



Australian Red Cross  
THE POWER OF HUMANITY

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# the changing face of warfare in the 21<sup>st</sup> century

CRISIS CARE COMMITMENT

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Copyright Chris Hondros/Getty Images. A rebel fighter celebrates as his comrades fire a rocket barrage toward the positions of troops loyal to former Libyan ruler Muammar Gaddafi, April 14, 2011.

Welcome to this edition of the International Humanitarian Law Magazine, which focuses upon the ways in which warfare has changed and developed in the 21st Century. As the world continues to evolve at an increasingly rapid pace, so too are the ways in which wars are fought and won.

When Henry Dunant, the founder of the International Red Cross and Red Crescent Movement, witnessed the enormous human suffering on the battlefield in Solferino in 1859, he could not possibly have imagined how different battlefields around the world would look in 2012. Cavalry has been replaced by high-tech transportation on land, sea and air; rifles have been replaced by drones and other automated weaponry, and to a large extent, battlefields are no longer fields at all – more and more conflicts are taking place in urban areas and cities with civilians feeling the brunt of conflicts.

However as we examine how warfare has, and continues to change, the basic laws of war as set out in the Geneva Conventions of 1949 remain. It is quite remarkable to reflect on the one hand on the extraordinary changes to modern warfare that have taken place in just the last two decades, and at the same time marvel at how the laws regulating warfare have continued to reduce human suffering in some of the most appalling situations on the planet for the last two centuries.

International Humanitarian Law continues to balance military necessity with humanity. Armed forces, more than ever, are held accountable when violations occur and a huge number of treaties have been created to add further strength to the IHL framework, particularly in relation to the means and methods of warfare.

Furthermore, the International Red Cross Red Crescent Movement continues its work in war zones using the same fundamental tenets established in the 19th Century. Whilst the environments in which we now work would be unrecognisable to Henry, his ambition to relieve human suffering in a neutral, independent and impartial manner is still evident in the work of the Movement around the world.

It seems appropriate that as technology continues to shrink the world in which we live, we are able to read articles in this issue of the magazine by such distinguished authors from around the world. We thank the authors of this edition for their insightful and informative views on a range of current issues – from the challenges facing the humanitarian sector in the 21st century, to new modes of warfare, the impact of warfare on civilians, and the privatisation of war. We also note our appreciation to King & Wood Mallesons for their support of this magazine. I hope you enjoy this issue which offers a broad cross-section of challenges and opportunities as we move forward into a truly new era in modern warfare and humanitarian response.

A handwritten signature in black ink, reading "Robert Tickner".

Robert Tickner  
Chief Executive Officer  
**Australian Red Cross**

Disclaimer: The articles contained within represent the views of the authors and not necessarily those of Australian Red Cross.

# conflict and violence in a changing world: the challenges for humanitarian response

## Part I

By Yves Daccord,  
Director-General of the  
International Committee  
of the Red Cross (ICRC)

In this article, adapted from the keynote speech given by Yves Daccord at the Australian Red Cross National Conference on 9 December 2011, Yves examines the changing environment in which humanitarian organisations are operating and the challenges that these changes pose for organisations such as the ICRC.

For humanitarian practitioners – concerned with addressing the consequences of conflict, violence and disaster – the events of the past year have often been so dramatic and unexpected, and the speed of change so fast, that it has sometimes been a challenge just to keep up.

If we draw just one lesson from the past year – which has seen armed conflict in Côte d’Ivoire and Libya, the tumultuous ongoing events of the Arab Spring, and the tsunami and nuclear disaster in Japan to name but a few – it is to expect the unexpected. More and more, we must be ready and able to respond to complex humanitarian needs in increasingly diverse and unexpected situations.

So what does all this imply for us? How does it affect us and the way we work, now and in the coming years? We are observing various trends in armed conflicts and other situations of violence that will ultimately have an impact on how humanitarian actors



*Copyright ICRC/B Heger. The ICRC visits a displaced indigenous family in a poor area in the south of the city of Bogota, Colombia. Offsetting a decline in “traditional” violence is the steady rise in both the scope and the humanitarian consequences of situations of violence below the threshold of international humanitarian law.*

respond. For the purposes of this article, I will highlight just two. While these trends are not necessarily new, they are particularly significant and we expect them to increase in the coming years. I will then go on to consider some of the key challenges these trends pose for humanitarian response, and how we in the International Red Cross and Red Crescent Movement (Movement) can aim to tackle such challenges.

### Key trends

#### 1. The changing nature of armed violence

The first trend I would like to highlight is the changing nature of armed

violence and the implications this has for both vulnerable people and for humanitarian actors. What do we mean by “war” and “violence”? What is the difference between them, and is it important?

There are relatively few international armed conflicts in the 21st century, with Afghanistan, Iraq and more recently Libya among them. But even when such conflicts are short – taking the Israel-Lebanon conflict in 2006 and the Russia-Georgia conflict in 2008 as examples – they still have far-reaching, complex humanitarian consequences. These may span generations, especially when they leave a legacy of landmines, cluster munitions or other explosive remnants of war.

Non-international armed conflicts have

also declined over the past quarter of a century, as have the number of deaths they cause. Yet many of these conflicts tend to be protracted or repeated. For the ICRC, this trend is confirmed by the fact that nine of our ten biggest operations in 2011 were the same as 2010, nearly all of them protracted armed conflicts, both international and non-international. These include Afghanistan, Iraq, Sudan, Pakistan, Israel and the Occupied Territories, the Democratic Republic of Congo, Somalia and Colombia.

However, offsetting this decline in “traditional” violence is the steady rise in both the scope and the humanitarian consequences of situations of violence below the threshold of international humanitarian law (IHL). As a result, the role and importance of IHL as a body of law dealing specifically with armed conflict is also being challenged.

These “other situations of violence” can take various forms. The conceptual dividing lines between conflict and criminality, for example, are increasingly blurred and overlapping. Transnational organised crime is now clearly identified as posing a significant and growing threat to national and international security, with implications for public safety, public health, democratic institutions and economic stability worldwide. Today’s criminal networks are fluid, striking alliances with other networks around the world. They engage in a wide range of illicit activities, including cybercrime and providing support to terrorism. Transnational organised crime can, and does, take advantage of failed states and contested spaces.

Latin America offers another dramatic illustration of the potential impact of national and transnational organised crime on entire societies. Figures

released by the United Nations two months ago refer to over 700,000 people killed by firearms in Latin America every year, of which 100,000 are said to be the victims of insurgencies and transnational organised crime. The number of weapons in the region is estimated at 80 million. In particular, Mexico and Central America currently have alarmingly high levels of confrontation between state security institutions, including armed forces, and a range of cartels and gangs. The Narco War in Mexico has resulted in an estimated 28,000 violent deaths since 2007, with an additional 10,000 missing persons. The levels and forms of violence against civilians, including women and children, are appalling. Kidnapping, extortion, torture, sexual violence, beheadings and disappearances are commonplace.

Another example of changing patterns of violence is of course the upsurge of violent unrest that continues to sweep parts of North Africa and the Middle East – caused and exacerbated by underlying economic and social trends and by acute frustration with unrepresentative governments. The very serious humanitarian consequences of such violence demands an appropriate humanitarian response. Of course, it is no small challenge to know how to balance operational, legal and political considerations in sensitive situations characterised by the use of force, where IHL does not apply.

Despite the overall decline in “traditional” forms of armed conflict, there are increasing concerns about the way in which they will be fought in the years ahead, especially in light of new technological developments. Recent conflicts have seen the increasing use of remotely controlled weapons or weapons systems – including so-called “drones” –

and of automatic weapons. There is a possibility that in the future, weapons systems may become fully autonomous, which raises certain concerns with regard to compliance with IHL, not least their ability to distinguish between combatants and civilians. Another risk is cyber warfare, which has potentially enormous humanitarian consequences. For example, cyber attacks against airport control, hospitals, transportation systems, dams or nuclear power plants are technically possible, and could result in profound infrastructure disruption and significant civilian casualties and damages. The ICRC, for one, is closely following the rapid developments in this domain, and examining the application of rules of IHL.

## **2. Changing actors**

The second key trend that can be seen in contemporary armed conflict and violence, as well as in the evolving humanitarian sector, is the proliferation of new actors. This relates to those who are involved in armed conflict and those who respond to it, sometimes with a blurred line between the two.

On the one hand, many new non-state groups are emerging, both on a national and transnational level, whose influence will continue to grow and will ultimately determine the agenda of humanitarian organisations. The spectrum of these actors is very broad, encompassing a range of identities, motivations and varying degrees of willingness, and ability, to observe IHL and other international law standards. Certain organised armed groups, private military and security companies, transnational corporations, urban gangs, militias and the huge variety of transnational criminal entities – including so-called “terrorist” groups and pirates – all require scrutiny in this regard.



*Copyright AP/ Rodrigo Abd. Free Syrian Army fighters take positions as the Syrian Army advances towards the town of Sarmin, in northern Syria in late February 2012. The difficulties for humanitarian agencies to deliver humanitarian assistance to the people of Syria resulted in heavy international criticism.*

On the other hand, humanitarian response itself is increasingly within the remit of new actors responding to humanitarian emergencies internationally, including the private sector, new non-governmental organisations, and foreign military forces, often with ways of operating that are different to traditional approaches and not necessarily based on humanitarian principles. This increasingly calls into question the “value add” of traditional humanitarian actors, as well as existing coordination mechanisms by which they operate. This has been demonstrated in Afghanistan, as it has in other situations of armed conflict, where competition between humanitarian actors has resulted in some compromising on humanitarian principles in order to gain profile and resources. Consequently, traditional humanitarian actors who insist on the

principles of neutrality, independence and impartiality may be marginalised, and their security put at greater risk.

In parallel to this is the current resurgence of state-based assertion of sovereignty, with increasing numbers of host states actively blocking, restricting or controlling humanitarian response on their territory. This may be in the guise of “counter-terrorism” or “internal policing.” Humanitarian agencies are sometimes used as a pawn or scapegoat in internal political struggles. Alternatively, governments may insist on their own definition or understanding of “humanitarian assistance” – for example, restricting it to emergency relief – or impose bureaucratic obstacles in order to restrict appropriate humanitarian assistance to contested parts of the country. A number of states even consider a neutral and independent

approach as an infringement of their right to manage conflicts or disasters unfolding on their territory.

One way or another, non-western host states increasingly want to be seen to deal with their own political and humanitarian crises – partly in line with their own responsibilities, and partly because they are sceptical about the effectiveness and intentions of the international humanitarian community.

Whilst it is important to identify these key trends, it is even more important to determine what challenges these pose to us in terms of our humanitarian response and how we can continue to provide effective and respected relief to vulnerable populations during times of armed conflict and other situations of violence. These challenges will be discussed in part II of this article.



# the changing locales

*Copyright NATO. The discovery of the Stuxnet worm in 2010 forced governments and businesses around the world to examine their security defences more rigorously. Cyber threat to real world infrastructure is now topping the security agenda for organisations worldwide. (Source Symantec Critical Informatica Infrastructure Protection survey, August 2010)*

**By Peter W Singer,  
Director of the 21st  
Century Defense Initiative  
at Brookings Institute**

**In this thought-provoking article Peter Singer looks at some of the ways in which conflicts are already evolving, and how and where future battles may take place – from the Arctic, to outer space.**

When most leaders think about the locales of war, their eyes are drawn to the burning places on the map. They try to find which state is about to collapse or become the next crisis. Those who see themselves as latter day Bismarcks wrestle with broader grand strategy and tend to view the globe as more like connecting tectonic plates, with rising powers like China or India changing the geopolitical landscape. These

strategists typically look for where the regional spheres of influence overlap, trying to find the seams from where the earthquakes of war might emanate. But those who step back from the map will notice something more: there are even greater shifts occurring that will shape the “where” of war in new ways in the coming century.

From the very first pre-historic battles over new hunting grounds to the European wars over gold in the “New World” (and one might even argue the more recent conflicts over Middle East oil fields), whenever we humans have discovered a new locale of value, we usually then fight over it. As we filled out the blank spaces on the map, though, it was new technologies that then shaped new spaces in which we contended. For 5,000 years of war, for example, humans only fought on the land and then on top of the sea. Then, at the turn of the last century,

technologies that had only recently existed in Jules Verne novels allowed the combatants of World War I to fight under the water and in the air above. These entirely new domains of submarine and air warfare required new forces to fight there and then new laws of war to regulate them. And the battle over these domains also created the need for new laws and norms, disputes over which were of great significance. The questions that surrounded whether and how submarines could attack civilian shipping actually drew the United States into World War I, leading to its superpower rise.

Today, a series of 21st century parallels are emerging. For example, the Arctic has long been a foreboding place that no one much cared about in policy circles. But through changes that our technologies have created upon the global climate, the waters are warming up. As a result, this once whited-out part of the world

# of conflict

map is yielding new and valuable navigable trade routes, as well as potential drilling spots for energy and mineral resources (with some believing there may be as much oil and natural gas at stake as Saudi Arabia has). But opening up a new part of the globe yields new security questions; indeed, there hasn't been a geographically as large an area to resolve sovereignty issues since 1493, when Pope Alexander VI tried to divide the New World between Spain and Portugal (which spurred wars by the powers left out of the deal). Today, while conflict is by no means inevitable, various players are preparing for a polar scramble. One advisor to Russia's Vladimir Putin declared, "the Arctic is ours." The Canadians, Norway, the United States, and even non-Arctic contiguous states like China don't seem to agree and have started to build up their capabilities to stake out their claims.

Outer space is a similar once

inaccessible domain, now of rapidly growing commercial and military value. The realm of Fritz Lang and George Lucas movies is now populated by 947 operational satellites, sent up by over 60 nations, through which runs the lifeblood of global commerce and communication, as well as military operations (over 80% of United States' communications travel over satellites). In an ironic echo of Clausewitz, United States Air Force General Lance Lord described that "space is the center of gravity now" and the Pentagon has carried out over 20 studies of space warfare.

Of course, as Dr. Yao Yunzhu of the Chinese Army's Academy of Military Science has warned, if the United States believes that it is going to be "a space superpower, its not going to be alone...". The Chinese passed the United States in launch numbers last year and plan to add more than 100 civilian and military satellites in the

next decade. More importantly, both nations have demonstrated kinetic anti-satellite capabilities repeatedly over the past several years, with Russia, India, Iran, and even non-state actors like the Tamil Tigers also showing capability at other counter-space operations like satellite jamming.

Unlike underwater, in the air, the polar cold, or outer space, cyberspace isn't merely a domain that used to be inaccessible, it literally didn't exist just a generation ago. Yet its current centrality to our entire global pattern of life is almost impossible to fathom, as the numbers involved are so high as to sound imaginary. The global internet is made up of almost a quarter of a billion websites, while almost 90 trillion emails were sent last year. The military use is equally astounding. The Pentagon alone operates 15,000 computer networks across 4,000 installations in 88 countries.

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But with so much of real value being located in this new virtual domain, it is also becoming a locale for crime, political and economic contestation, and even conflict. Each day some 55,000 new pieces of malware are created with more than 100 states reported to have set up organisations to engage in cyber operations. Indeed, the FBI described cyber security as the third most important global security threat; notable considering that its Director didn’t even have a computer in his office ten years ago. In reaction, the United States Cyber Command, for example, went from imaginary concept just a few years ago to an organisation of 90,000 personnel that coordinates more than \$3 billion in spending.

While the majority of the cyber discussion has been on mostly overblown scenarios of “electronic Pearl Harbors,” Russian-Georgian-Estonian “cyberwars”, and the wiki-leaking of embarrassing policy memos, the vast majority of these attacks remain nuisances for now, the equivalent of cybergraffiti, cyberleaks, and cybercrime, not war. From a normative standpoint,

a key challenge is disentangling what exactly is an attack and what isn’t and who is conducting it and what can be done about it.

While the last year has seen new focus on this due to the use of new focused cyber attacks via specially designed malware like Stuxnet (which arguably was a highly ethical weapon in that it could only work against its target and no other), the real danger may actually lie in the less sexy, but gradual, long-term undermining of innovation and intellectual property, so key to economic and national security strategy. It is estimated that western firms suffer approximately \$1 trillion a year in lost business, wasted research and development investment, and added spending due to cyber attacks that appear to be directed by political, military, or intelligence entities. If summed up, it would be the largest robbery in history. But measuring in dollars may miss the actual importance. The multinational Joint Strike Fighter program, for instance, had several terabytes of data (a terabyte is 1,000,000,000,000 bytes, roughly the equivalent of the entire internet’s size just a decade ago) stolen by hackers,

the result being roughly 10-20 years of technological advantage. Another operation called Shady RAT targeted everything from defence and oil companies to international athletic organisations and human rights groups.

The lesson we should take away from these trends is that as important as the concern over the next year in Afghanistan or the looming rise of China is, policymakers in security must also be mindful that there are even broader changes afoot. The 21st century is seeing immense value being created in locales that were either inaccessible or literally didn’t exist before. But this also means that we are (yet again in history) gearing up to fight in new places off the map we’ve never previously fought. For those who care about peace, the same lessons hold. One can either ignore these new domains, the non-strategy of merely hoping for the best, or work to stave off future conflict and crisis by establishing the norms and institutions needed to stabilise and regulate the new spaces shaping our world.





# what can live crisis maps tell us about patterns and processes in violent conflicts and war?

**By Dr. Jen Ziemke,  
Co-Founder & Co-Director  
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Network of Crisis  
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deployments for Libya,  
Chile and Haiti**

*Copyright iRevolution, Patrick Meier.  
Crisis maps, such as this one prepared  
by teams of online volunteers and Libyan  
citizens during the Libyan conflict in 2011,  
are revolutionising the ways in which  
humanitarian organisations are able to  
respond to humanitarian emergencies.*

**In her article, Jen Ziemke explains some of the groundbreaking ways in which conflicts are being “mapped” by not just large organisations, but by those experiencing conflict and teams of online volunteers from around the world. These online data collection and analysis techniques are changing the way in which humanitarian organisations respond to armed conflict and disasters, and are also revolutionising the role of those on the ground experiencing the humanitarian crisis first-hand.**

Crisis maps help analysts quickly identify gaps in service provision because they offer a more comprehensive picture of evolving humanitarian emergencies.

A confluence of events contributed to the development of crowd sourced crisis mapping, including the near global ubiquity of mobile phones enabling users to type basic text messages or document an event occurring in real-time. Such crowd sourced event data can then be placed on a map and used to track repression in order to help keep governments accountable, observe elections, monitor disease outbreaks, and cope with emergency needs after earthquakes, hurricanes and other natural disasters.



Copyright ICRC. Ibn Sina hospital, Sirte. To improve its response to people's needs in its humanitarian operations, the ICRC is increasingly turning to geographic information systems.

Crisis maps may also be deployed to capture incidents in conflicts and wars as they happen. During the recent revolution in Libya, for example, the Libya Crisis Map tracked, among other events, the movement of refugees, food and water requests, and the evolving situation on the battlefield (see [www.libyacrisismap.net](http://www.libyacrisismap.net)). The United Nations' Office for the Coordination of Humanitarian Affairs (OCHA) initiated the Libya Crisis Map in order to improve their situational awareness of this complex and changing environment. This map helped identify gaps in humanitarian assistance and provision, and to chart next steps.

In order to create the map, OCHA requested the support of the Standby Task Force (SBTF) (<http://blog.standbytaskforce.com>). This global community of online volunteers monitored a large volume of incoming

data from a variety of outlets in order to create reports highlighting changing patterns and trends.

Crisis maps also reveal something about the trends and processes inherent to conflicts and wars themselves. War can have its own memory or progress through a cycle. Analysing event data on a crisis can help us identify enduring patterns that might be generalised to other conflicts in a way that helps inform policy response. To take one example, the Angola Crisis Map tracked the historiography of all known battles, massacres and territorial gains and losses over this 41 year long war, comprising some 10,000 events. Evidence from the study of battle and massacre events in the Angolan war suggests that security for civilians in a war zone was not constant across all places and all times in the war. Rather, risk to civilians varied according

to the battlefield context. The most dangerous time for civilians during the Angolan war occurred after combatants sustained large battlefield, territorial, or symbolic and strategic losses. When an army is losing, the likelihood that combatants engage in violations towards civilians in the next period drastically increases.

Research in political science suggests that most civil conflicts do not end by negotiated settlement but by military victory over a defeated army. That means that when analysts observe what seems to be "endgame", and one army is being pushed back toward inevitable defeat, practitioners and policymakers should be on increased alert for mounting violations against civilians in the area. The creation of humanitarian corridors or other measures for the protection of civilians should be prepared in

advance and readily deployable for these contingencies. This study is just one example of how crisis maps as applied to conflicts, wars, and complex emergencies might illuminate micro-level patterns and trends that in turn help inform policy and practice.

The protection of informants, the reliability of crowd sourced data, and ensuring the security of the crisis map from rogue actors are some other well-cited issues that will not be discussed in depth here except to mention that several working groups have been created in past months to actively work to assuage these concerns. So far, their recommendations remind us that not every crisis map needs to be a public affair. Additionally, groups deciding to create a map can decide to deploy password-protected private websites or use closed or trusted networks to obtain reliable information in insecure environments. Crowd sourced data can be triangulated, vetted, and scored before it appears on a map, and analysts always have the option to view maps containing only verified reports.

While the concerns listed above are indeed critical, these debates are not specific to the case of crisis mapping conflicts in particular. Rather, they are part of broader conversations being held about crisis mapping in any environment. What specific analytic, practical, or theoretical concerns might animate the study of crisis mapping conflicts and wars in particular?

Consider the counterinsurgency wars of the past decade in Iraq, Afghanistan, Somalia, and Yemen. On the one hand, we are at a historical juncture characterised by the increasing availability of real-time, geo-referenced event data making

maps with dots an attractive first visualisation of this complex data. On the other hand, wars in this era seem less about place and space than they are about other features and dynamics. Most wars are no longer best understood as simply a fight to capture and control strategic territory. Insurgent tactics and strategies may not be best visualised by the ebb and flow of moving fronts because the actors under examination are not structured, conventional armies whose goal is to capture a specific town or area. Network maps might best reveal relationships shaping the strategic context in this instance.

It is important to remember that the complex data collected about a single event contains much more information than solely its location. Indeed, motivating and precipitating factors for an event are often very complex. Understanding the role personal networks, history, relationships, and symbols play in warfare should not be lost in the excitement of geographic maps. We should not limit our analyses to geographic visualisations alone because alternate depictions of the data may also reveal important patterns.

Another interesting possibility to consider is how the mere presence of a live crisis map might actually change the course of events on the ground. Because crisis maps are near-real time reflections of live conflicts, their mere presence means events may not truly be independent observations. Rather, individual events need to be viewed as processes partly endogenous to the reports on the map itself. Depending on their ubiquity, one might imagine that crisis maps may one day even act to tilt the balance in favour of one or the other party to a conflict.

Finally, there is a deeper way in which these technologies and changing social practices around the use of new technology have the potential to reshape and alter the balance of power between people and states. Whereas in the past states and government institutions enjoyed the preponderance of power vis-à-vis their citizenry, in an era of new media, the power of the state is weakening. Such a shift complicates well-trod political and military strategies at precisely the time when several wars are becoming more analytically complex. For example, most so-called “civil wars” are not solely domestic affairs but rather are best viewed and understood through the prism of international dynamics and regional rivalries. What may on the surface appear to be a civil war may actually be better understood as one state trying to undermine its neighbour by secretly financing or supporting its neighbour’s separatists, rebels, or insurgents. Add layers of intrigue, double games, and secret maneuvers, and suddenly “understanding” the data seems nearly impossible. We thus urgently need to find better ways to represent all of the dynamic and spatio-temporal complexities of large datasets, paying particular attention to the peculiar intricacies of conflicts and wars.

Some exciting new developments in recent months indicate new directions for crisis mapping in complex environments. From using volunteers to identify mass graves, refugee shelters and tank movements on satellite images, to allowing citizens in Somalia to register their individual stories on a map (see [www.aljazeera.com/indepth/spotlight/somaliaconflict/somaliaspeaks.html](http://www.aljazeera.com/indepth/spotlight/somaliaconflict/somaliaspeaks.html)), several projects indicate future work in this nascent new field will continue to be creative, forward thinking, and connected to events on the ground.



# regulating

## new types of violence: reconciling international humanitarian law and non-lethal weapons

**By Eve Massingham,  
International  
Humanitarian Law  
Officer at Australian  
Red Cross**

**Non-lethal weapons are increasingly being used and developed for situations of armed conflict. In her article, Eve Massingham raises some of the challenges that this new trend in weapon development pose, in particular, its compliance with the most fundamental tenets of international humanitarian law.**

United States Department of Defence Colonel George Fenton has said he would like some magic dust to put everyone on the battlefield to sleep – combatant and non-combatant alike. Whilst his version of warfare may be a little improbable, the emergence of non-lethal weapon technologies designed with specific military application is putting some methods of warfare, akin to magic dust, into employment.

Non-lethal weapons are weapons which are designed to incapacitate rather than to kill. North Atlantic Treaty Organisation (NATO) defines them as “weapons which are explicitly designed and developed to incapacitate or repel personnel, with a low probability of fatality or permanent injury, or to disable equipment, with minimum undesired damage or impact on the environment.” There are a range of non-lethal weapons technologies with differing counter-personnel, counter-material and counter-capability applications. For example, the Directed Energy Active Denial System fires a 95 GHz-2 millimetre-wave directed energy which rapidly heats a person’s skin to achieve a pain threshold without burning the skin. Less high-tech methods include anti-riot water cannons which can

*Copyright Commonwealth of Australia,  
Service Newspapers Russell/LAC Aaron  
Curran. Pictured are U.S. Marines and East  
Timor Defence Force soldiers practicing  
non-lethal techniques.*

knock a person down at around 90 meters, rubber bullets and the Net Launcher, which is a non-lethal way to restrain and control a fleeing or aggressive suspect.

The challenges that non-lethal weapons pose on the modern day battlefield are many. The potential for these weapons to, in fact, be lethal is widely commented on – either through unexpected consequences of their use or through abuse of the weapons system. Other considerations include how to recognise whether an incapacitated opponent is, or is not, out of the fight. How would an incapacitated opponent signal an intention to surrender? Does feigning incapacitation constitute a perfidious action? Is there an obligation to use a non-lethal weapon in circumstances where it would be available and expected to achieve the military objective? And, perhaps of most significance, can you use a non-lethal weapon against civilians in circumstances where to do so would actually save lives?

In terms of legal regulation, some non-lethal weapons technologies are dealt with specifically by existing international humanitarian law (IHL) treaties and other legal frameworks. The Biological Weapons Convention's prohibition on development, production and use of biological weapons, whether lethal or non-lethal, and the Chemical Weapons Convention's prohibition on any chemical which, through its chemical action on life processes, can cause death, temporary incapacitation or permanent harm to humans or animals are two such examples. The Protocols to the Certain Conventional Weapons also deal with a number of potential non-lethal weapons technologies such as non-detectable fragments, mines and booby-traps and blinding laser weapons. Such regulatory frameworks do not, however, provide for comprehensive regulation of non-lethal weapons and so we must also turn to the general principles of IHL.

The Geneva Conventions of 1949 and their Additional Protocols of 1977 – the cornerstone documents of IHL – do not make reference to non-lethal weapons. In fact, they do not make specific reference to any particular

weapons. Rather, these laws, which at their very core establish the notion of combatant privilege in times of armed conflict (that is, the right to kill and its corresponding duties, including the duty to protect and respect those hors de combat), prohibit the use of any weapon or tactic which:

- is unable to distinguish between combatants and non-combatants;
- causes damage disproportionate to the anticipated military advantage; or
- causes unnecessary suffering.

The notion of combatant privilege is absolutely central to the effectiveness of IHL. Like many features of modern day warfare including the suicide bomber, the farmer by day and fighter by night, and the increasing use of private military and security companies, the possibility of using non-lethal weapons has significant potential to undermine the principle of distinction in the minds of commanders. The notion that civilians could be removed from an area of military importance and will not be permanently harmed in the process, through the deployment of a non-lethal weapon, has to be very appealing to a commander who at the end of the day just wants to achieve his or her military objective without killing those not taking part in the fight.

The European Working Group

Non-Lethal Weapons notes the “[d]evelopment of new non-lethal technologies will allow military and law enforcement personnel to exploit alternative means of countering potentially hazardous threats, expanding their capability with new options that offer an acceptable alternative to lethal force.”

Indeed, there seems to be budding acceptance of the inevitability of the growth in non-lethal weapons technology and use. This is not necessarily deleterious, but it must be balanced against the awareness that the preservation of fundamental IHL principles is imperative. The Geneva Conventions have been signed by every nation in the world. Although not perfect, these vital documents contain the very basic provisions for the preservation of humanity in times of armed conflict and have, in the midst of humanity's most horrible pursuit, brought about the alleviation of much suffering. Directed against combatants, it is conceivable that non-lethal weapons could create a more humane form of warfare. However, the temptation to blur the principle of distinction in the age of non-lethal weapons to allow the sorts of actions mentioned in the previous paragraph, whilst understandable, will ultimately lead to an undermining of the Geneva Convention's central tenets and consequently greater human suffering.



Copyright US Marines/Joy E. Crabaugh. Two US Marine Corps vehicles mounted with the Directed Energy Active Denial System, a non-lethal weapon that uses directed energy. When fired at a human, it delivers a heat sensation to the skin and generally makes them stop what they are doing and run.

The changing face of warfare has a direct and fundamental impact on those caught up in armed conflict. These summaries encapsulate some of the practical challenges posed by contemporary armed conflicts raised by the ICRC in its latest “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts” report.

## classifying conflicts under international humanitarian law: focus on Libya



# challenges to international hum

## safeguarding healthcare in armed conflict and other situations of violence



Copyright ICRC/Boris Heger. This medical group, based in Nyala, Sudan, flies or drives to combat zones, with virtually no medical facilities and are protected under IHL.

**“One of the first victims of war is the healthcare system itself.”**

- Marco Baldan, ICRC chief war surgeon

For more information and resources on this issue, see: <http://www.icrc.org/eng/what-we-do/safeguarding-health-care/index.jsp>

In January 2009, ICRC and Palestine Red Crescent Society staff made a terrible discovery in a house in Gaza City – four children, too weak to stand, crouched beside the corpses of their mothers. The house had been shelled four days earlier, but ambulance teams had not been allowed to reach the victims. Soldiers at a nearby checkpoint had offered no assistance to the injured.

A month earlier, the last functioning hospital in the war-torn north of Sri Lanka was shelled, killing and wounding many of the 500 patients, who had to be evacuated to a community centre with no potable water.

In September 2009, soldiers entered a hospital in Afghanistan searching for wounded enemy soldiers. Their search proved unsuccessful, so they rounded up the staff and ordered them to report the presence of enemy soldiers seeking treatment. When staff refused, citing medical ethics, they were threatened at gunpoint and told they would be killed if they refused to comply. Several staff quit after the incident, too afraid to return to work.

In December of the same year, a suicide bomber at a university graduation ceremony in Mogadishu killed medical students who had studied for years to alleviate some of the terrible suffering brought about by two decades of civil war. This was only the second group of medical graduates in the last twenty years, with the attack depriving the Somali people of desperately needed doctors.

These four examples from four very different conflicts in 2009, are only the tip of the iceberg. Attacks on healthcare facilities, personnel and vehicles, and impediments to the wounded and sick reaching healthcare services have become common in conflicts and other situations of violence. They result in far-reaching consequences as healthcare professionals flee their posts, hospitals close and vaccination campaigns cease.

These knock-on effects leave entire communities without access to adequate services. Violence, both actual and threatened, against healthcare workers, facilities and beneficiaries is one of the most serious humanitarian challenges in the world today. And yet it frequently goes unrecognised.

Under international humanitarian law (IHL), conflicts are categorised as either international (between two or more countries) or non-international (between a state armed force and other organised armed groups within the country). Categorising conflicts into one of these two groups is important as different laws and protections can apply under each.

Libya provides an excellent example of the difficulties in classifying conflicts and the fluidity with which they move between categories. Violent unrest overtook Libya in late February 2011, however it wasn't until March 2011 that the violence was serious enough to reach the threshold of an armed conflict.

The violence began between government forces and rebels. At a later stage, North Atlantic Treaty Organisation

(NATO) forces began offensive action against the Libyan government, however they weren't acting with, or on behalf of the rebel forces. Because of the different groups involved and their different objectives, categorising the conflict – once it had finally been categorised as a conflict at all – was extremely difficult.

The overall consensus from the international community was that there were in fact two conflicts operating side by side. A non-international conflict was occurring between the Libyan government and the rebels, and when NATO started its offensive, an international conflict commenced between the Libyan government and NATO forces.

The emergence of two simultaneous conflicts created complications.

Reminders to the various actors about their responsibilities differed depending on their role and what conflict(s) they were participating in. It was also difficult when different people were afforded different standards of protection depending on which conflict they were involved in. Additionally, the role that humanitarian organisations, especially the ICRC, can play during armed conflict will often depend on whether the conflict is international or non-international in nature. Two simultaneous conflicts can cause ambiguity and confusion about the role of humanitarian agencies, particularly amongst the parties to the conflict.

*Left: Copyright ICRC/Getty Images/Gratiene De Moustier. ICRC and Libyan Red Crescent Society evaluate the potential impact on civilians of an explosion near Benghazi, Libya.*

# International law in the 21<sup>st</sup> century

## the role of human rights in situations of armed conflict: lessons from the European court of human rights

Whilst IHL and human rights law do share key aims, such as to protect the lives, health and dignity of people, there are many differences. For example, IHL applies only in situations of armed conflict, whereas human rights law applies at all times. Traditionally, human rights have taken a back seat to IHL during times of armed conflict. However the way in which the two areas of law interact is evolving.

Recently, relatives of six Iraqis who were killed by British troops in Basra, Iraq brought a case before the European Court of Human Rights. The Court found that the British armed forces were exercising authority and control over the local population and assuming some of the powers normally exercised by the Iraqi Government. Because of this, they decided that the European Convention on Human Rights applied not only to the United Kingdom but also to the area they were controlling in Iraq.

The death of the six civilians and the standard of investigations after the deaths were found to be a breach of the European Convention on Human Rights. The decision to extend the reach of human rights law beyond traditional territorial boundaries creates far-reaching implications for human rights obligations of armed forces and military operations around the world.

*Copyright ICRC. Iraqi Red Crescent Society staff prepare coffins for handover from the Kuwaiti authorities to the Al Zubair Centre of the Iraqi Ministry of Human Rights.*

**“Those who export war ought to see the parallel export of guarantees against the atrocities of war.”**

- Judge Giovanni Bonello, European Court of Human Rights

For the full judgment of this case, see the European Court of Human Rights website: [http://www.echr.coe.int/ECHR/homepage\\_en](http://www.echr.coe.int/ECHR/homepage_en)

To access the report, visit the ICRC website: <http://www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm>

Compiled with the assistance of King & Wood Mallesons



# the hidden costs of war

**By Deng Adut, former child soldier and refugee and currently a solicitor in Sydney**

**Deng Adut shares with us his very personal experiences as a child soldier in the Sudanese civil war. His terrible story serves to highlight the inescapable reality that whilst there have been enormous technological and legal developments in warfare in the 21st Century, the effects of war on civilians continues to be both inevitable and devastating.**

Some of my earliest and fondest memories as a child are of times spent talking with my relatives as we spent the day fishing. In my community, it was tradition that the men would make a living by fishing and keeping cows and as a young child, I had already decided that I would like to be a cattle-keeper and a fisherman, just like my father.

However, by the middle of 1987, those ambitions and dreams had been shattered. I was among many young children forcibly removed from their homes and families and marched to Ethiopia, for reasons

that were unknown to me at the time. I walked thousands of kilometers without shoes or underwear. I witnessed children like myself dying and being subjected to all sorts of dreadful experiences as we made our way, bare-foot and starving, to Ethiopia. I have witnessed abuse and death among my friends during the war. I sustained many physical abuses from my superiors because of my inability to follow orders and for demanding decent treatment. I became a child soldier.

By the end of 1988, I was plagued by deadly cholera, malaria, diphtheria, malnourishment, whooping cough and measles. I felt isolated and deserted by



my loved ones. I remember being told off by one of my close relatives in 1989 because I was forking him with my protruding bones. He told me I should just die instead. I realised that he too was suffering from depression and by caring for me he was unable to improve his own situation. By this time I could only eat and drink fluids. I was emaciated, weak and a burden to care for. I felt sorry for my relative. I do not believe that he was trying to be cruel, indeed, he was just a child himself, unable to properly look after me.

In those days, what I needed was a parent to care for me. What child, taken away from the care of his parents will not suffer some form of psychological trauma? What child, less than seven years of age and ordered to witness horrific deaths by firing squads will not suffer a nervous breakdown or mental illness? What child, upon seeing dead bodies, idling in pools of blood with blood flowing around them like torrential rain, will not suffer some sort of psychological damage?

I also witnessed, in around 1993, some boys, only 10 or 11 years old, picking up their AK47s, squeezing the triggers with their own fingers and blowing off their brains. I couldn't pull a trigger myself, because I was too scared. But I understand why they did it. For my friends, pulling the trigger was the quickest way to die and for them the thought of dying just meant "so what"? Another friend of mine took a hand grenade and detonated it while he was still holding it. Luckily, he survived, however his physical injuries were very awful and he is now completely deformed. I was lucky not to have been injured as I was just a few yards away from the scene. Among us children, blowing your head off was common practice, owing to the psychological trauma of what we were experiencing.

My greatest fear at the time was landmines. I always thought that I would prefer to die than have to live with the horrific injuries that they inflict. As it was, I had shrapnel lodged in my lower back and whilst the pain was excruciating, it wasn't fatal enough to cause death. There were times when I wished I had never

been born at all and times where I was so desperate that I did consider suicide. I saw several children severely injured or killed by someone attempting to commit suicide. If someone attempted suicide and accidentally killed someone else they ended up in front of a firing squad. If they accidentally injured other soldiers they were sentenced to deadly duties for substantial periods of time.

Eventually I was briefly discharged from services as a child soldier as I started to develop psychological problems after witnessing too many deaths. There was no doctor to diagnose or care for me. I remember I had a relapse in Ethiopia in 1988. I clearly recall chasing fog at sunrise and sunset, hallucinating that it was smoke coming from my uncle's cattle-camps. I was chasing fog from the earliest hours of the morning until nightfall, running and chanting unknown songs into the wind. I was determined to get to my family's cattle camps in search for food and my mother. I accused people of hiding my mother in sacks. I searched and dreamt about her, determined to find where she had been and all the while, following the imaginary cattle-camp smoke.

My experience of war in Sudan has resulted in periods of depression, psychological breakdown and severe physical injuries to my left thigh, lower-back and to my skull. It is my belief that conflicts of this nature are the worst of their kind due to the numbers of children and civilians caught up between the warring parties and being used as human shields. Thousands of children and civilians were erratically butchered, mutilated and injured every year.

One reason why these experiences matter to me is because the manner and locations of wars do affect both children and civilians in remarkable ways, causing them substantial psychological and physical harm. I am very grateful for not being insane and for not taking my own life.

My conviction is that children and civilians who are exposed to wars do suffer from long-term psychiatric damage, which is sometimes irreversible. I relive these horrific

images every day, yet I am also afraid to get rid of them as they are a true reflection of my life and past experiences.

Whether you starved to death from hunger or died of thirst, the horrific images of death do not change the fact that innocent children and civilians, forced to witness and even participate in these wars suffer dearly from psychological trauma. My experiences of the civil war in Sudan have well-embroidered psychological and psychiatric injuries in me, like a beautifully crafted lullaby barbered into my soul.

We as humans continue to design and trade in sharper, more lethal and more destructive weapons. We must think about the purpose of designing the weapons and how they are distributed and regulated, and what the result will be. Psychological, psychiatric and physical injuries; diseases and hunger – they are not collateral damage for me. They are an illustration of irresponsible human designs.



*Above: Copyright ICRC/Victoria Ivleva-Yorke. A child soldier in Northern Uganda. The use of child soldiers is illegal under international humanitarian law, however many are forcibly recruited to fight in wars around the world.*

*Opposite page: Copyright Deng Adut. Deng Adut arrived in Australia as a 15 year old refugee. He has since learnt English and become one of very few Sudanese-born people to attain a law degree in New South Wales. He was recently reunited with his mother after 20 years of separation.*



# the contribution

## of military legal officers to the furtherance of international law

**By Wing Commander  
Catherine Wallis, legal  
officer in the Royal  
Australian Air Force**

**In her article, Wing Commander Catherine Wallis outlines some of the ways in which military lawyers contribute to the evolution of international humanitarian law in response to new and emerging challenges encountered on the battlefield.**

In 2012, all the major military forces of the world employ lawyers, many of them as commissioned military officers. The largest is the United States Judge-Advocate General (JAG) Corps, with more than 5,000

full-time serving military lawyers. In Australia, approximately 140 full-time military lawyers serve in the Navy, Army or Air Force. In addition, there are approximately 300 part-time (reserve) military legal officers working across every State and Territory of Australia, as well as deployed to Afghanistan and serving with ships or units in the Middle East, Malaysia and the United States.

The core obligation of the modern military lawyer is found in Article 82 of Additional Protocol I to the Geneva Conventions which provides: "The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available,

when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject." Australian military legal officers work in three major areas: operations law, which includes international humanitarian law (IHL) as well as the many legal obligations that apply during military operations, military discipline law and administrative law. They provide advice at every level, from the Chief of the Defence Force and the Commander Joint Operations, right down to briefing individual soldiers, sailors and airmen on their individual responsibilities.

What makes military legal officers unique is the combination of the skills learned in their military training and those gained as legal practitioners. The United States Army JAG Corps sums this up well in their motto, “soldier first, lawyer always.” It is this unique perspective which allows military legal officers to further international law in important ways:

### **Provision of grassroots advice**

Military legal officers are on the ground with deployed units and provide immediate practical advice on the application of the law, assisting military personnel to apply the law correctly. For example, advice could be provided on the application of rules of engagement or on compliance with the law in the accommodation of detainees.

### **Greater access**

In conflict situations, military legal officers may have the ability to work in locations that other legal programs cannot, producing outcomes that would not otherwise be achieved, in some cases because of poor security situations. For example, United States and Canadian military lawyers have for the past four years trained over 3,000 commanders, judges and military police in the Democratic Republic of Congo to improve capacity for compliance with international law.

### **Bridging the gap between military and legal perspectives**

The combination of military and legal training allows military legal officers to think in both spheres and to use this understanding to develop practical solutions. The amendment to the Rome Statute of the International Criminal Court, to add as a war crime “employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions” affords an example. Military legal officers working within the delegations of their countries were able to explain the possible military utility of these rounds, and then work towards solutions that met both humanitarian

objectives and military concerns, thus contributing to agreement on the amendment.

### **Promotion and development of international law**

Military legal officers regularly contribute to the promotion and development of international law. A number of military legal officers have been involved in their private capacity in projects designed to improve the understanding of international law. Recently these have included the Harvard Air and Missile Warfare Manual (2009), the San Remo Handbook on Rules of Engagement (2009) and the Cyber Warfare manual, which is currently under development.

The Asia Pacific Centre for Military Law is a collaborative initiative of the Defence Legal Division and the Melbourne University Law School, which aims to promote greater understanding of and increased respect for the rule of law in military affairs within the Australian Defence Force and other forces in the Asia Pacific region.

### **The future**

As we head further into the 21st Century, there is increasing pressure on the law to adequately come to terms with new technologies and new approaches to warfare. The emerging technological challenges include the space domain, the complexities of cyber operations, the development of non-lethal weapons that are designed to incapacitate rather than to kill and the use of unmanned combat vehicles. Other challenges are likely to arise from the increasing “civilianisation” of military tasks, the application of human rights law to armed conflict and the blurring of the distinction between the law applicable in international and non-international armed conflict.

Military legal officers are uniquely placed to contribute to the development of the law governing the regulation of armed conflict and the protection of civilians.

*The views expressed in this article are solely those of the author and do not necessarily represent the views of the Royal Australian Air Force or the Department of Defence.*



*Top left: Copyright Commonwealth of Australia, 1st Joint Public Affairs Unit/CPL Raymond Vance. Members of the Special Operation Task Group (SOTG) provide security as the Australian SOTG legal officer attends a Shura (consultation) with officials from the Afghan Ministry of Justice at the Tarin Kowt Court House.*

*Above: Copyright Commonwealth of Australia, 1st Joint Public Affairs Unit. Members from the SOTG conduct a Shura with tribal elders in Uruzgan.*



# state control over private military and security companies:

# obligations and challenges

**By Hannah Tonkin, Legal Officer in the Appeals Chamber of the Special Court for Sierra Leone and author of “State Control over Private Military Companies in Armed Conflict” (Cambridge University Press 2011)**

*Copyright ICRC/Marko Kovic. Private military security companies are increasingly asked to provide services traditionally performed by trained armed forces.*

**Hannah Tonkin highlights some of the difficulties of assessing state responsibility of private military and security companies and the challenges facing States and other actors for ensuring compliance from these companies under appropriate legal frameworks such as international humanitarian law and international human rights law.**

Tens of thousands of contractors working for private military and security companies (PMSCs) currently perform a wide range of military and security activities for a variety of clients around the world including states, corporations, non-governmental organisations and the United Nations. Many PMSCs operate in zones of armed conflict, where they carry out functions that were formerly the exclusive domain of the armed forces. PMSC activities in current conflicts include armed security, military advice

and training, intelligence collection and analysis, mine clearance, the maintenance and operation of complex weapons systems, and military support services such as transport, food and housing.

Nowhere has the scale and scope of PMSC activity been more evident than in Iraq and Afghanistan, where the United States and its partners have become dependent on private contractors to carry out their operations. For several years now, the United States Department of Defense (DOD) has had more contractor personnel working in Afghanistan and Iraq than uniformed personnel. According to official government figures, the total DOD expenditure on PMSCs in Iraq and Afghanistan from 2005 to 2010 was \$146 billion, which equates to approximately 18% of its total war spending in those theatres during that period.

## **State control over PMSC activities and accountability for misconduct**

This boom in private military and security activity raises serious concerns about the reduction in state control over violence and the lack of adequate accountability mechanisms for PMSC misconduct in the field. Like national troops, private contractors may at times engage in inappropriate or harmful behaviour in the course of their activities. Yet states often fail to take the same measures to control PMSC personnel that they would ordinarily take to control national soldiers, and many of the accountability mechanisms that exist for national forces are weak or absent in the case of PMSCs.

However, international law imposes

clear obligations on states to control PMSCs and to ensure that there are accountability mechanisms to deal with PMSC misconduct. Three states are particularly important in this context: the state that hires the PMSC (the hiring state); the state in which the PMSC operates (the host state); and the state in which the PMSC is based or incorporated (the home state). While they often face significant practical challenges, each of these three states generally retains some capacity to influence PMSC behaviour and to promote accountability for misconduct.

In considering states' international obligations in regard to PMSCs, it is necessary to consider two key issues. First, what positive obligations are imposed on states to take measures to control PMSC activities and ensure accountability for PMSC misconduct? Second, if a contractor engages in misconduct, under what circumstances could this give rise to state responsibility under international law?

## **States' positive obligations to control PMSCs and ensure accountability**

The most pertinent obligations on states in regard to PMSCs operating in armed conflict derive from two frameworks: international humanitarian law (IHL) and human rights law (HRL). Although IHL and HRL share a common humanist ideal, they differ in their historical origins, theoretical foundations and primary objectives. IHL regulates the conduct of parties to an armed conflict with the purpose of alleviating the calamities of war as far as possible and imposes obligations on both states and individuals. The

primary purpose of HRL, on the other hand, is the protection of individuals from abuses of power by their own governments. This traditional conception of human rights as a means of protecting the governed from the governing, helps to explain why HRL imposes obligations only on states and not on individuals, and why it confers rights directly on individuals per se without the interposition of states.

It is now well established that HRL continues to apply in situations of armed conflict, except to the extent that states have formally derogated from certain provisions of human rights treaties. However, a crucial limitation of HRL is that it generally binds states only within their "jurisdiction," and this is primarily interpreted in a territorial sense. This limitation is crucial because many PMSCs operate outside the territory of their hiring state and/or home state (consider the large number of PMSCs working for the United States and United Kingdom in Iraq and Afghanistan, many of which are based or incorporated in the United States or United Kingdom). HRL clearly binds a state within its own territory, but the case law indicates that HRL only binds a state outside its territory in two situations: first, where the state exercises effective control over territory overseas (for example; in cases of military occupation); and second, where a state exercises effective control over a particular individual overseas (for example; where a state agent arrests an individual overseas).

Where a state is bound by both IHL and HRL in an armed conflict, it is important to consider the two frameworks side-by-side in order to determine the precise scope of

the state's obligations in relation to a particular PMSC. Relevant obligations under IHL include the obligation to "ensure respect" for IHL in all circumstances, the obligation to protect the civilian population, the obligation to suppress or repress violations of IHL, and the obligation of an occupying power "to restore, and ensure, as far as possible, public order and safety." Similarly, HRL imposes a range of positive obligations on states, including the obligation to prevent killings and torture or ill-treatment (whether by state or non-state actors), especially in relation to individuals in state custody and individuals who are known to be at risk. Human rights bodies have also interpreted the right to life as requiring states to take special measures to plan and control security operations to minimise the risk to life as far as possible. All of these obligations entail a "due diligence" standard of conduct, which requires states to take those measures that are reasonably within their power in the circumstances.

### **Circumstances in which PMSC misconduct may give rise to state responsibility**

While the general rule is that states are not responsible for the acts of private persons, under certain circumstances PMSC misconduct may give rise to the responsibility of a state under international law. There are essentially two ways in which this may occur.

The first pathway to state responsibility involves the direct attribution of PMSC misconduct to the hiring state. Aside from those rare cases in which a PMSC forms part of the armed forces of the hiring state, such attribution will ordinarily depend upon either Article 5 or Article 8 of the International Law Commission's Articles on State Responsibility. Article 5 encompasses contractors who are empowered by the law of the hiring state to exercise governmental authority, provided that they are "acting in that capacity in the particular instance," while Article 8 encompasses contractors who are in fact acting on the instructions or under the direction or control of the hiring state.

The second pathway to state responsibility does not involve the direct attribution of PMSC misconduct to a state. Rather, it derives from a state's failure to fulfil a pre-existing positive obligation to prevent or punish the PMSC misconduct in question. Although it is the prohibited PMSC activity that triggers state responsibility in such cases, it is the state's own failure to take the necessary positive measures that in fact constitutes the basis for the state's responsibility, and not the PMSC activity itself. The hiring state, host state and/or home state of a PMSC could potentially incur responsibility in this way, provided that there was a relevant positive obligation on the state at the time. The most important obligations in this context derive from IHL and HRL, as discussed above.

### **Conclusion**

International law imposes clear obligations on states to take positive measures to control PMSC activities and to promote accountability for PMSC misconduct. Under certain circumstances, PMSC misconduct may give rise to the responsibility of the hiring state, host state and/or home state under international law. Of course, state responsibility is not sufficient in itself to address the accountability concerns surrounding PMSCs, particularly since it cannot address the accountability of individual contractors or companies per se and it lacks powerful enforcement mechanisms. Any attempt to regulate the private security industry should not simply rely on existing international law, but should seek to develop new domestic and international frameworks targeting a variety of actors including states, PMSCs and individual contractors. The risk of incurring responsibility in cases of PMSC misconduct provides a significant incentive for states to exert greater control over PMSC activities and to promote accountability for any misconduct. More generally, international obligations could play an important standard-setting role to encourage and assist states in developing their domestic laws and policies with a view to improving overall PMSC compliance with international law.

# conflict and violence in a changing world: the challenges for humanitarian response

## Part II

continued from page 3

The changing nature of armed conflict and armed actors are significant trends in current conflicts around the world. Whilst the causes and emergence of these trends can be clearly identified, understanding how these key trends pose challenges to humanitarian response and an evolving humanitarian sector is crucial. The multiple changes in the global environment discussed earlier are testing the acceptance, perception and relevance of humanitarian aid, and of those who deliver it perhaps more than ever before. Humanitarian actors – especially “traditional” mainly western ones – are being forced to rethink the assumptions on which many have been operating.

### 1. Role and perception of “victims”

The changing role and perception of “victims” is one aspect of this. If the events of the Arab Spring confirmed only one thing it must be that the “victims” are anything but helpless and passive. The resilience and often formidable coping mechanisms demonstrated by people across the region – from Libya to Syria and elsewhere – has shown that they are more partners than passive beneficiaries of humanitarian organisations.

In the sphere of information gathering and sharing, and needs assessment, for example, the ever-increasing availability of new web-



Copyright ICRC/ I. Malla. Local people help Syrian Arab Red Crescent volunteers unload food parcels for distribution to people who have fled their homes.

based technology means that “auto assessment” by beneficiaries themselves is becoming more of a reality. When the earthquake struck in Haiti, for example, new media and communications technology were used in unprecedented ways to help the recovery effort. One example is “crowd sourcing” – pioneered among others by the Ushahidi group – which provides open-source software tools for communities and individuals to share real-time information using text messages, email, Twitter and the web. In this way, a stream of real-time updates and interactive maps are made available on where help

is most urgently needed or available. Beneficiaries are thus empowered to identify needs and be better involved in formulating adequate responses. Still, the way in which we interact with beneficiaries must continue to improve.

### 2. Politicisation of aid

A second, fundamental, challenge is the continuing politicisation of aid. The 9/11 attacks and what subsequently became known as the “global war on terror” marked a turning point in this regard. The political, military and humanitarian objectives of western donor governments became increasingly blurred. Some states



*Copyright ICRC/ Christoph Von Toggenburg. San José del Guaviare, forest infantry battalion international humanitarian law dissemination session. The importance of dialogue cannot be underestimated and proximity to the beneficiaries entails engagement with all actors.*

started supporting their military actions with aid campaigns aimed not only at protecting their troops, but also contributing to stabilisation strategies. It is no surprise that donor states and host states want humanitarian action to contribute to their own national interests. Indeed, we find it normal and right that states deliver humanitarian aid to their populations in times of conflict or disaster. And while we all know that humanitarian action cannot happen in a vacuum, the problem arises precisely when objectives become blurred, in other words when aid is prioritised and allocated on political, military or economic objectives rather than on the basis of humanitarian needs.

What might also be surprising is the extent to which some humanitarian agencies have allowed themselves to be co-opted into this endeavour. Their own actions to obtain access

have, paradoxically, created more challenges to upholding humanitarian principles and ultimately constrained access yet further. Earlier this year in Côte d'Ivoire, humanitarian agencies called on foreign military contingents to provide escorts for access to regions in which other agencies were working without escorts. In Somalia, there were calls for troops from the African Union's Military Mission (AMISOM) to escort humanitarian goods to distribution points. Clearly the humanitarian community needs to be more self-critical about its own choices and better able to resist government pressure.

Closely linked with this is the apparent inability of key humanitarian actors to respond to emergency phases in armed conflict environments. In Libya, the United Nations Security Council's green light for military intervention in March to protect the threatened civilian population

ultimately constrained United Nations humanitarian access. The political, military and humanitarian agendas of the key international players were – at least in the public eye – difficult to separate.

### **3. “Traditional” versus “new” humanitarian action**

My final point on the challenges and trends in evolving humanitarian response relates to the issue of changing actors and the questionable relevance of “traditional” humanitarian action. The saying “out with the old and in with the new” was visibly translated into reality in the past year, particularly in Somalia and Libya. During the Horn of Africa food insecurity crisis, “traditional” humanitarian actors were busy coordinating in Nairobi, and presenting figures of expected



numbers of victims. Meanwhile Muslim charities and National Societies from Turkey and Qatar deployed to Somalia and began operating presenting a picture of two humanitarian worlds living alongside each other: one – the traditional – where coordination has become an end in itself, and the other one in which there is readiness to engage and where results are tangible.

This same trend already existed in Libya, with Muslim organisations such as the Arab Medical Association deploying more than 100 doctors in the early stages of the conflict.

From an ICRC perspective, it is critical to draw lessons from these developments and to engage both humanitarian worlds. In this way, whether through rapid deployment or through a longer process of negotiation, in such diverse situations as Libya, Syria, Yemen, Egypt and beyond, the ICRC aims to ensure a constant, relevant operational presence.

## **Adapting to a changing world: balancing tradition with innovation**

We are faced now with the looming question of how to move ahead in the face of these daunting challenges. Of course, we need to adapt. That much is true for all of us, from whatever walk of life or line of work – everyone has to change with the times. But for humanitarian actors, moreover for specifically neutral, independent and impartial ones like the ICRC, a more specific approach is required. Our goal remains the same – to address the needs and vulnerabilities of the victims of crisis in all their many dimensions, keeping them firmly at the centre of our work, and help strengthen and build their resilience. And we need to do this in a way that reinforces our own relevance and effectiveness.

At the heart of this is the need to uphold – and demonstrate the value

of – our neutral, independent and impartial humanitarian approach. Of course, principled humanitarian action is nothing more than an empty mantra unless it is translated into a meaningful response on the ground, and there are different approaches by many different actors.

For us, this means an approach that is needs based, has proximity to the beneficiaries, and entails engagement with all stakeholders – thereby gaining the widest possible acceptance and respect, and through this the widest possible humanitarian access. The risk of proximity is one we are willing to take, and we must take it. The importance of dialogue with all actors cannot be underestimated. We have seen this in Lebanon, in Israel and the Occupied Territories, in Sri Lanka, and the list goes on. In Afghanistan, for example, the ICRC has been in dialogue with the Taliban since as far back as 1999 – which has been a crucial element in gaining humanitarian access and helping to ensure the safety of our staff.

Secondly, the way ahead will require us to better integrate beneficiaries into our action. As I mentioned earlier with regard to the changing role and perception of so-called “victims”, we need to recognise and understand the complex range of needs but also the resilience and coping mechanisms of affected people, and we need to adapt our response accordingly. There must be independent needs assessment, with strict adherence to the principle of impartiality. Indeed, impartiality must be the minimum common denominator among all humanitarian actors, regardless of their particular mandate or approach.

Another aspect is the need to better understand how we can connect with other responses – through operational partnerships within and beyond the Movement. The need to build a broader support base through engagement with more diverse stakeholders is essential to strengthen the acceptance,

perception and relevance of humanitarian aid. Failure to do so will create a risk of being marginalised by the state, military forces, civil societies or faith-based organisations. Lack of acceptance could also have negative repercussions on the security of staff in the field.

Thirdly, we need to demonstrate stronger leadership to shape key debates in a variety of fora and on issues where we have strong legitimacy. In other words, we need to make our expertise and voice heard – where it counts. Taking just one recent example – the International Conference of the International Red Cross Red Crescent Movement in Geneva – I was struck by how challenging it was at times to get our message across, be it on international humanitarian law or healthcare in danger. This really highlights the need for joint humanitarian diplomacy and communication efforts on key issues.

## **Closing remarks**

This is just a snapshot of conflict and violence in our rapidly changing world, and the challenges this brings to humanitarian response now and in the years ahead. The good news is that the ICRC and some National Red Cross and Red Crescent Societies are already used to reacting quickly to disaster and conflict, and to adapting to changing realities. Whether it is addressing the psychosocial needs of people affected by conflict, or managing dead bodies, or even assessing acceptable levels of radiation for staff, the ICRC and its partners in the Movement have undertaken various unexpected activities in recent times.

The challenge will be to keep pace with the evolving environment, not least in view of constrained resources. But together, we must be ready and able to rise to this challenge, and in so doing continue to make a real difference for people affected by ongoing and emerging humanitarian crises. Action, not intention, is what really counts.

## International Humanitarian Law (IHL) Program

Australian Red Cross is part of the International Red Cross and Red Crescent Movement, the largest humanitarian network in the world.

IHL is something Red Cross thinks everyone should be aware of. We run an IHL Program providing training and education highlighting IHL issues to key target groups identified as having a role to play in situations of armed conflict.

Photo: Australian Red Cross. An IHL Officer from Australian Red Cross talks to Australian Defence Force personnel at HMAS Stirling, WA.



The IHL Program focuses on the following target groups:

- Australian Defence Force
- Australian Federal Police
- Non-government organisations
- Commonwealth Government agencies
- Key professions (law, medicine, journalism)
- Tertiary and secondary education sectors
- Wider community

The IHL Program specifically offers training programs to sectors of the Australian Defence Force such as military medics and military police, in addition to being invited to participate in Australian Defence Force training exercises. More broadly, we run education seminars for members of the general community who have an interest in humanitarian issues and whose work is affected by the application of IHL.

**Red Cross has a mandate to promote an understanding of, and respect for, the law in times of armed conflict – International Humanitarian Law (IHL).**

For more information on the IHL Program please visit: [www.redcross.org.au/ihl](http://www.redcross.org.au/ihl)



# fundamental principles

*Copyright: ICRC/J. Björgvinsson. Ajdabiya, Libya. An ICRC delegate and a Libyan Red Crescent volunteer talk to stranded Bangladeshis who had been working for a road cleaning firm before fighting broke out in Libya.*

## In all activities our volunteers and staff are guided by the Fundamental Principles of the Red Cross and Red Crescent Movement.

### Humanity

The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all people.

### Impartiality

It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

### Neutrality

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

### Independence

The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.

### Voluntary Service

It is a voluntary relief movement not prompted in any manner by desire for gain.

### Unity

There can be only one Red Cross or Red Crescent Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.

### Universality

The International Red Cross and Red Crescent Movement, in which all Societies have equal status and share equal responsibilities and duties in helping each other, is worldwide.

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