CONTEMPORARY CHALLENGES IN INTERNATIONAL HUMANITARIAN LAW

I. Introductory remarks

II. Fundamental Purposes and Underlying Principles of IHL

Whether at war or at peace, States have an abiding interest in the law of armed conflict, otherwise known as international humanitarian law. Humanitarian law serves two basic functions in times of armed conflict: first, it places limits on the conduct of hostilities and secondly, it determines the treatment to be accorded to persons who do not take part, or who no longer take part, in hostilities and who find themselves in the power of the enemy. The words "in the power of the enemy" may refer to prisoners of war, to civilian detainees, to internees, as well as to the general population subject to occupation.

The ICRC has recently embarked upon a public education campaign under the banner "even wars have limits." This is not just a wish. It is a reflection of several of the long-standing, fundamental principles and rules of humanitarian law applicable to both the conduct of hostilities and the treatment of persons in the power of the enemy.

As concerns conduct of hostilities, it has long been understood that the purpose of hostilities is not to wreak maximum death and destruction upon your enemy, but rather, to inflict only that minimum of harm that is reasonable and necessary to disable your adversary from continuing hostilities against you. Thus, humanitarian law draws a line between, on the one hand, permissible hostile acts committed by privileged combatants against legitimate military objectives, and on the other hand excessive, and therefore, unlawful injury and damage, even when committed by privileged combatants against legitimate military objectives.

Another organizing principle of humanitarian law, again, reflecting the concept that wars have limits, is the principle of distinction. The principle of distinction requires combatants to restrict their targeting to legitimate military objectives, to take precautionary measures to avoid harm to civilians and civilian infrastructure, and to refrain from attacks that would cause disproportionate harm to civilian objects, even if those attacks would have a legitimate military objective. Chemical and biological weapons are two examples of tools of warfare that are prohibited precisely because they cause excessive and potentially indiscriminate injury.

The concept "even wars have limits" is also reflected in the many rules of humanitarian law that protect persons who do not, or who no longer take part in hostilities and who find themselves in the power of the enemy. All four of the Geneva Conventions are primarily concerned with such persons and contain detailed rules for their protection and in respect of their humanity. For example, the rules of the First and Second Geneva Conventions reflect the duty to protect and care for the enemy's sick and injured soldiers and sailors. The Third Geneva Convention does likewise for prisoners of war, while the Fourth Geneva Convention performs the same function for civilians.

The specific rules applicable to any particular armed conflict may vary, depending upon the international or non-international nature of the conflict and upon which instruments are binding upon the parties to the conflict. But the fundamental principles that give rise to rules of law governing the conduct of hostilities and the treatment of persons in the power of the enemy are truly universal. They apply to all armed conflicts, whether international or internal, in all corners of the globe.

There no doubt exists a degree of tension pitting the claimed universality of certain principles and rules, including those of humanitarian law, against the distinctiveness of social, cultural, economic and political values in any particular country. Indeed, it is the essence of sovereignty that each State and its people are free to negotiate the terms of their relationship as they see fit. But here too, there are limits. Where might those limits be defined in relation to the laws of armed conflict? With 191 States Party, the Geneva Conventions are among the most widely ratified of international treaties. Based on this fact alone, the principles upon which the rules of the Conventions are based – those principles that I have just described – and the rules, themselves, may truly be described as universal. In addition, the ICRC will soon release its long-awaited customary law study, which clearly confirms the universality of humanitarian law principles in the practice of, and in the legal opinions expressed by, States.

III. IHL Obligations in Times of Peace

It is, perhaps, obvious that in times of war, States must be aware of, and must be capable of discharging their humanitarian law obligations. But why should this body of law – as expressed in the Geneva Conventions of 1949, their Additional Protocols of 1977, and in other international instruments - be of interest in times of peace?

One reason is that humanitarian law contains certain obligations that must be, and can best be, implemented in peacetime. Among these is the obligation to educate and inform military personnel of the principles of humanitarian law and the rules that give them practical significance.

A second reason, related to, but distinct from the purposes of education, is the requirement to implement the international rules and norms of humanitarian law into national legislation. States are bound by their treaty obligations and by the provisions of customary international law. But in most States, the rights and obligations of individuals under treaties and customary norms are not subject to direct enforcement by domestic institutions, such as courts. Instead, the constitutional structure first requires implementation of treaty and customary provisions into domestic law. Of particular concern is the authority of domestic courts to repress and punish war crimes and other violations.

A third reason that humanitarian law is of interest, and requires action, in peacetime concerns the existence of State-to-State obligations – obligations that only gain in significance with the ever-increasing pace of globalisation. Although the phrase "global village" was coined some forty-odd years ago to reflect the revolutionary effect of television on the concept of "community", the pace at which human interconnectedness grows shows no signs of slowing down. In today's world, any conflict, whether in Cambodia or Kosovo, Indonesia or Israel, affects the people of Thailand. States have an obligation to respect the provisions of the Geneva

Conventions. Although this obligation may be obvious, it is nonetheless made explicit in Article 1 Common to each of the four Geneva Conventions and in Article 1 of Additional Protocol I Relating to the Protection of Victims of International Armed Conflicts. But these provisions go one step further – in addition to mandating respect, Article 1 Common also reflects the solemn undertaking of States to "*ensure* respect" for the provisions of the Conventions and the Additional Protocol. Whatever might be the detailed content of the obligation to ensure respect, it clearly refers to the duty of States, whether at war or at peace, to undertake proactive measures designed to increase the level of compliance with humanitarian law, both within and beyond their borders. And the ever-increasing interconnectedness of our world gives rise to an ever-increasing urgency that the content of States' obligation to *ensure* respect be defined and be implemented in times of peace, as well as in times of conflict.

Government officials, representatives of civil society, students, and business people - all citizens have a stake in these matters. Indeed, the very interests of State and personal security, of the political relationships of a State to its citizenry, and of economic and social well being are directly linked to the success or failure of peacetime efforts to educate people about, and to ensure the enforceability of, international humanitarian law.

IV. The History, Role and International Legal Status of the ICRC

A. History of the ICRC

This brings us to the role of the International Committee of the Red Cross and its relationship to humanitarian law, primarily as expressed in the Geneva Conventions and their Additional Protocols. In 1859, Swiss businessman Henry Dunant travelled to the village of Castiglione, now Italy, to meet Napoleon III. Dunant's purpose was to obtain Napoleon's permission to build windmills in Algeria, then a colony of France, on land owned by Dunant's company. Napoleon's purpose was war. The Franco-Austrian war was short, only three months long. But what it lacked in longevity, it made up for in carnage. Dunant arrived in the aftermath of the battle of Solferino and encountered thousands of sick and wounded soldiers of both sides, in desperate need of attention. In addition to mobilizing the local population to provide assistance, Dunant later proposed the establishment of relief societies to assist the armed forces' medical services, and an international agreement recognizing a legal basis for the protection of the neutral and independent personnel of those societies.

The ICRC was founded one hundred and forty years ago, in 1863, four years after Dunant's experience in Solferino. A year later, the ICRC drafted the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. A parallel Convention for members of armed forces at sea became the Second Geneva Convention. The Third Geneva Convention, Relative to the Treatment of Prisoners of War had its origins in the experience of the First World War with its seven million prisoners of war, while the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War was the outgrowth of the Second World War's twenty million civilian victims.

B. The Role of the ICRC

The ICRC and humanitarian law are inseparable. The Geneva Conventions and their Additional Protocols contain the international community's mandate to the ICRC to provide protection and assistance to persons affected by international armed conflict. In non-international, or internal armed conflict, the ICRC possesses a right of initiative to provide protection and assistance.

The principles of the Red Cross and Red Crescent Movement are humanity, impartiality, neutrality, independence, voluntary service, unity and universality. They provide the foundation that enables the ICRC to work hand-in-hand with the principles of humanitarian law that I previously described. As the promoter of international humanitarian law, the ICRC contributes to its development, and, to that end, prepares for the work of the Diplomatic Conferences empowered to adopt new texts. This is how the Geneva Conventions and Additional Protocols came into being. As the custodian of humanitarian law, the ICRC monitors its application by parties to conflict, through its delegates in the field. For example, they observe whether or not the civilian population is properly respected, that is, protected from hostilities. They visit prisoners of war and other detainees to determine whether or not they are being treated in accordance with the provisions of the Third Geneva Convention and other relevant laws. They determine whether or not the population in occupied territory is receiving adequate care. Where belligerents fall short of their obligations, the ICRC is there to remind them. Like States, the ICRC has humanitarian law related tasks in peacetime, as well as in times of conflict. For instance, it translates the texts of humanitarian law, advises in the adoption of mechanisms for prosecution of war criminals, provides technical advise and assistance to States in connection with ratification and national implementation of humanitarian law instruments and provisions, including the protection of the emblems of the International Red Cross and Red Crescent Movement, and finally, it strives to spread knowledge of humanitarian law, particularly among the armed forces.

But the ICRC does not shoulder these responsibilities alone. Although it is at the origin of the International Red Cross and Red Crescent Movement, and is the focal point for armed conflict issues within the Movement, the ICRC is merely one component thereof. The International Federation and the National Red Cross and Red Crescent Societies, together with the ICRC make up the Movement. States also play an important and direct role in the quadrennial international conference of the Movement, the next one – the 28th such conference - to take place this December.

Although all components of the Movement are bound by the principles of independence and neutrality, cooperation among States, National Societies, the Federation and the ICRC is crucial to the ability of the Movement to undertake humanitarian action. **Thus, I am especially pleased to note the history of excellent cooperation between the ICRC and Thailand, not the least example of which is the large Thai/Cambodian border operation undertaken in the 1980s to bring humanitarian relief to .....** Likewise, it is with great appreciation that I note the outstanding cooperative relations between the ICRC and the Thai Red Cross. The ICRC wishes to express its special gratitude to the Thai Red Cross for its demonstrated commitment to the promotion and understanding of humanitarian law issues in Thailand – as evidenced by, among other things – this very meeting. In addition, we are equally grateful for the fund raising efforts of the Thai Red Cross and

the generosity of the Thai Government, as shown by the recent contribution to the ICRC's Emergency Appeal for Iraq.

C. International Legal Status of the ICRC

By virtue of its mandate to accomplish all its tasks, the ICRC possesses international legal personality, similar to the status of international, intergovernmental organisations. But unlike intergovernmental organizations, the ICRC is neither comprised of nor created by States. The ICRC's relations with States are established through a system of Headquarters Agreements. These Agreements, which the ICRC and many States consider to be international treaties, recognise the ICRC's diplomatic privileges and immunities that are necessary to safeguard the neutrality and independence that are essential to the ICRC's ability to fulfil its mandate. At present, the ICRC maintains Headquarters Agreements with 74 States and enjoys privileges and immunities through legislation in ten other States. This total of 84 States comprises the vast majority of States in which the ICRC maintains an operational presence. The ICRC also maintains official relations with numerous regional and universal intergovernmental organizations. Among these are the Asian African Legal Consultative Organization, with which the ICRC has just recently signed a Cooperation Agreement, and the UN General Assembly, where the ICRC enjoys Observer Status. In addition, the President of the ICRC meets annually with the UN Security Council.

V. The role of International Humanitarian Law in Contemporary Conflicts

A. Humanitarian Law as a Tool to Break the Cycle of Violence

Having spoken about the general, interrelated roles of humanitarian law and the ICRC, I hope to have provided a sufficient background to discuss a topic much in the news and in the minds of those with an interest in the future of humanitarian law – that is the role of humanitarian law in contemporary conflicts.

I would like to begin with a preliminary question: How can respect for the rules of war contribute to the goal of peaceful coexistence among peoples? I have already stated that the law of armed conflict, primarily as codified in the Geneva Conventions of 1949 and their Additional Protocols of 1977, merely regulates the conduct of hostilities and the treatment of persons in the power of the enemy. As such, this body of law tacitly accepts the fact of armed conflict.

But it is no accident that the law of armed conflict is also known as international humanitarian law, since its function and all its myriad provisions are designed with one goal in mind: to minimize human suffering. In 140 years of working in the field to protect and assist victims of war and other forms of violence, the ICRC has learned many lessons about the sources of human suffering. One such lesson is that conflict begets conflict. Atrocities visited upon civilian populations not only exact their obvious toll on the victims, they also impede the course of reconciliation and feed the cycle of retribution and revenge. Where the authors and executors of war crimes enjoy impunity, today's victims are that much more likely to both continue to be victimized, and to become tomorrow's perpetrators.

While conflict begets conflict, our experience leads us inescapably to the conclusion that respect for humanitarian law, in both international and internal conflicts, contributes mightily to the odds of breaking the cycle of violence. Where parties to

conflict respect the immunity of the civilian population from attack, and where violators are brought to justice - in other words, where the rule of law applicable in war is respected - the felt need for subsequent resort to force and the ability of demagogues to fuel and prey upon residual anger and frustration are diminished.

B. The Additional Protocols, the International Criminal Court and Other instruments of International Humanitarian Law

For these reasons, the ICRC encourages States to consider becoming party to humanitarian law instruments to which they may not already be party. The first among equals in this regard may be the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, otherwise known as Additional Protocol, or AP I. The added value of AP I is its development of protections for both civilians and in the realm of conduct of hostilities, primarily in response to technological advances in the means and methods of warfare. In connection with AP I, the ICRC recalls with satisfaction the pledge of Thailand made at the 27th International Conference of the Red Cross and Red Crescent to accelerate consideration of becoming a State Party to the Additional Protocol. The ICRC encourages Thailand to continue its efforts in that regard.

The ICRC also encourages States to consider becoming party to the 1977 Additional Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts. AP II is an elaboration of the rather basic provisions of Article 3 Common to the Geneva Conventions, specifically applicable in non-international armed conflict. By developing protections of international humanitarian law applicable to internal conflict, AP II adds to the protections available to the civilian population, but without according any legal status to rebel forces. These measures, when enforced, not only prevent unnecessary suffering during the conflict, but in so doing, aid in the process of reconciliation, as well.

The 1998 Rome Statute establishing the International Criminal Court is another mechanism that upholds and enforces the values, principles and rules of humanitarian law. The Court, known as the ICC, can become a powerful tool in the struggle to put an end to impunity for the most serious crimes of all: genocide, crimes against humanity, war crimes, and once a definition is agreed upon, the crime of waging aggressive war. While respecting the sovereign primacy of States to prosecute such crimes that occur within their own borders, or are committed by or against their nationals, the ICC will stand ready to act when States are either unwilling or unable to do so. The ICRC takes the position that the ICC Statute more than adequately reflects the fundamental rights to a fair trial to which persons accused of crime are entitled and contains formidable protections against unfounded or politically motivated prosecutions. While repressing and thereby discouraging the commission of serious crimes of concern to the entire international community, the ICC, like other mechanisms of international humanitarian law, will help to bring justice and dignity to perpetrators and victims, alike. In doing so, the ICC, like other mechanisms, will discourage the endless cycles of retribution and revenge and encourage the process of reconciliation that is prerequisite to durable peace. For these reasons, the ICRC encourages States to ratify the Rome Statute and discourages States from engaging in acts that might undermine the Court.

In 1980 the Convention on Certain Conventional Weapons (CCW), with its three Protocols, was adopted. It has become the cornerstone of humanitarian law in the field of the prohibition or restriction of weapons. Thailand is not a party to this Convention.

In the last ten years, several other important treaties have been adopted:

- in 1993, the Chemical Weapons Convention, to which Thailand is a party;
- in 1995, the prohibition of blinding laser weapons (through a Fourth Protocol to the CCW); and in 1996, an amendment of Protocol II to the CCW, to which Thailand is not a party;
- in 1999, a new Protocol reinforcing the protection of cultural property (new Protocol to the 1954 Convention), to which Thailand is not a party, although Thailand is a party to the 1954 Convention;
- in 2000 the strengthening of the protection of children against recruitment into armed forces or armed groups, to which Thailand is not a party;
- and of course, in 1997, the Ottawa Treaty banning antipersonnel mines, to which Thailand is a party.

The obligation to distinguish at all times between combatants and civilians refers not only to the care that combatants must take in where and how to aim. It applies equally to the choice of methods and means of warfare, including weapons. Methods and means of warfare must be capable of being directed at a specific military objective. However, there are some weapons, which by their very nature strike blindly, killing or maiming soldier, civilian, man, woman and child indifferently. The best-known example of an indiscriminate weapon is the anti-personnel mine, which as you know was outlawed in the Convention on the prohibition of anti-personnel mines.

The ICRC commends Thailand for its strong commitment to the elimination of anti-personnel landmines, as evidenced by its hosting of the Fifth Meeting of the States Parties to the Convention on the prohibition of anti-personnel mines taking place this week, in which close to 500 delegates from all over the world are participating. Thailand was one of the first forty States to have ratified the Convention, thereby triggering its entry into force on the 1st of March 1999. Earlier this year, Thailand completed the destruction of its over 50,000 stockpiled anti-personnel mines as required by Article 4 of the Convention. It is also our understanding that Thailand is in the process of developing legislation to provide for penal sanctions for violations of the Convention, as required by Article 9 of the Convention. We congratulate Thailand for the great strides it has made not only in implementing the Convention, but also in promoting adherence to the treaty in Asia. It is our hope that other States the continent -- which is after all the most mine-affected in the world -- will follow Thailand's lead and commit to the total elimination of these indiscriminate weapons by joining the Convention.

C. The Adequacy of International Humanitarian Law to Deal with the Conflicts of the 21st Century

When considering the role of humanitarian law in 21st century conflicts, no topic is more controversial than the role of humanitarian law in the fight against terrorism. It is, therefore, important to know what the law of armed conflict has to say about terrorism and human rights, and if I may be so bold, what the ICRC has to say about what the law of armed conflict has to say about terrorism and human rights.

A few basic points:

- International Humanitarian law applies only during and to armed conflict;
- other legal regimes such as domestic and international criminal and human rights law also apply, but only to a limited extent, during armed conflict;
- terrorism and the "war on terror" are sometimes manifested in armed conflict, other times not; and
- there are good reasons involving the global balance between state and personal security, human rights and civil liberties for this division of legal labor between humanitarian law and other laws.

The debate about whether international humanitarian law adequately protects the victims of war is not new, but has certainly intensified since the end of the Cold War, with an increasing number of internal armed conflicts, often fuelled by religious and ethnic differences, and characterised by shocking brutality. There have also been conflicts where State structures disintegrate to a point where "war lords" are able to take the fate of entire populations into their hands. All too often, civilians become the very targets of the war and are not just indirectly affected as "collateral damage".

Yet, the debate took on another dimension after the attacks of September 11, 2001. On that date, the United States announced that it was "at war" with the group at the origin of these attacks and with terrorism more generally. This has led to some confusion and uncertainty about humanitarian law, fuelled by assertions that it is not applicable to or adequate in the effort to combat terrorism and that it constitutes an obstacle to justice.

One complicating factor in the discussion about the role of humanitarian law in relation to terrorism is that there exists no single, universally accepted definition of the term "terrorism." The ambiguity of the term can be seen in contrasting the backgrounds to the recent conflicts in Afghanistan and Iraq. On the one hand, the Security Council's actions left little doubt that there was considered to be a legitimate cause and effect relationship between terrorism, as manifested in the acts of September 11, and the subsequent US-led invasion of Afghanistan. On the other hand, the same cannot be said about the US and British-led military campaign in Iraq, despite assertions that this war too was part of a larger "war on terror". But lack of agreement on the definition of terrorism is irrelevant as to the application of humanitarian law, which is triggered by the fact of armed conflict, regardless of the characterization of its cause.

A second complicating factor in the discussion about the role of humanitarian law in relation to terrorism is that there is no single, universally accepted definition of the term "armed conflict." While the existence of international armed conflict - that is, armed conflict between State A and State B - may be relatively easy to determine,

the same cannot be said for internal armed conflict, which must be distinguished from lesser forms of violence such as sporadic riots and other internal disturbances. This fact may, indeed, lead to good-faith differences over whether or not one or more terrorist acts, or a State's response to them, amount to armed conflict.

Another complicating factor concerning the role of humanitarian law in relation to terrorism is the fact that there exists no bright line boundary between terrorism and armed conflict. Terrorism can certainly occur within a larger context of armed conflict. Threats or attacks against civilians who take no part in hostilities; objects indispensable to the survival of the civilian population (like food, agricultural areas, livestock and drinking water); cultural objects and places of worship; works and installations containing dangerous forces (dams, dykes and nuclear electrical generating stations); as well as against the natural environment may all be characterized as terrorism. Humanitarian law already more than adequately covers and explicitly prohibits such acts perpetrated in armed conflict.

While terrorism can occur within armed conflict, armed conflict can just as well be a component within a larger context of terrorism or counter-terrorism. An example suggested by some observers is that the attacks of September 11 were acts of war in a larger terrorist campaign. Likewise, armed conflict can be a component of the efforts to combat terrorism - for example, the previously mentioned US-led invasion of Afghanistan.

While there is no doubt about the qualification of the recent wars in Afghanistan and Iraq as international armed conflicts, the legal qualification of other incidents of violence, detention and trial is, however, much less clear. According to the United States, the "war against terrorism" started well before 11 September 2001 and continues today. It includes a number of attacks, including on the World Trade Center about ten years ago, on the American embassies in Nairobi and Dar-Es-Salaam, on the "USS Cole" in Yemen, attacks in Karachi, on a hotel in Mombassa, the bombing in Bali and, more recently, attacks in Riyadh and Casablanca. In Yemen, an American drone launched a missile that killed alleged members of Al Qaeda. According to the United States, all these events are linked and are part of a protracted "global war". As such, they would form part of an international armed conflict, to which humanitarian law would apply. This sweeping definition of armed conflict has often been questioned and has been considered by many commentators to be too broad. [1]

This debate has probably suffered from a fundamental misunderstanding of the role of humanitarian law in the fight against terrorism. Because of the tendency to equate the notions of "war against terrorism" and "armed conflict", humanitarian law has been expected to provide answers to situations, which fall outside its scope of application. And all too often, confusion has arisen between the rules governing when force may be used, which are contained in the United Nations Charter - the *jus ad bellum* - and the rules which apply once an armed conflict has started – the *jus in bello* - whether the use of force was legal or not. It should be recalled that violations of humanitarian law as such can never be the basis for the use of force and that even an alleged "just war" would not imply any exemption from the application of humanitarian law.

The proposition that the so-called "war against terrorism" constitutes an armed conflict raises several difficult challenges. Clearly, the fight against terrorism does not fit well into the existing categories of armed conflict. This alleged "war" does not meet either of the two criteria to be considered an international armed conflict, as it is neither between States, nor can it be considered to be a war of national liberation.

It could be worthwhile to examine if the fight against terrorism could be considered a non-international armed conflict. Several questions arise: Who are the parties to such a conflict? The essential humanitarian function of humanitarian law is carried out through the parties to the conflict. They have rights and responsibilities. There can be no humanitarian law conflict without identifiable parties. "Terror" or "terrorism" cannot be a party to the conflict; therefore a "war on terror" cannot be a humanitarian law event. It has been suggested that wars against proper nouns (for example, Germany and Japan) have advantages over those against common nouns (for example, crime, poverty, and terrorism), since proper nouns can surrender and promise not to do it again. A terrorist group can conceivably be a party to an armed conflict and a subject of humanitarian law, but the lack of commonly accepted definitions is a hurdle. What exactly is terrorism? What is a terrorist act? Does terrorism include state actors? How is terrorism distinguished from "mere" criminality? Can Al Qaeda be a party to an armed conflict? But who exactly is Al Qaeda?

Another question is where does the conflict actually take place? And when did this conflict begin? When, or under what circumstances might it be said to end? Are the laws of armed conflict, with its attendant rights to kill and to detain persons without trial now in operation for the entire planet, without any limitation as to place or time?

The recently coined term "war against terrorism" has properly been compared to the "war on poverty", or the "war on drugs". This widely used slogan is, however, so broad and amorphous as to lack any real legal significance. The notion of "armed conflict," on the other hand, has taken more than a hundred years to develop. Before changing this cornerstone of humanitarian law, it is suggested that a very careful analysis be undertaken, balancing the advantages and shortcomings of such an exercise.

It is certainly important and useful to discuss these issues, but under existing humanitarian law, it is not easy to consider the "global war against terrorism" as being a "global armed conflict". Under the existing framework humanitarian law applies when the level of force used amounts to an armed conflict. This approach limits the scope of humanitarian law to those situations it has been intended to regulate. As was indicated previously, that level of force was reached in the military operations against Afghanistan and against Iraq.

Those who would apply the notion of armed conflict to all aspects of the fight against terrorism should bear in mind that all parties to a conflict have the same rights and duties under international humanitarian law. To consider a trans-national armed group a party to an armed conflict could therefore raise difficulties of a more political nature, as it could amount to give some form of legitimacy to the group. But to deviate from this essential principle would be to put into question the whole fabric of humanitarian law, according to which all parties to a conflict have equal status

All these complicating factors, and indeed, the lack of fit between much of the so-called "war on terror" and the provisions of humanitarian law, have nurtured a widely held but misbegotten view that the laws of war are obsolete and must be reformulated to embrace the conflicts of the 21st century. Without claiming that humanitarian law is perfect, we respectfully disagree.

It is the firm belief of the ICRC that humanitarian law, while not perfect, is sufficient to deal with the conflicts of today. Attempts to significantly alter its content in response to the perceived novelties of "new conflicts" would carry the risk of upsetting a finely tuned balance that humanitarian law strikes among the interests of personal security, State security, and individual rights and liberties. Humanitarian law is not designed to deal with all the exigencies of terrorism and the efforts to combat it, but it is adequate to deal with them when they amount to armed conflict.

Parenthetically, there is little evidence that domestic and international laws and institutions of crime and punishment are not up to the task when terrorism and the fight against it do not rise to the level of armed conflict. Police and judicial cooperation among States and domestic law enforcement are usually much more adapted and efficient in such cases. Indeed, terrorist acts are first and foremost crimes. Several international conventions have been adopted over the years to respond to international terrorist crimes.

Meanwhile, there are powerful reasons to conclude that application of humanitarian law in circumstances that do not amount to armed conflict would do more harm than good. While the purposes of humanitarian law are humanitarian, it is also true that death and destruction, detention without judicial review and trials with reduced menus of rights are permitted, albeit within defined limits, in times and situations of armed conflict. Thus, the determination that a particular situation is subject to the law of armed conflict can have decidedly un-humanitarian consequences. This is especially the case when parties assert the rights of belligerency that are found within the law of armed conflict, but decline to accept the humanitarian obligations imposed by that body of law.

In the view of one commentator upon whose words I cannot improve:

> *"the concept of war feeds the vision of an enemy that must be defeated, rather than a criminal problem to be solved. Viewing terrorism as crime, we might be permitted to consider its root causes. But to ask why they make war against us is to risk the appearance of sympathy. It is precisely by declaring war against them that we fall into their trap, following them in a scorched earth policy of burning bridges between civilizations and driving civilian populations with them over the precipice."*

(Frederic Megret, *War? Legal Semantics and the Move to Violence,* European Journal of International Law, April 2002)

The Geneva Conventions and their Additional Protocols – these fundamental repositories of humanitarian law - did not anticipate September 11 or Al Qaeda. And yet, the balance struck between humanitarian law and other legal regimes is probably

more valid today than ever before. Civil rights, judicial guarantees, human rights and the rule of law are not impediments to human security. They are, in fact, the ultimate repositories of it. Humanitarian law, in particular, is a bulwark of human security in times of armed conflict.

The power of humanitarian law to protect and assist victims lies in the limitation of its application to true conditions of armed conflict. Below that threshold, other legal regimes applicable in times of peace should, and do, apply. To apply the laws of armed conflict and thereby displace domestic and international criminal and human rights law in situations below that threshold would be to do violence to human rights and civil liberties that protect us all. We owe it to ourselves and to our children not to take such radical measures, which, in the words of Frederic Megret, would have us fall into their trap, unless and until the legal mechanisms otherwise applicable in times of peace should prove unsuited to the task.

This does not mean that in the eyes of the ICRC, all would be well as long as humanitarian law is not mistakenly applied to circumstances in which it does not belong. I previously mentioned the world's increasing number of internal armed conflicts, often fuelled by religious and ethnic differences, and characterised by shocking brutality; conflicts where State structures disintegrate to a point where "war lords" are able to take the fate of entire populations into their hands; conflicts where all too often, civilians became the very targets of the war, not just its unintended victims. As a result of its activities in the field, the ICRC speaks from grim experience when it asserts that these are the conflicts that present the greatest challenges for humanitarian law. Rather than involving the wrongful application of humanitarian law to circumstances in which it does not belong, these challenges concern the lack of respect for humanitarian law in places where it does belong – situations of armed conflict.

Respect for, and implementation of, the law are always a challenge. Implementation of humanitarian law must occur in three phases, which may overlap. First, States should ratify the relevant treaties and, where necessary, enact national laws and regulations to implement them at the national level. They must also teach the law, in particular to their armed forces. Secondly, States and – in internal armed conflicts – organized armed groups must apply the law in armed conflict. The obligation to apply the law is not, however, limited to the parties to an armed conflict. It includes other States, which must respect and also *ensure respect* for the Geneva Conventions and their Additional Protocols. The lack of readiness of States to contribute to ensure the respect of humanitarian law, for example, by denouncing violations or by exerting pressure on the parties to a conflict, is regrettable. And thirdly, States have an obligation to search for and prosecute all those suspected to have committed grave breaches of the Geneva Conventions and the Additional Protocols.

Clearly, the main problem today is not a lack of rules, but rather a lack of political will to implement and respect existing rules. And so, the continuing efforts of the ICRC to ameliorate human suffering will focus on the requirement of parties to conflict to implement available law, to respect applicable law and to ensure respect there for. But we will continue to assert that while humanitarian law must be respected where it is properly invoked, it must only be invoked where it properly belongs. Thank you.