT.

28 See Sub-Rules 73.4 to 73.6.

29 Jeannot Stéphane. "Testimony of ICRC Delegates before the International Criminal Court," *International Review of the Red Cross*, No. 840, 993 – 1000.

30 Sub-Rule 73.5

become involved in providing information that can lead to the punishment of those who have violated IHL. This is an opportunity the ICRC has consistently refused based on its desire to strictly abide by its principles and working methods.

Circumstances such as these illustrate the fact that the ICRC enjoys a privileged position, recognized by states under IHL, but by no means solely occupies the field, nor does it preclude other NGOs from exercising vital functions which the ICRC cannot or does not wish to become involved with.

II. Legal position of all other NGOs active in a conflict zone, with a special focus on the provision of medical services and humanitarian assistance

Inherent for an NGO not belonging to the Red Cross-family is the nature of its 'non-privileged' positions under IHL. Such is, and will most likely remain, the state of the law.

Conversely, on quite a number of occasions, not being subject to the Red Cross Movement's fundamental principles can constitute a comparative advantage. This can lead to complementary efforts between groups and can benefit the victims of an armed conflict. The question which arises concerns the legal position of the NGO under IHL, especially as it is understood as the framework according to which an NGO should begin an assessment of their rights and obligations under IHL.

Therefore, in this section, attention will be turned to what IHL itself actually provides, while not going into the practice, (ungoverned by IHL), under which, for example, some NGOs conclude agreements with an intergovernmental organization in order to work and receive protection.³¹ Also untouched here are the examples where a process was pursued to conclude an agreement between the NGO and the host government, in order to make certain arrangements for the protection of the NGO's staff.³² This section does not deal with some of the operational challenges faced by NGOs when providing medical services or humanitarian assistance. The latter aspect will only be dealt with to the extent the issues have some relevance from the legal point of view.

31 Beigbeder, Yves. *The Role and Status of International Humanitarian Volunteers and Organizations. The right and duty to humanitarian assistance*, Martinus Nijhoff Publishers, 1991.

32 Suy, Erik. "La protection des volontaires humanitaires dans les conflits armés non-internationaux et dans les opérations de secours en case de catastrophes," published in: *Des Menschen Recht Zwischen Freiheit und Verantwortung*, Duncker and Humblot, Berlin, 1989, 173 – 182.

Generally, staff of NGOs active in a zone where IHL applies qualify as *civilian* and as such can not be directly targeted, as long as they continue to fulfil the qualifying conditions of IHL. Most importantly, this will mean that NGOs need to remain constantly vigilant and ensure their facilities do not become involved in non-civilian military functions. This might, under IHL conditions, lead to losing their immunity from attack that is normally ascribed to any civilian person or facility.

The question thus arises: Can ‘ordinary’ NGOs have any more special status under IHL than that accruing to ‘ordinary’ civilians, in recognition of the specific assistance they are ready to deliver? Asking this question requires the articulation of under which conditions (i) NGOs can provide medical services, both on and beyond the battlefield; (ii) NGOs qualify as “medical personnel” or as a “humanitarian organization” which has a specially protected status under IHL; and (iii) NGOs are entitled to provide humanitarian assistance to civilians. Both the provision of medical services and humanitarian assistance qualify as a mode of action based upon substitution, whereby non-state actors provide services that should be normally delivered by the public authorities.³³

Preliminarily to this section, it must be stressed that official texts of IHL do not explicitly mention the term ‘non-governmental organization’ or ‘NGO.’ The actors are referred to, but never under that term (see below). The concept of NGO is, however, used here as a convenient model encompassing a wide variety of actors that need to ascertain whether they fulfill IHL’s criteria for being able to draw specific rights directly from IHL.

Rather than providing a generic overview of the articles, the present section seeks to identify the law’s main features on this issue. Hence, the following treatment intends to be systemic rather than descriptive.

IHL does not grant legal personality, but still confers certain rights

Under IHL, non-Red Cross NGOs do not enjoy *international* legal personality. A limited regional exception in Europe notwithstanding,³⁴ and apart from certain humanitarian NGOs with consultative status to the United Nations’ Economic and Social Council,³⁵ NGOs only have a *national* legal status in their country of

33 Bonard, Paul. “*Modes of Action Used by Humanitarian Players: criteria for operational complementarity*,” ICRC Publication, 1999, especially para. 2.3.

34 European Convention on the Recognition of the Legal Personality of International NonGovernmental Organizations, 24 April 1986, which has only been ratified by about 10 states.

35 Pursuant to Article 71 of the UN Charter. Such status, while certainly granting them legitimacy, does not confer any right to the NGO that it could exercise before any other (inter)national body. See Beigbeder, Yves. “*The Role and Status of International Humanitarian Volunteers and Organizations. The right and duty to humanitarian assistance*,” Martinus Nijhoff Publishers, 1991, 330.

establishment or recognition. Such status does not necessarily need to be recognised by the country in which they operate. It is clear that IHL does not explicitly deal with NGOs, nor provide them with a special legal status.

Despite these limitations, IHL does contain some provisions which are capable of granting NGOs a certain status which extends beyond the ordinary protective status belonging to all non-military persons and facilities. While most of these provisions will impose the same requirements as those of the ICRC, such as impartiality and being of an exclusively humanitarian nature, the real test for assessing the actual scope of any NGO's margin for manoeuvre in a zone where IHL applies, will often depend on whether or not *consent* by the parties to the conflict is required before the NGO can act.

Essentially, the core treaties of IHL still provide for such requirement of consent,³⁶ though arguments have been made that, in specific circumstances, a state's refusal to consent to the provision of assistance which is exclusively humanitarian in nature, would violate international law.³⁷ A specific provision exists for instances of occupation, where Article 59 of the Fourth Geneva Convention renders it compulsory for the Occupying Power to accept relief supplied under certain conditions.³⁸

Irrespective of the legality of providing humanitarian assistance without having obtained the belligerents' consent, the latter's effectiveness can be compromised, as can the level of protection to be expected for their staff. Thus, in practical terms, NGOs cannot ignore the state and, in the context of IHL, the views of the belligerents.³⁹

In addition to the requirement to obtain consent, a number of IHL provisions indicate that the rights accruing to medical personnel/units and so forth are dependent upon having been *recognized* and *authorized* by the parties to the conflict. An example of this can be found in Article 9(2)(c), as well as in Article 12, of the First Additional Protocol.

36 One of the most prominent examples of this can be found in Article 70 of the First Additional Protocol.

37 Sandvik-Nylund, Monika. "Caught in Conflicts. Civilian Victims, Humanitarian Assistance and International Law," Institute for Human Rights, Åbo Akademi University, 1998, 116 – 119. There are some precedents in international law that such refusal would be unlawful if the assistance is the only way to ensure the population's survival, though it must be stated that there is no general instruments thus far authoritatively regulating this.

38 In IHL's core treaties, the issue of relief actions for civilians is regulated by GC IV, Articles 59, 60 – 62 and 108 – 111 and by AP I, Article 71 (the latter pursuant to AP I, Article 69). The issue of relief actions to civilians in territory that is not occupied, is being dealt with by AP I, Article 70.

39 Campos, Nicole Gastineau and Farmer, Paul. "Partners: Discernment and Humanitarian Efforts in Settings of Violence," *Journal of Law, Medicine and Ethics*, 2003, 507.

Another example can be found in Article 81(4) of the First Additional Protocol, which enshrines a general obligation for “the Parties to the conflict” that they should enable “other humanitarian organizations” to carry out their “humanitarian functions.” Apart from this article’s stipulating that that these organizations should “perform their humanitarian activities in accordance with the provisions of the Convention and this Protocol,” the primary consideration, before one falls under this article’s scope, is that the organization in question must have been “duly authorized by the respective Parties to the conflict.” Hence, if one wants to remain within the confines of IHL, in order to benefit from those provisions which provide specific protection to non-Red Cross NGOs, there is no other way but to engage with the very belligerents whose victims one wants to provide assistance to. The same holds true both in international and non-international armed conflicts.⁴⁰

Despite all such practically significant constraints, from the point of view of public international law, the simple fact that “impartial humanitarian organizations” have been directly recognized in IHL is revolutionary in and of itself. This leads to the observation that those NGOs qualifying for such status have made the greatest progress of all non-state actors in obtaining enhanced international status. If one accepts the arguments that, under certain circumstances, such as when the civilians of an occupied territory are severely lacking adequate food supplies, a state cannot legally withhold its consent to such an organization offering its services, then this would mean that those NGOs have rights that have been granted to them directly through IHL.⁴¹

In what follows, both the legal conditions for providing medical services and for providing humanitarian assistance, will be analyzed. Interestingly, the concept of neutrality, one of the ICRC’s fundamental principles, representing its commitment to not taking sides between the belligerents, has not been explicitly imposed upon NGOs by IHL. On the other hand there is significant room for the belligerent to exercise control over who is delivering assistance in an armed conflict.

Providing medical services

More specifically, as to the *provision of medical services*, IHL imposes quite a number of conditions related to the way medical personnel should carry out their duties. For example, the law itself mandates that only medical criteria can serve as the basis on which to decide who, amongst the law’s protected persons, will receive medical attention. Another obligation which also flows from the general requirement of being impartial and civilian in character, is that none of the medical staff or medical

⁴⁰ See, for example, Article 18.2 of the Second Additional Protocol.

⁴¹ O’Connell, Mary Ellen. “Enhancing the Status of Non-State Actors Through a Global War on Terror,” *Columbia Journal of Transnational Law*, 2005, 440 – 441.

units should ever become involved in military activities, or in any other acts that are harmful to the enemy. There are, however, limited exceptions allowing medical personnel, under particular conditions, the right to bear arms for self-protection.

In addition to the requirements of having to obtain consent and, in most instances, of receiving formal authorization by the belligerent, many of IHL's provisions stipulate that for an organization to enjoy a degree of protection, it must be duly identified as such. Here, in terms of the types of *identification* that are allowed, non-Red Cross NGOs are significantly impaired. Only the distinctive emblems from the Red Cross family qualify as acceptable identification. Hence, this means one will need to operate under the auspices of the ICRC or the National Red Cross and Red Crescent Societies, which theoretically leads to the automatic requirement of having to abide by their fundamental principles (see Section I). This will only pose a real difficulty, however, when the latter go beyond what is required by IHL.

Thus, the medical personnel from an NGO that does not work under the auspices of the Red Cross will in principle not be able to carry any of the officially recognized distinctive emblems from the Red Cross family. However, this by no means changes their being of a civilian character, nor does it necessarily exclude their benefiting from protection. This, then, will most often be subject to their having been *recognized* by the belligerents or carrying an official identity card, all of which grant a significant degree of control to the belligerents. Operating 'outside the box' of all these conditions in turn means forfeiting to an extent the specific protections provided for under IHL.

In other words, IHL black letter law has elaborate provisions regarding medical personnel. Most of the time such special status will only be acquired when it occurs after the state where an operation is intended has *consented* to the provision of medical activities by a specific organization or has *recognized* that specific relief association.⁴² Essentially, this leaves ordinary NGOs in a rather weak position, for, absent those conditions, none of the specific provisions of IHL will benefit them.

As medical ethics have similar requirements in their attitude towards the provision of medical services, all medical relief assistance NGOs should qualify as impartial / humanitarian organizations, in the sense required by IHL and as long as they refrain from publicly denouncing belligerents. However, from the moment a medical NGO takes side in terms of publicly denouncing an actor in the armed conflict, it no longer qualifies as such under IHL. Apart from the intrinsic feature of impartiality is the requirement of obtaining the belligerents' consent, or being authorized by them, which have proven to be the main stumbling blocks for most NGOs.

⁴² See, for example, Article 27 of the First Geneva Convention (1949).

Thus, a number of actors, most notably Médecins Sans Frontières, have in some cases provided medical assistance to the civilian population, irrespective of having obtained prior governmental approval, or even ignoring a governmental prohibition. Others have publicly denounced one of the belligerents, thus effectively rendering themselves no longer impartial in the sense of IHL. Leaving aside all other strategic and moral considerations, from the legal point of view of IHL, there can be no doubt that, while they remain civilians, personnel of such NGOs do not benefit from any other specific protection, nor do they possess a *right* to carry out their activities.

Given this situation, a number of NGOs have felt, and perhaps continue to feel, dissatisfied with this state of the law, which indeed preconditions protection in most instances on having been recognized and authorized by the belligerents or on having to work under the auspices of the ICRC. Organizations such as Médecins sans Frontières, for example, openly broke with the ICRC's modes of working in the 1960s conflict in Biafra.⁴³

The concerns of such NGOs led to a resolution that was adopted on June 30, 1998 by the Council of Europe's Parliamentary Assembly "on the protection of humanitarian medical missions." The resolution contains provisions which recognize the right "to life" and "to health", but the "invaluable humanitarian activities carried out by or under the auspices of the ICRC" are considered implicitly to be primordial. The work done by all other "medical missions" is regarded as "complementary."⁴⁴ Furthermore, the requirements of impartiality and neutrality remain affirmed, hence seemingly confirming the methods through which the Red Cross Movement works.

For all that can be said about this resolution's content, one should stress that this is a regional document without any legally binding value. Notably, it is highly questionable that all states would accept the statement, based on such provisions as that included in Appendix, Article 2, which states "medical personnel must be afforded access to all places where medical care is needed." Consent remains very much enshrined as a fallback reflex by many sovereign states.⁴⁵

43 See also Anderson, Kenneth. "Humanitarian Inviolability in Crisis: the Meaning of Impartiality and Neutrality for UN and NGO Agencies following the 2003-2004 Afghanistan and Iraq Conflicts," *Harvard Human Rights Journal*, 2004, 68. Also, see for example, Article 18.2 of the Second Additional Protocol.

44 Resolution, para. 8

45 See, for more information on this Resolution: Beigbeder, Yves. "*The Role and Status of International Humanitarian Volunteers and Organizations. The right and duty to humanitarian assistance*," Martinus Nijhoff Publishers, 1991, 346 – 352

Providing humanitarian assistance

In terms of the *provision of humanitarian assistance*, most of what has been said about the provision of medical services, applies *mutatis mutandis*. Hence, IHL poses the precondition that an organization's right to "offer its services" is dependant upon its being an "impartial humanitarian body."⁴⁶ Thus, while the provisions most certainly mention the ICRC as being an *example* of such a body, the latter has no monopoly whatsoever on this right. Taking into account the fact that each of the Conventions has its scope of applicability limited *ratione personae* in terms of who the protected persons are benefiting from them, the language is rather uniform across the Conventions and Protocols.⁴⁷ Unsurprisingly, some provisions, such as Article 81(4) of the First Additional Protocol, furthermore require that the "other humanitarian organizations" be "duly *authorized* by the respective Parties to the conflict" (emphasis added).

Even if an organization fulfils such criteria, there is no legally enforceable obligation incumbent upon the belligerents to accept the offer, as is demonstrated by past experience.⁴⁸ For example, Article 70 of the First Additional Protocol, which is the most detailed provision regarding relief actions in territory which is not occupied,⁴⁹ still very much echoes the requirement to obtain the "agreement" of the "parties concerned in such relief." It warrants mention that a number of authors argue in favour of an obligation on the parties to a conflict to offer such agreements if the conditions stated in the relevant legal articles are fulfilled.

Still, despite these consent-based restrictions, Article 70 provides one crucial principle governing any offer of humanitarian assistance through "relief actions which are humanitarian and impartial in character and conducted without any adverse distinctions:" "Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts." Thus humanitarian assistance which meets the requirements of being both humanitarian and impartial is a legally recognized form of intercourse.⁵⁰

Impartiality: different in different times and places?

The participatory *rights* of non-Red Cross NGOs are virtually always subject to some form of recognition, approval or explicit consent of the belligerents. This

⁴⁶ To use the terminology of common Article 3 to the 1949 Geneva Conventions.

⁴⁷ See, for example, common Article 9 (Article 10 in the Fourth Geneva Convention) to the Geneva Conventions

⁴⁸ Beigbeder, Yves. "*The Role and Status of International Humanitarian Volunteers and Organizations. The right and duty to humanitarian assistance*," Martinus Nijhoff Publishers, 1991.

⁴⁹ For the issue of relief actions to occupied territory, see AP I, Article 69, which lists all provisions of IHL that are relevant.

⁵⁰ Anderson, Kenneth. "Humanitarian Inviolability in Crisis: the Meaning of Impartiality and Neutrality for UN and NGO Agencies following the 2003-2004 Afghanistan and Iraq Conflicts," *Harvard Human Rights Journal*, 2004, 41 – 74.

does not mean that NGOs cannot act if these conditions are not met. There have been situations in which NGOs have taken action in the absence of such conditions; but such action becomes a matter of factual practice and is not based on any actual rights under IHL. In such instances, the protection NGOs can derive from IHL does not go any further than that which generally belongs to any civilian, with all rights and obligations such status entails.

As noted, national laws are often of quintessential import. Admittedly, the national situation can lead to a particular reading of the word “impartial.” An interesting example of this can be found in Afghanistan, where certain NGOs were involved in the distribution of humanitarian services. The fact, however, that they were also “preaching Christianity” led to their staff being arrested.⁵¹

Examples such as this indicate that the international legal concept of “impartiality” can receive a connoted reading in a specific context: given the absence of an internationally agreed upon binding definition of “impartiality” and “exclusively humanitarian,” the concepts’ open-endedness do not exclude a strict interpretation, potentially leading to situations whereby “exclusively humanitarian” can adopt a literal meaning.

In order to provide a preliminary conclusion as to NGOs’ rights and responsibilities under IHL, it seems that any NGO wishing to provide medical services or humanitarian assistance in a zone where IHL applies will need to make a basic choice as its willingness to respect the conditions elaborated by the Geneva Conventions and their Additional Protocols, which provide for a degree of involvement in the process by the belligerents and, for certain rights, the ICRC, as a precondition to being able to deliver certain services.

Certainly organizations have bypassed these preconditions, and the present section will attempt to analyze this from the point of view of IHL, as a legal framework which remains faithful to the concept of state sovereignty.⁵² To wit, failed attempts to the contrary provide proof that the following statement is still true:⁵³ under current international law in general and IHL in particular, states have not recognized any right, in legal terms, which belongs to non-Red Cross NGOs to

51 O’Connel, Mary Ellen. “Enhancing the Status of Non-State Actors Through a Global War on Terror,” *Columbia Journal of Transnational Law*, 2005, 443 – 444.

52 For example, see AP II, Article 3, para. 1. Also the Statutes of the International Red Cross and Red Crescent Movement, Article 2.5, indicates that “The implementation of the Status by the components of the Movement shall not affect the sovereignty of States, with due respect for the provisions of international humanitarian law.”

53 See, for a failed French attempt to have a UN General Assembly recognize a right of victims to receive assistance, Beigbeder, Yves. “*The Role and Status of International Humanitarian Volunteers and Organizations. The right and duty to humanitarian assistance*,” Martinus Nijhoff Publishers, 1991, 380.

operate in the conflict zone itself, without their being formal engagement with any of the belligerents.

In addition to the inherently uncertain scope of the concept of impartiality, it would seem that the past five years have witnessed a decrease in the scope of manoeuvre for NGOs, with an increasingly more narrow reading of the sector's foundational concept of impartiality.⁵⁴ Especially with the recent wars in Afghanistan and Iraq, these concepts have come under pressure, with some organizations embarking upon non-neutral political work such as state-building, while hoping to draw upon other activities of a neutral nature, in order to gain recognition as possessing neutral status. Attacks by terrorist groups can serve to remind that this view is not universally accepted.⁵⁵ Additionally, new challenges have arisen when certain states attempt to co-opt NGOs into helping with what are essentially political projects.

As previously indicated, IHL does not impose neutrality, but only impartiality, on non-Red Cross NGOs. While the first concerns not taking sides among belligerents, the second requires that no discrimination be made as to which victims receive assistance other than based purely on medical concerns. Through the subtle mechanisms in IHL, such as those which allow belligerents to exercise some form of oversight concerning who they allow to operate in a conflict zone, it appears that the *idea* behind the concept of neutrality, is part of the law as it is practiced. Due to such largely unavoidable intercessions by the belligerents, considerations other than those directly related to the victims' interests will quite logically enter the picture. Thus, impartiality is not only a legal concept, but also a state of affairs which hinges on perception.

Leaving aside ethical considerations which could come to bear on such a discussion, from a legal perspective, the only relevant criterion is whether the organization in question still qualifies as impartial and, depending on the wording of the specific treaty provision from which one intends to derive rights, "exclusively humanitarian." This is the legal framework one needs to navigate, while realizing that the open-ended nature of some of these concepts can lead, in a particular time and place, to having certain activities embarked upon by NGOs resulting in charges that the organization is no longer impartial. Hence, it will only be the shift from 'law in the books' to 'law in action' that can indicate how these concepts play out for organizations that do not belong to the Red Cross-family: providing medical services and humanitarian assistance is, and remains, an activity

54 O'Connell, Mary Ellen. "Enhancing the Status of Non-State Actors Through a Global War on Terror," *Columbia Journal of Transnational Law*, 2005, 435 – 458.

55 Anderson, Kenneth. "Humanitarian Inviolability in Crisis: the Meaning of Impartiality and Neutrality for UN and NGO Agencies following the 2003-2004 Afghanistan and Iraq Conflicts," *Harvard Human Rights Journal*, 2004, 43 & foll.

that is very much dependent on the goodwill of the belligerents, whether it be a matter of law or a more pragmatic recognition of the need for outside assistance.

III: Influencing others

The requirements and constraints imposed by IHL on NGOs preclude automatically that one and the same organization could embark upon numerous types of humanitarian activities.

The present section highlights some of the challenges and opportunities for any NGO wishing to adopt a ‘naming and shaming’ approach, yet such a campaign rules out the possibility that the organization would be able to exercise any of the specific rights and protections that are described in the previous section. The ICRC often curtails the scope of its work, based upon either IHL or self-imposed constraints. It is at this point that other NGOs often start their work, without necessarily benefiting from any protection under IHL beyond those afforded all civilians present in a zone of armed conflicts.

Therefore, IHL as a legal framework and the ICRC as a living institution guided by its fundamental principles, lead to a situation whereby the complementary nature of civil society actors in zones of armed conflict is not only desirable, but will also be a natural by-product of the law and practice governing these actors.

Against this background, the present section seeks to highlight activities that NGOs could consider, all of which are of direct relevance to the humanitarian dimension of IHL, in that they seek to influence other actors holding a position of power to act upon it, most notably states and criminal tribunals. In the first sub-section, attention will be turned to some of the challenges involved in employing the specific discourse of IHL for any publication or outreach effort undertaken by NGOs. In the second sub-section, some of the dilemmas and opportunities will be highlighted which relate to the direct engagement by NGOs with belligerents, or to NGOs using their presence in the field to facilitate the publishing of reports intending to denounce certain violations on the ground. In the last sub-section, without any claim to being exhaustive, some past examples in the field of legislative advocacy will be discussed, all of which demonstrate that NGOs can play a role in pressuring states towards, or helping them as experts during the actual process of, drafting new rules of IHL.

The challenges of acknowledging and incorporating the language of IHL into human rights driven work

Historically speaking, most NGOs were exclusively concerned with human rights law and with the values that law sought to protect. A number of NGOs developed

a subsequent expertise in monitoring human rights compliance by states. Quite naturally, this led to a high degree of familiarity with human rights as a separate legal framework, both in its dimension of mastering human rights discourse and treaties, as well as its engagement with global and regional institutions through which human rights law comes alive.

Once a situation of armed conflict breaks out, however, human rights law only regulates behaviour to a certain extent.⁵⁶ In technical-legal terms, it is said that IHL becomes the *lex specialis*, specifically agreed upon and applicable during and for situations of armed conflict. Thus, under the conditions set out by human rights law, all human rights treaties have inherent in them the allowance for the state to suspend some of its human rights obligations in situations of emergency; it should be noted that most human rights treaties explicitly stipulate that a limited number of provisions, considered non-derogable, can never be suspended, even in times of emergency.

There are a limited number of exceptions whereby provisions of human rights law remain fully applicable during an armed conflict. Sticking to human rights law, however, will provide only a partial picture of the situation. Following on this, the expertise thus acquired by NGOs for analyzing and writing about a given situation or set of events from the perspective of human rights law will only be partially relevant for engagement with a situation in which IHL applies.

Against this background, a valuable question can be raised regarding the merit of focusing on human rights law when analyzing situations of armed conflict. This is often done in an attempt to garner additional protection, inspired by human rights law, than what would be legally possible under IHL, a legal framework in which is inherent both a humanitarian dimension as well as one related to considerations of military necessity. Put simply, do the requirements of military necessity fundamentally conflict with a 'human rights-only' legal analysis? Should NGOs engage with these concerns of military necessity?

In this section, it is suggested that NGOs active in zones of armed conflict will benefit from acknowledging, to a certain extent, IHL in their human rights-driven work, with the result of making their writing more convincing. Some human rights law is simply no longer applicable in a situation of armed conflict, subsequently making certain claims about the applicability of human rights legally incorrect. Some NGOs have incorporated the legal framework of IHL; others have acknowledged that while a given situation qualifies as an armed conflict, they fail to

⁵⁶ The legal analysis in this part is, for reasons of space, simplistic. For an excellent treatment on the issue of human rights' relevance during an armed conflict, see Watkin, Kenneth. "Controlling the Use of Force: a Role for Human Rights Norms in Contemporary Armed Conflict," *American Journal of International Law*, 2004, 1 – 34.

provide even a single reference to the Geneva Conventions, sticking exclusively to human rights law.⁵⁷

A challenge for NGOs thus lies in acquiring proper knowledge on the substance and process of IHL, as well as in acknowledging that a number of the rules comprising the core of IHL may seem contradictory when set against a human rights background. A prominent example of this may be found in the recognition by IHL of the legality of collateral damage. Without being referenced explicitly in IHL treaties, IHL does indeed recognize, through the principle of proportionality, that incidental loss of civilian life may be lawful as long as it is not “excessive in relation to the concrete and direct military advantage anticipated.”⁵⁸ In other words, IHL recognises as lawful the circumstance that civilians may be killed, so long as the resulting military advantage exceeds the loss to civilian life. The substantive analysis of this complicated rule, which is undoubtedly part of current IHL, is beyond the scope of this paper. It will be clear, however, that this rule is in contradiction with human rights advocacy for the right to life.

Rules such as that cited above pose considerable challenges to NGOs wishing to attract and utilize considerable media attention, while simultaneously being faithful to the applicable IHL. Another difficulty resides in the fact that some provisions of IHL require engagement with more nuanced restrictions, rights and obligations, which is in contrast with what are often more simple and unambiguous rights stemming from human rights law. To address the challenge there exists such possibilities as employing, as a minimum, the provision found in common Article 3 to the Geneva Conventions, which may be considered less complicated to navigate.

Above all, the real difficulty resides in the implication that in order to provide a correct legal analysis of a situation of armed conflict it is necessary to qualify the armed conflict as international or non-international,⁵⁹ both being governed by regimes which remain separate under the aegis of IHL, despite some gradual narrowing of the gap in recent years. For an NGO wishing to issue a report about its findings on the ground is it necessary to provide an analysis as to which type of armed conflict a given situation is? It may strategically be better to state that such

57 See Weissbrodt, David. “The Role of International Organizations in the Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict,” *Vanderbilt Journal of Transnational Law*, 1988, 313 – 366, especially at pages 318 - 325, analyzing the reports issued by organizations such as Americas Watch, Amnesty International, the International Commission of Jurists, and advocating for a mitigated position as to whether or not human rights NGOs should fully incorporate IHL in their discourse.

58 See First Additional Protocol, Article 51, para. 5 (b)

59 To mention the classic dichotomies, leaving aside the many controversies and uncertainties that inevitably arise for anyone wishing to qualify, for example, a non-international armed conflict which has received some degree of internationalization, or an armed conflict between a state and a non-state actor operating on the territory of another state without the latter’s being itself involved in the hostilities: to say the least, these are situations which are not easily apprehended under existing IHL.

analysis is not necessary in the *public* communications issued (having naturally followed an internal analysis concerning categorization of the conflict). It is worth noting that the ICRC virtually never publicly indicates how it qualifies a given situation. The analysis of conflict type is made internally, but its conclusions are not necessarily made available publicly for every conflict situation. The main concern is not one of qualification, but to advocate for greater protection in situations of armed conflict, for the purpose of which a general call to belligerents to respect “the provisions of IHL” may suffice. It is by having focused on these more general concerns, as well as on the rights of individuals as opposed to states, that the Red Cross and NGOs have indeed managed to ‘humanize’ certain fields of public international law.⁶⁰

The following section will delve into some of the more strategic issues faced by NGOs that are present in conflict zones and interested in publishing reports on the violations of IHL of which they are aware. As will become clear, pitfalls abound in this field which is vital for ensuring the implementation of IHL by all.

In the heat of conflict: Is engagement with belligerents while monitoring them possible?

As previously indicated, the ICRC virtually always keeps its findings confidential, sharing them with actors deemed to have violated IHL; while the ICRC will continue to engage in a dialogue with the highest governmental levels, in sharing with them their concerns, it will rarely ever ‘go public’ and publicly denounce the observed violations of IHL. Quite naturally, this leads to opportunities for other actors in the field to take on a complementary role,⁶¹ not only vis-à-vis the ICRC’s approach, but also vis-à-vis those non-Red Cross organizations that wish to qualify as impartial under IHL in order to be able to exercise certain rights.⁶²

Given the fact that both aspects are regulated by different legal and strategic concerns, this section first deals with more general challenges and opportunities that arise, beyond the issue of discourse for any NGO wishing to work on the ground before, during, or after the armed conflict, in terms of using its presence to improve the situation. Subsequently, a second issue will be highlighted, namely how NGOs can or should relate to international criminal tribunals, most notably the International Criminal Court (ICC), as institutions adopting a retrospective and punitive approach to violations that allegedly occur. Apart from the issue regarding the benefits of provision of information by NGOs to these tribunals, a separate

60 Charnovitz, Steve. “NonGovernmental Organizations and International Law,” *American Journal of International Law*, 2006, 361.

61 For an elaborate argument on the complementarity that can be achieved humanitarian actors, distinguishing between modes of persuasion, denunciation and substitution, see Bonard, Paul. “*Modes of Action Used by Humanitarian Players: criteria for operational complementarity*,” ICRC Publication, 1999.

62 Subject in most instances to agreement, consent, recognition, authorization etc.: see Section I.

questions is whether NGO staff can be compelled to testify before the ICC, or be forced to hand over relevant information in its possession.

On the ground: using the presence for the better

NGO presence on the ground is crucial. When an armed conflict is about to, or does, break out, either the NGOs are already present in the area, due, for example to their previously existing focus on development work, or NGOs tend to be among the first actors to mobilize. This is in contrast to most state-driven humanitarian actors. The wheels of bureaucracy can only move so fast, and there are many pitfalls along the road prior to physical mobilization. Fully acknowledging this crucial role played by NGOs, the present section seeks to assess how the framework of IHL affects their scope of manoeuvre and, conversely, how NGOs in the field can actively contribute to the enhanced respect for the law.

The presence of NGOs in the field can play a crucial role in *preventing* a situation to develop into an armed conflict in the first place.⁶³ Reports of atrocities swiftly issued after their occurrence, as well as direct communications with states and international organizations, can help alert the relevant actors and garner strong support resulting in diplomatic efforts. Thus, NGOs are significant in ensuring word gets out concerning certain situations that may be out of the public eye. In this respect, and contrary to the classic, state-run bureaucracy, the pace may accelerate rapidly. By utilizing the Internet to disseminate a message and to network with other engaged actors, as well as through a carefully designed strategy of involving the media, in a few days a situation in even the most isolated of areas may be put under the spotlight.⁶⁴ In this respect, one can choose to transform a mode of action based upon persuasion into one of denunciation,⁶⁵ or to embark upon a strategy of denunciation from the beginning. Of course, the organization may then run the risk of being expelled from the country, or only being able to work under great security threats.

Just as NGOs can help in preventing the development of a situation warranting IHL applicability, they can play an equally crucial role in the post-conflict phase in which the methods of transitional justice can be applied usefully.⁶⁶

63 Focusing on the detection of genocide, see Kagan, Joshua. "Speeding up the International Community's Response Time in Addressing Acts of Genocide: Deferring to the Judgment of Nongovernmental Organizations," *International Journal of Legal Information*, 145 – 167.

64 Spencer – Scheurich, Corinna. "A New Model for Globalizing Human Rights Struggles via the Internet: Understanding the Chiapas Example," *International Legal Perspectives*, 2004, 22 – 28.

65 Bonard, Paul. "Modes of Action Used by Humanitarian Players: criteria for operational complementarity," ICRC Publication, 1999, para. 2.3 "Three modes of Action."

66 For a case study of this, see Ballengee, Melissa. "The Critical Role of Non-Governmental Organizations in Transitional Justice: a Case Study of Guatemala," *UCLA Journal of International Law and Foreign Affairs*, 1999 – 2000, 477 – 506.

During the actual armed conflict, a crucial issue to be addressed is whether the NGO chooses to focus its monitoring effort upon the behavior of only one of the two or more belligerents. Such one-sided attention may prove both challenging and undesirable. Traditionally, the main focus of NGOs was on state behaviour, as being the only actor for whom human rights law was arguably applicable. On the other hand, while IHL imposes obligations both on state and non-state belligerents, not many NGOs⁶⁷ have actually incorporated the monitoring of non-state actors' behavior into their mandate (provided the latter employs such tactics as 'naming and shaming').

Legally speaking, only focusing on one of two sides in the conflict will automatically lead to an organization's no longer qualifying as impartial in the sense discussed under the first section of this paper. If that is the case, IHL no longer grants the right to such organization to offer its services in the field of humanitarian assistance.

Still, not all organizations intend to embark upon the type of activities for which IHL requires such impartiality in the strict sense of the law, nor should they. A healthy division of labor in a spirit of complementarity means that certain organizations would do better to confine their activities to such 'naming and shaming.' Confining one's work to monitoring one side, however, will fuel the arguments used by the other side, which may lead to situations of questionable usage and leverage of reports. Such one-sided approach can also lead to the organization's losing its credibility and jeopardizing its presence. Hence, it is recommended that any NGO publishing reports and subsequently using in them in their lobbying, devotes similar energy to assessing evenly the adherence of both sides to IHL.

For instance, in November 2004, two British NGOs, operating in the Darfur region, were ordered by the Sudanese authorities to leave the country.⁶⁸ The authorities considered certain public statements made by those NGOs as being supportive of the rebels. While the expulsion of these organization's aid workers has been protested by the United Nations, there did not seem to have been any questioning, by the United Nations or by other states, of the fact that Sudan had and maintained full discretion in deciding whom to allow into the country.⁶⁹

67 Organizations such as Amnesty International and Human Rights Watch have monitored the behaviour of armed opposition groups. See, more generally on some of the challenges in this field: Nair, Ravi. "Confronting the Violence committed by Armed Opposition Groups," *Yale Human Rights and Development Law Journal*, 1998, 6.

68 Sengupta, Somini. "Sudan Orders the Expulsion of Aid Officials from 2 Groups," *New York Times*, 30 November 2004.

69 O'Connell, Mary Ellen. "Enhancing the Status of Non-State Actors Through a Global War on Terror," *Columbia Journal of Transnational Law*, 2005, 444.

Examples such as this indicate that the relationship between an NGO and the host state authorities are extremely fragile and that NGOs which do not wish to remain silent and confine themselves solely to the provision of assistance, potentially situate themselves so that a forced exit may be likely.

If one takes into account these basic considerations, which are to be applied not only for reasons of actual requirements of IHL, but also for reasons of strategy, NGO's publishing of such reports is vital, especially given the ICRC's policy of discretion. If carefully examined and substantiated, the information contained in such reports will be of vital use in order to allow other actors (such as the ICRC, UN agencies, states) to carry out their work related to engagement with belligerents regarding their recognition of IHL.

Keeping this eventual aim of complementarity in mind serves as an incentive for every organization to keep distinct its own identity; the good work of many organizations would be compromised if they were to adopt the approach of the ICRC, just as it would likewise be detrimental for the ICRC to abandon its working methods by publishing reports which are critical of one or more parties to the conflict.

Finally, it must be stated that the outlined division of labor serves as an additional argument in favor of the idea that NGOs should gain sufficient expertise in order to fully appreciate and be able to communicate the particularities of IHL as a distinct legal framework. However, it can be argued that they should not necessarily speak out publicly as to the legal qualification of the armed conflict under IHL. Such a determination has little to do with the realities on the ground related to the conditions of operation for most NGOs. Any NGO present in the field that would embark upon such an exercise of legal qualification would inevitably render itself liable to criticism for a statement on what tends to be a highly controversial and politicized topic.

Issues such as these demonstrate that pitfalls and risks abound for any NGO that wishes to 'go public.' In some instances, if sufficient information is lacking regarding the actions of one of the belligerents, it may be advisable to postpone any publication, in order to ensure the viability of the presence on the ground. Navigation of this difficult terrain is crucial, for publicly available information on the behavior of *all* belligerents is essential in the formulation of a coherent and viable argument for compliance with IHL.

Towards the criminal courtroom: assisting in the punishment of the worst

The 1949 Geneva Conventions and their 1977 Additional Protocols provide for a separate criminal enforcement system for violations of IHL. Substantively they define, for international armed conflicts, some particularly severe violations of the

conventions as “grave breaches” while coupling this procedurally with an obligation for each state, regardless of any link to the international armed conflict in which said “grave breach” took place, to search for the perpetrators and to bring them to trial before its own domestic courts.⁷⁰

As is well known, the 1998 Rome Statute established the International Criminal Court, with jurisdiction over genocide, crimes against humanity and war crimes. Subject to the condition that it has jurisdiction over events which took place in a particular country, it is mandated with bringing to trial those allegedly responsible for “the most serious crimes of concern to the international community as a whole.”⁷¹ Currently, the Court has been tasked with exercising its jurisdiction related to acts committed in the Democratic Republic of Congo, Uganda, the Central African Republic and the Sudan.

A substantive treatment of the criminal law enforcement dimension attached to IHL is beyond the scope of the present paper. The only questions dealt with here is, first, to seek how NGOs can help to further such enforcement and whether there are any risks inherent in doing so. Secondly, it will be assessed whether NGOs can be forced, against their own will, to cooperate with the International Criminal Court, by, for example, having to provide information to the Court or to have persons appear as witnesses.

In what follows, only the ICC will be dealt with. As for prosecution at the domestic level, one will need to assess whether the domestic criminal system *allows* for NGO involvement in assisting the prosecutor or whether the system provides for mechanisms through which their staff could be *compelled* to collaborate with, or appear as a witness for, the court.

First, in what ways can NGOs that wish to do so, assist the ICC? In a useful basic document, Human Rights Watch⁷² distinguishes three main axes along which any NGO could develop its activities: telling others about the ICC, providing information to its prosecutor, and serving as a link between the court and the victims/witnesses.

As to NGOs serving as a link between the court and victims/witnesses, there has been activity in the court in 2006 which was triggered by applications for being accepted as victims in the investigative phase on Congo, which had been introduced by individuals with the help of the Fédération internationale des ligues des droits de l’homme. The Court itself provides some guidance as to how such

70 See GC I, Article 49 ; GC II, Article 48 ; GC III, Article 129 ; GC IV, Article 146 and AP I , Article 85.

71 Rome Statute of the International Criminal Court, 1999, 4th paragraph of the Preamble.

72 Human Rights Watch. “*The International Criminal Court: How NonGovernmental Organizations Can Contribute to the Prosecution of War Criminals,*” September 2004. Available online.

application should materialize,⁷³ as it is clear that for most victims of the type of crimes over which the ICC has jurisdiction, access to the ICC remains impossible, but for the help of NGOs.

The provision of information will be quite useful to the prosecutor in helping him decide whether to initiate his own investigation into a particular situation. As for the situation in the Congolese Ituri region, the prosecutor has already indicated that two reports from NGOs were instrumental in helping him decide to focus his energies on this region. Especially when NGOs themselves are selective in sending to the prosecutor the most convincing and substantiated information, it is quite likely that the prosecutor will pay attention to documents of such high quality.⁷⁴

For most NGOs, however, such support to the prosecutor, would mean quite a shift away from the traditional neutrality of humanitarian action, and it could result in their being expelled from the country in which they operate. How does the Rome Statute system envision this?

Most crucially, the Rome Statute itself has enshrined some provisions envisioning such support by NGOs to the different organs of the ICC. For good reasons, given the risks involved, a humanitarian organization might well decide to maintain its humanitarian activities, and to not become involved with elements of criminal prosecutions, leaving it to others which do not necessarily wish to qualify under IHL provisions preconditioning the exercise of certain rights by requiring the organization be impartial and exclusively humanitarian.

Hence, a second question of great practical significance for any organization active in a situation over which the ICC could exercise its jurisdiction is whether they could be compelled, against their will to adhere to purely humanitarian activities, to collaborate with the Court in investigative or trial phases. As noted, the ICRC benefits in this from a truly unique position, in that it cannot be forced to cooperate with the ICC. These provisions do not apply to other organizations.

While the input from NGOs on some of the Rome Statute's provisions is apparent, the Statute itself foresees *explicitly* their involvement in the Court's functioning.⁷⁵ The key provision in this respect is Article 15(2), which reads:

73 <http://www.icc-cpi.int/victimissues/victimsparticipation.html>

74 Human Rights Watch. "The International Criminal Court: How NonGovernmental Organizations Can Contribute to the Prosecution of War Criminals," September 2004, 15.

75 This section has greatly benefited from the analysis done by Thomas, Andrea. "NonGovernmental Organizations and the International Criminal Court: implications of Hobbes' Theories of Human Nature and the Development of Social Institutions for their Evolving Relationship," *Emory International Law Review*, 2006, 435 – 471.

The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental *or non-governmental organizations*, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. (Emphasis added).

When read together with Articles 54 and 64 of the Statute,⁷⁶ it becomes evident that, in principle, NGOs could indeed be compelled to hand over to the Court information in their possession which they might have preferred to keep confidential, on the one hand, and to be forced to appear as witness on the other hand.

However, the said potential for being forced to cooperate with the Court has been lessened potentially by the Rome Statute itself. As any trial at the ICC will be public and as defendants will have the right to examine those who testify against him,⁷⁷ such forced cooperation may indeed prove to be difficult for a particular organization, that risks losing its granted acceptance in the field. Thus, some provisions allow for at least a case to be made that certain information shall not be turned over or at least not be made public. Article 54(1)(b), for example, imposes on the prosecutor a duty to “respect the interests and personal circumstances of victims and witnesses.”⁷⁸ Other provisions of the Rome Statute at least allow for the Court to have to take into account the interests of NGOs.⁷⁹

To date no international criminal tribunal has granted any type of privileged status regarding access to information for non-Red Cross NGOs; in past cases where similar issues arose, it appeared as if the judges were only ready to recognize the unique position of the ICRC, with its *absolute* privilege in not having to cooperate,

76 For example, Article 54 (3): “The Prosecutor may (...)Request the presence of and question persons being investigated, victims and witnesses.” (underlining added).

77 See Article 67 (1) of the Rome Statute of the International Criminal Court.

78 Similarly, Article 54(3)(e) indicates that the “Prosecutor may (...) agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents;”

79 For example, see Article 68: “Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

and were reluctant to grant any other organization such a unique status.⁸⁰ Of note, however is the recognition in a judgement of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia,⁸¹ of a *qualified* privilege for war correspondents barring them from being compelled to testify. The test developed by the Chamber, however, provides only limited protection.

Furthermore, the decision rendered in this case is not legally binding for the ICC, and it bears reminding that currently no international tribunal has recognized such privilege with regard to ordinary NGOs. It is unlikely that the status afforded the ICRC on this issue will be obtained by non-Red Cross NGOs. Some scholars, however, have argued in favor of having a qualified privileged status applicable to all NGOs, analogous to the privilege recognized for war correspondents.⁸²

As none of the provisions of the Rome Statute that are relevant to the present discussion, concerning whether NGOs can be forced to cooperate, has been judicially tested, it remains to be seen which interest will prevail in practice: an NGOs' interest in wishing to stick to exclusively humanitarian activities, carried out in a spirit of impartiality while not being caught up in assisting the criminal prosecution of perpetrators of international crimes, or the interests of the international community in seeing the most egregious perpetrators brought to trial while having access to all potential sources of information, against the background of the Rome Statute's explicitly envisioned supporting role for NGOs. Operationally speaking, however, NGOs that are working in a country over which the ICC can exercise its jurisdiction, need to take into account that there currently exists no legal guarantee should they wish to be shielded from having to testify or publicly share information.

Advocating for generally applicable rules with strengthened protection

No discussion of the roles and responsibilities that can be played by civil society in relation to IHL would be complete without at least a brief mention of the role that NGOs can play, and have played, in pressuring states towards the adoption of new internationally binding treaty rules.

While the trend is certainly not confined to the field of IHL, some of the most significant examples can be found in the following two treaties: the 1997

80 Thomas, Andrea. "NonGovernmental Organizations and the International Criminal Court: implications of Hobbes' Theories of Human Nature and the Development of Social Institutions for their Evolving Relationship," *Emory International Law Review*, 2006, 450 – 451.

81 Prosecutor v. Brdjanin & Talic, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, issued on 11 December 2002.

82 See Fairlie, Megan, "Evidentiary Privilege of Journalists Reporting in Areas of Armed Conflict – Evidence in War Crimes Trials – Rule-Making Process of ICTY," *American Journal of International Law*, 2004, 809.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (commonly referred to as the Ottawa Convention), and the 1998 Rome Statute of the International Criminal Court. Of course, there are other treaties in which the role of NGOs was paramount,⁸³ as are certain international procedures at the International Court of Justice, whereby coalitions of NGOs managed to trigger, for example, the UN General Assembly to ask an Advisory Opinion to that Court on the legality of nuclear weapons.⁸⁴ Equally, at the domestic level, NGOs can be driving factors behind litigation designed to put violations from a conflict zone in the public spotlight from the home state.⁸⁵

The Ottawa Convention resulted from pressure exercised upon states by an impressive coalition of more than 1,400 NGOs in ninety countries around the world,⁸⁶ a feature explicitly recognized in the Convention's Preamble.⁸⁷

NGOs have played an equally instrumental role during the negotiations leading up to the Rome Statute, whereby some of its members had a role, respected by states, in providing expert information on some issues, thus triggering a certain outcome that was welcomed by other NGOs. One of the most prominent examples is the recognition of the Rome Statute of war crimes belonging to the category of gender crimes.⁸⁸

Not only did the large and well-known NGOs play a role during the negotiations for the ICC, but small NGOs also proved instrumental in providing information on certain issues, and in terms of the legitimacy of interests represented. However, it must be recognized that at the start of negotiations, there was the concern of small organisations being disadvantaged, which was an issue addressed by gaining

83 For example, see Breen, Claire. "The Role of NGOs in the Formulation of the Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict," *Human Rights Quarterly*, 2003, 453 – 481; also see Gezelius, Helena. "International NGOs Collaborate to Promote the Rights of Children Affected by Armed Conflict," *The International Journal of Children's Rights*, 1996, 161 – 164.

84 Falk, Richard. "The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society," *Transnational Law and Contemporary Problems*, 1997, 333 – 352.

85 For an example, see Cleveland, Sarah. "The Alien Tort Statute, Civil Society and Corporate Responsibility," *Rutgers Law Review*, 2003 – 2004, 971 – 988.

86 The International Campaign to Ban Landmines, see www.icbl.org

87 Para. 8 of the Preamble: "Stressing the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban in anti-personnel mines and recognizing the efforts to that end undertaken by the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines and numerous other non-governmental organizations around the world." (underlining added).

88 Example: see Women's Initiatives for Gender Justice, via www.iccwomen.org

credibility throughout the process.⁸⁹ An empirical study argues that states' delegates preferred NGOs in a position of neutral experts, as informants, rather than as aggressive and possibly hostile advocates.⁹⁰

Instances such as these demonstrate that the ICRC does not enjoy a monopoly as an entity which is acceptable in the eyes of states for dealing with treaties related to situations of armed conflict. Additionally, the successful examples invoked here were all the result of a broad international coalition of numerous NGOs - no single organization would be able to arrive at such results independently.

Conclusion

In any zone where an armed conflict occurs, NGOs wishing to make a difference need to be aware of the modified legal circumstances under which they operate, as distinct from the law applicable in times of peace. Indeed, IHL provides a specific legal regime, and in circumstances triggering its applicability, human rights law becomes only applicable partially. In their reporting and monitoring of the situation, NGOs who undertake to speak out about their findings on the ground, should be prepared to incorporate the separate legal discourse of IHL, even if some of its rules may appear initially contradictory from the point of view of an exclusively human rights perspective.

NGOs' activities have increasingly made a difference in the adoption of new rules relevant for conflict zones. The groups can use their presence to mobilize pressure, and in contradistinction to the ICRC, NGOs remain free to criticize the belligerents. For the purpose of furthering the cause of victims, NGOs should not necessarily seek the belligerent parties' appreciation.⁹¹ As has been demonstrated, however, such a stance should not be adopted by all NGOs in the field.

Civil society is composed of a wide variety of NGOs, representing a broad array of views, concerns, goals, and *modus operandi*. Undoubtedly the Geneva Conventions and their Additional Protocols contain a specific status for "impartial humanitarian organizations," whereby the status is predicated on their being and remaining impartial and exclusively humanitarian (from a practical view, neutrality is also an important criterion in regards to operability).

89 Pearson, Zoe. "Non-Governmental Organisations and the International Criminal Court: Changing Landscapes of International Law," *Cornell International Law Journal*, 2006, 261 – 263.

90 Pearson, Zoe. "Non-Governmental Organisations and the International Criminal Court: Changing Landscapes of International Law," *Cornell International Law Journal*, 2006, 280 – 281.

91 Chayes, Abram and Chayes, Antonia Handler. "*The New Sovereignty. Compliance with International Regulatory Agreements*," Harvard University Press, 1995, 251 – 525.

From the point of view of IHL it is clear that an organization which reports publicly on violations of the legal framework risks becoming subject to the charge of partiality. The recent years have seen a number of such organizations expelled from areas of operation (and countries) due to such activism. Therefore, if an NGO decides to make such public pronouncements, a rather strict policy should be adopted under which one reports about violations committed on all sides of the conflict. This policy would be aimed at demonstrating a degree of impartiality, which if recognized by the parties to the conflict, could enable the actors' continuation of work in the field due to their continued acceptability and legitimacy in the eyes of all actors in the field.

Overall, a division of labor should be kept in mind, both on a conceptual and a practical level. Indeed, the ICRC has a unique position with rights that have been granted it by states, under which it receives often exclusive access, but this is with the understanding that it will, with only very limited exceptions, keep confidential even the gravest violations it observes. The ICC's legal framework respects this mode of action.

Therefore, there is a natural complementarity that arises in which non-Red Cross NGOs can take advantage of this opportunity by 'going public' with their findings and thus seeking to enlist the support of states in order to put diplomatic pressure on the belligerents. Such modes of action, however, will mean that the organization will not be able to claim any other specific status under IHL than the one accruing to all ordinary civilians. Most importantly, the organizations that have an explicit policy of being "exclusively humanitarian" and not making any public statements, will find that they can have an added value in comparison with the ICRC. IHL, indeed, only requires "impartiality" and being "of an exclusively humanitarian nature" in most articles, coupled with some degree of overview by the belligerents. The ICRC, however, has additional self-imposed limitations beyond which it will not go when providing, for example, humanitarian assistance. This is one of the key areas in which NGOs have a significant role to play by remaining faithful to requirements of IHL without having to follow the internal constraints of the ICRC; this is the point at which IHL provides the clearest entrance point into humanitarian action.

The current legal framework is such that, in a zone where IHL applies, direct rights can only be derived from it if one plays by the rules of the game, for which states have articulated requirements of impartiality, in line with humanitarianism's traditional neutrality. While beneficial and often life-saving for all those who receive humanitarian assistance, the same victims benefit from organizations that are partial and spread the word about what goes on in the conflict zone. Such publications could, for example, build upon and derive their power from alliances formed among organizations, though such alliance could be in and of itself a cause of

controversy, and hence of concern, for an organization that wants to adhere to IHL requirements.

Recognition must be made of the crucial usefulness of the ICRC as a privileged actor and of the fundamental principles by which it works. However, being able to fully realize the potential of IHL, is too complex and important a challenge to be left to the ICRC alone. Despite the important constraints under which IHL forces them to operate for the provision of certain services, ordinary NGOs have an extraordinary potential for realization at exactly this juncture.

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