UNIT 14 WHAT IS THE ROLE OF ICRC UNDER IHL?

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14.1 INTRODUCTION

The ICRC acts as the guardian of international humanitarian law, a complex role that is closely connected with its own foundation and was later formally entrusted to it by the international community. This chapter presents various aspects of this role and examines its scope in the contemporary context.1

The International Committee of the Red Cross (ICRC) is primarily known for its field operations in the aid of victims of the armed conflicts and internal violence all over the world.2

Less well known is the scope of its role as “guardian” of international humanitarian law. This complex function is closely connected with the founding of the ICRC and was formally entrusted to it by the international community subsequently.3

The ICRC has always had a close and special relationship with international humanitarian law. It has worked on battlefields, and has always sought to adapt its action to the latest developments in warfare. It has then reported on the problems encountered, and on that basis has made practical proposals for the improvement of international humanitarian law. In short, it has made a very direct

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For further details please visit: http://www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm

2 Hans Peter Gasser, International Humanitarian Law and Protection of War Victims, ICRC Resource Centre, 1998; for further details please visit:
http://www.icrc.org/eng/resources/documents/misc/57jm93.htm

contribution to the process of codification, in the course of which its proposals were examined. This has also facilitated regular revision and extension of international humanitarian law, notably in 1906, 1929, 1949 and 1977.4

14.2 OBJECTIVES

After reading this unit, you should be able to:

- explain the role of the ICRC under the IHL;
- discuss are the Major functions of the ICRC in the promotion and protection of IHL; and
- discuss why the ICRC is called as a Guardian of the IHL?

14.3 THE ROLE OF THE ICRC

This special role of the ICRC is now formally recognised in the Statutes of the International Red Cross and Red Crescent Movement, which have been adopted both by the components of the Movement and by the States party to the Geneva Conventions, that is, practically all the world States.5

Article 5 of the Statutes states that the role of the ICRC is “to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law” (Article 5.2c), and also “to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof” (Article 5.2g).6

Self Assessment Question

1) What is the legal basis for the role of the ICRC as the guardian of the IHL?

The various facets of the role of the ICRC, as a guardian of international humanitarian law, are not easy to discern and to delineate clearly by reason of an overlap of some of its function. A rough classification as below may, however, be proposed:

14.3.1 The Monitoring Function

Whenever there are serious and large-scale violations of international humanitarian law, the law itself tends to suffer the blame. Such violations should of course rouse

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the international community to action, but it is important to find out exactly where the problem lies rather than rushing headlong into changing the rules.\(^7\)

It was the inadequacy of the rules protecting prisoners of war, highlighted by events during the First World War, which led to the drafting of the 1929 Geneva Conventions. Further, it was the tragedy of the Holocaust that largely prompted their revision in 1949, and the addition of a Convention specifically designed to protect the civilian population. The bombing of cities during the Second World War, and later episodes of massive bombing, notably over Vietnam, led to the reaffirmation and development of the rules governing the conduct of hostilities, as codified in the 1977 Protocols additional to the 1949 Geneva Conventions.\(^8\)

Are there at present any good reasons to justify further revision or adaptation of international humanitarian law? This is exactly where the monitoring function comes in, and the ICRC is particularly well suited to discharge such a function because of its operational activities in nearly all situations of armed conflict.

The monitoring function requires constant analysis of failures to observe international humanitarian law, so as to determine whether they are due to shortcomings in the law and, if so, whether these shortcomings are serious enough to justify the risk and expense of embarking on a revision procedure; and then, if the time seems ripe for revision, taking steps to facilitate it and to highlight the humanitarian dimension of the problems involved, on the basis of experience acquired during conflict situations.\(^9\)

**14.3.2 The Catalyst Function**

The second function identified here is that of acting as a catalyst. It is not sufficient simply to take note of problems of application of international humanitarian law; those concerned must also be encouraged to think about ways to deal with them. This second function is, in a way, a corollary of the first. When a real problem crops up on the ground it is not enough to say that it cannot be resolved by revising the law.\(^10\) It is essential to go a step further and seek possible remedies. In short, international humanitarian law must be transformed into a dynamic force so that it can better serve the interests of those it is designed to assist and protect.\(^11\)

Any account of the ICRC’s work under this functional classification would be incomplete without mention of the major study the organisation undertaken to identify the rules of international humanitarian law which form a significant part of customary international law. The 26th International Conference of the Red Cross and Red Crescent requested this study, and to be of any value must necessarily be far-reaching. Indeed, it is impossible to prejudge the practice and *opinio juris* of States without verifying these points, and this requires an extensive network of

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\(^8\) Ibid.

\(^9\) Id.


correspondents, great expertise and flawless coordination. The importance of the study is widely recognised.\textsuperscript{12} It should also be an ideal opportunity to give new impetus to thinking on international humanitarian law by involving specialists and research workers from all over the world.

The ICRC has forged links within the International Red Cross and Red Crescent Movement; with international organisations concerned with matters not prominently distinguished from international humanitarian law; with academic institutions interested in the subject; and lastly with the many non-governmental organisations whose work in theatres of armed conflict and other emergencies has led them to undertake a critical analysis of the various activities.

Thus, the scope of the “catalyst” function involves enlisting experts in many disciplines to contribute, on the basis of their practical experience and their thorough knowledge of the existing rules, the fresh thinking that is indispensable for the application, interpretation and development of international humanitarian law, to resolve problems and prepare for future developments.\textsuperscript{13}

\textbf{14.4 THE PROMOTION FUNCTION}

There is no fixed dividing line between the “catalyst” function and that of “promotion”. Admittedly, generating interest in the difficulties that arise in applying international humanitarian law often serves to make this body of law more familiar and better understood.

The States have to be encouraged to ratify the instruments they have drawn up at diplomatic conferences. Indeed, it is vital, especially where armed conflicts are concerned, that all parties should be governed by the same rules. Everything possible must therefore be done to ensure that the treaties of international humanitarian law are universally accepted, and that calls for a great deal of effort.\textsuperscript{14}

To start with, the reason for the existence of the rules, some of which are admittedly complicated, has to be explained repeatedly to members of parliament, ministers, top civil servants, high-ranking military officers and all the other officials who have to adopt the treaty or make recommendations in this respect. That means finding people in the concerned countries who are strongly in favour of the treaty and are prepared to defend it and keep drawing attention to its existence. But sometimes the question of ratification may have to be purely and simply rescued from oblivion. The international obligations of many countries are so extensive and complex that their overworked and understaffed civil services cannot cope with the paperwork. The ICRC’s job is then not so much to answer complicated legal and political arguments as merely to convince the government and the upper reaches of the civil service, by persuasion and perseverance that the matter is important enough to be exhumed earlier than others. One of the reasons why the 1949 Geneva Conventions are now almost universally recognised, and the 1977 Protocols additional thereto are well on the way to being so, is that the ICRC, acting


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through a delegate with special responsibility for the subject and through its delegations abroad, has constantly been placing the issue on the table.\textsuperscript{15}

A second aspect of the function of promotion is to encourage implementation of international humanitarian law on the national level by means of legislation and other measures. Treaties of international law are often “forgotten” after they have been drafted and signed, and unfortunately, this may happen even when they are theoretically in force. Therefore, a number of measures have to be taken in peacetime. Accordingly, the ICRC has for many years in past systematically sent States that have decided to participate in the Geneva Conventions or the Protocols additional thereto a note reminding them of the immediate obligations this entails, during peacetime. Due to the setting up of regional delegations, States have been reminded more frequently of this duty, and a certain momentum has also been created at regional level. The interest and backing of academic experts, members of National Red Cross and Red Crescent Societies and others have also been invaluable.\textsuperscript{16}

The matter was carried a stage further in 1995, when governmental experts, recognising that the ICRC could render great services in this respect, recommended that it step up its efforts to persuade States to incorporate international humanitarian law in their domestic law. The 26th International Conference of the Red Cross and Red Crescent, at which the great majority of States were represented, confirmed this recommendation by consensus.\textsuperscript{17} The ICRC accepted the challenge by setting up an Advisory Service to coordinate and promote such efforts, and to collect full documentation on domestic legislation adopted in this area. Since national measures generally involve several ministries (Justice, Education, Defence and Foreign Affairs), it was recommended that interministerial committees be formed, and several, some including representatives of National Red Cross and Red Crescent Societies, which have a role to play in this regard, have already been set up. In addition, the ICRC has taken the initiative, through its new-found Advisory Service, of convening a meeting of heads of existing or nascent national committees to share their experiences and make a preliminary assessment of the methods used.

The third aspect of the function of promotion worth mentioning is assistance in disseminating international humanitarian law. This is a treaty obligation for the States party to the Geneva Conventions, and also figures in the two Additional Protocols of 1977. It is therefore included in the national measures States have to take in peacetime, but deserves special mention because of the great efforts required and the vital importance this task has assumed.\textsuperscript{18}

Knowledge of international humanitarian law should have both an educational and a preventive effect. International humanitarian law will never be properly understood and assimilated without constant and thorough reflection. It seems essential that it be taught at universities, whether as a separate discipline complementing instruction in human rights or as part of the courses on international law. Humanitarian action, like some aspects of international humanitarian law, may and indeed should be discussed in other faculties – like those of medicine and

\textsuperscript{15} Yves Sandoz, “The International Committee of the Red Cross as a guardian of International Humanitarian Law, ICRC Resource Centre, 2006, for further details please visit: http://www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm

\textsuperscript{16} ibid.

\textsuperscript{17} http://www.loc.gov/rr/frd/Military_Law/pdf/RC_Jul-Aug-1995.pdf

\textsuperscript{18} http://www.ihl.org/ihl/Documents/e2c3a585-a190-4eaf-9665-37f7b692c01d.pdf
sociology, for example. The teaching of international humanitarian law at universities appears to be indispensable if future national leaders in government and other spheres are to be made aware of the implications.

Finally, it is obvious that the armed forces, which have primary responsibility for the application of international humanitarian law, must be taught the subject systematically. Here too the aim must be to create an impetus, to remind the States and the top level of the armed forces that they are bound by treaty to provide such teaching, and to convince them that it is in their own interest. The ICRC also provides for training in international humanitarian law for the rebel forces, and does all it can to get in touch with their leaders. Thus, training and dissemination account for much of the “promotion” aspect of the function of guardian of international humanitarian law.

Self Assessment Question

2) Discuss the role of the ICRC in promoting IHL.


14.5 THE “GUARDIAN ANGEL” FUNCTION

The Guardian Angel function means, as the phrase implies, watching over the law to protect it from those who may undermine or weaken it. This function though connected with the monitoring function and working to promote that activity, but it has certain characteristics of its own and needs constant attention.

For example, when the UN Convention on the Rights of the Child was being drafted, the proposed provisions concerning the protection of children in war fell short of those contained in the Geneva Conventions and the Protocols additional thereto. This inconsistency in the rules would certainly have weakened international humanitarian law, government delegates and the ICRC had to intervene to draw up an acceptable text and introduce a saving clause to safeguard the gains made by international humanitarian law.

Another example is offered by the Convention on the Safety of United Nations and Associated Personnel, drafted and adopted by the UN. Here too the idea was prompted by a real problem that certainly called for examination and discussion. Yet again, however, it was necessary to defend international humanitarian law, whose very basis might have been challenged. This body of law is of course founded on the idea of separating responsibilities relating to the underlying causes of a conflict from those relating to the conduct of hostilities. This

http://www.unhcr.org/3ae68cbe8.html


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fundamental distinction was threatened by the proposal to penalize all attacks on UN staff, notwithstanding the fact that UN or UN-authorised forces might be engaged in armed hostilities in accordance with Articles 42 ff. of the United Nations Charter. In such situations, penalising the soldiers of the country in which UN forces were deployed merely because they opposed those forces would discourage them from respecting international humanitarian law. It is therefore essential that the soldiers be judged for offences against the law and not for the political decisions of their leaders, for which they cannot be held responsible. A great deal of argument was necessary before this essential distinction was incorporated in the Convention.22

There have been many other cases in which the gains made by international humanitarian law have been in danger of being undercut, which usually, is true, on account of ignorance rather than malice. Take, for example, the concept of mercenaries in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989;23 or the International Law Commission’s concept of “serious” war crime, which threatened to weaken the very concept of “war crime”. These few examples serve to show that international humanitarian law is unfortunately still not fully understood even in the diplomatic circles that draw up rules overlapping its provisions. It is therefore in real need of a guardian angel that will fly to its rescue whenever necessary.

Self Assessment Question

3) Explain the “Guardian Angel” function of the ICRC.


14.6 THE DIRECT ACTION FUNCTION

Henry Dunant began by taking action on behalf of victims of conflict, and direct action to help them is still the ICRC’s top priority. The ICRC visits prisoners to ensure that they are detained in acceptable conditions and can communicate with their families, helps to care for the wounded, and endeavours to protect the entire civilian population from the effects of hostilities. This function has assumed vast proportions over recent years, ever since the Nigeria-Biafra war. The ICRC has consequently acquired considerable expertise in matters as diverse as aid to detainees, tracing the missing, war surgery, rehabilitation of amputees, public health, sanitation, nutrition and supply of safe water, not to speak of logistics, purchasing, transport and warehousing. Its experience has prompted it to think about emergency operations and their effects in the short and longer term not only on public health but also on the social and cultural fabric of the country concerned;

22 UN General Assembly, official documents: 44th session, Supplement No. 43 (A/44/43) and draft resolution A/C.6/44/L.10 adopted without a vote on 21 November 1989.

about taking preventive action during the conflict itself to ensure that the population does not become permanently dependent upon aid and to forestall an escalation of violence and hatred; and about the best ways of propagating the message of international humanitarian law both during war and peace.

International humanitarian law clearly sets out the rights and duties of parties to, and the victims of, armed conflicts. The duty of combatants is to spare the civilian population and the wounded, and to treat prisoners well. As for victims, they all have a right to humane treatment; the wounded are entitled to be cared for, prisoners to be detained in good conditions, and the population to enjoy the means essential to its survival. Therefore, the ICRC’s field operations are clearly part of its function as guardian of international humanitarian law, because their purpose is to ensure that its rules are applied in practice. The ICRC does this in two ways. The first is to draw the parties’ attention to their obligations as regards the treatment of victims and means and methods of waging war, and to point out any failure to observe these obligations. The second is to protect victims and give them direct assistance to remedy the inevitable shortcomings observed by the ICRC delegates in such circumstances.

The right to remind parties to an armed conflict of their obligations is conferred on the ICRC by international humanitarian law itself, and hence by all the States that drew up and adopted that law. It also gives the ICRC a right of initiative in taking any action it considers appropriate to help victims of conflict. Also it is very important that in a conflict situation the ICRC must restrict the scope of its message to international humanitarian law. The ICRC should stand apart from the political problems underlying the conflict to avoid a loss of confidence and credibility that would jeopardize dialogue and action aimed at promoting respect for humanitarian law.

The second aspect of direct action, that is, practical assistance to victims, involves highly complicated operations and raises problems in terms of choices and priorities. The ICRC needs to have an overall picture of all situations so that it can focus its efforts where they are most needed. Public opinion is influenced by situations given prominence by the media and governments are not unaware of this. The result is that some operations attract funds and a host of humanitarian organisations, some reliable and some less so, while others remain outside as a part of what has been called the “charity business”. It is therefore the ICRC’s duty to draw attention to operations that are no longer feature in the headlines, either because they are conducted in remote places or because they arise from situations that stagnate and fester with no newsworthy developments. Defending the forgotten victims of such situations is certainly one of the duties of a guardian of international humanitarian law which, indeed, has to extend its protection without discrimination to all those within its purview.

Thus, the ICRC has to assess all the parameters of situations that it obviously cannot handle unaided, so as to identify areas requiring the cooperation of other members of the International Red Cross and Red Crescent Movement; areas in which it has to rely on its own efforts; and lastly those in which it must operate

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24 Hans Haug, “Can the Red Cross contribute to safeguarding peace?” *IRRC*, No. 240, May-June 1984, pp. 127-139
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In close consultation with other organisations, governmental or non-governmental, so as to seek complementary action wherever necessary.27

14.7 THE WATCHDOG FUNCTION

The ICRC sees the work it does to encourage parties to armed conflict to comply with international humanitarian law as part of its “direct action” function. This work is indeed closely interrelated with field operations and the observations made during those operations. However, many examples show that, even when other players combine such encouragement with the direct ICRC action and complementary activities, there are still serious shortcomings and grave breaches of international humanitarian law. This is where the watchdog function comes in, as an alarm.28

Experience has led the ICRC to adopt a number of policy guidelines governing the manner in which it reacts to breaches of international humanitarian law. The ICRC’s only concern in relation to breaches of international humanitarian law is to take the most effective action possible – to do everything it can to spare the victims from having to suffer such breaches any longer. It is quite true that the best way of doing this is not necessarily to start with a public denunciation; but by establishing a dialogue with the parties concerned. It is also important to have reliable information before making accusations. The ICRC exercises this restraint because it wants to maintain its access to the victims. Making accusations before holding talks with the authorities, and, worse still, basing those accusations on unreliable information, would be a sure way of destroying the confidence of the authorities with which the ICRC has to work.29 Generally, therefore, only if its dialogue with the authorities remains fruitless does the ICRC appeal to the international community. Sometimes, of course, denouncing the authorities concerned involves the risk of ending the whole operation, either because the ICRC’s presence might be declared undesirable or because its delegates would no longer be safe. Therefore, the ICRC comes to a decision only once it has thoroughly reviewed and assessed the matter, the overriding consideration being the interests of the victims in the short term and thereafter.

Having taken the decision, the ICRC puts it into effect primarily on the basis of international humanitarian law, reminding all States party to the Geneva Conventions of their collective obligation to “ensure respect” for the Conventions30.

The persistence of certain violations of international humanitarian law is no longer the ICRC’s only or even its main reason for appealing to the international community. Indeed, the very wide media coverage of practically all conflicts means that very few violations remain hidden for long and a reaction from the ICRC is rarely called for. And yet there are situations in which it is simply no longer possible to conduct humanitarian activities in all or part of the territory affected by an armed conflict.

27 Ibid.
28 “Action by the International Committee of the Red Cross in the event of breaches of international humanitarian law”, IRRC, No. 221, March-April 1981, pp. 76-83.
30 Id.
Thus, it is no longer enough merely to inform; those concerned have to be placed squarely before their responsibilities. The watchdog must bark intelligently.

14.8 SUMMARY

- In this unit, we discussed the meaning role of ICRC in the area of IHL and how ICRC is the guardian of the IHL.
- We further discussed how it promotes IHL and disseminates the informational and knowledge about the IHL.

14.9 TERMINAL QUESTIONS

1) How the ICRC encourages States to ratify the Instrument?
2) Discuss the function of the ICRC in monitoring the development of IHL.

14.10 ANSWERS AND HINTS

Self Assessment Questions

1) Refer for Section 14.3
2) Refer for Section 14.4
3) Refer for Section 14.5

Terminal Questions

1) The States have to be encouraged to ratify the instruments they have drawn up at diplomatic conferences. Indeed, it is vital, especially where armed conflicts are concerned, that all parties should be governed by the same rules. Everything possible must therefore be done to ensure that the treaties of international humanitarian law are universally accepted, and that calls for a great deal of effort.

To start with, the reason for the existence of the rules, some of which are admittedly complicated, has to be explained repeatedly to members of parliament, ministers, top civil servants, high-ranking military officers and all the other officials who have to adopt the treaty or make recommendations in this respect. That means finding people in the countries concerned who are strongly in favour of the treaty and are prepared to defend it and keep drawing attention to its existence. But sometimes the question of ratification may have to be purely and simply rescued from oblivion. The international obligations of many countries are so extensive and complex that their overworked and understaffed civil services cannot cope with the paperwork.

2) This first function is a sensitive and complex one. Whenever there are serious and large-scale violations of international humanitarian law, the law itself tends to get the blame. Such violations should of course rouse the international community to action, but it is important to find out exactly where the problem lies rather than rushing headlong into changing the rules.
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14.11 REFERENCES AND SUGGESTED READINGS

1) David P Forsythe, ‘Humanitarians- The International Committee of the Red Cross’.


6) Leslie C. Green, “The Contemporary Law of Armed Conflict.”