THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND ITS MANDATE TO PROTECT AND ASSIST: LAW AND PRACTICE

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ABSTRACT

It is 150 years since the establishment of the International Committee of the Red Cross (ICRC), following Henry Dunant's experiences during the aftermath of the Battle of Solferino. It is 100 years since the commencement of the Great War: if we think about a 'traditional' battlefield, what images come to mind? Perhaps one imagines soldiers in uniform, tanks, guns and trenches. Do the emblems of the International Red Cross and Red Crescent Movement (IRCRCM) feature in the imagined conflict scenario? Now imagine the conflicts happening today in, for example, Syria, Mali, Democratic Republic of Congo (DRC) and Ukraine. In these conflicts, soldiers mingle with civilians in towns, armoured vehicles and open backed trucks transport non- uniformed soldiers between conflict areas and weapons include, amongst others, improvised explosive devices, suicide bombers and sexual violence. Nevertheless the emblems of the IRCRCM continue to emblazon the uniforms of medical personnel and their equipment, vehicles and aid boxes.

What consequences do the changes in the nature of armed conflicts have for the ICRC? The human consequences of conflict and the presence of the ICRC has been a constant for 150 years, but the needs of the population and the types of violence continually change. Indeed, since the creation of the ICRC in 1863, the methods, means and actors in conflicts have changed, but so has the practice of the ICRC. This thesis considers the legality of such developments. The ICRC is, perhaps most significantly, the self-entitled, 'guardian' of international humanitarian law (IHL) and a neutral and independent entity.[1]

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1 Sandoz Y, 'The International Committee of the Red Cross as Guardian of International Humanitarian Law' (*ICRC*, 31 December 1998)

This thesis considers the activities currently undertaken by the ICRC in the name of 'humanitarianism'. It addresses whether a strict interpretation of the Geneva Conventions I, II, III and IV 1949, Additional Protocols I and II and Statutes of the ICRC would show that it is, as an organisation, usurping its mandate and principles.[2] It also takes into account the 'ICRC Study on Customary IHL'.[3]

The thesis examines the issue of whether the ICRC is an organisation with International Legal Personality (ILP) and, if so, whether it has legitimately extended its role beyond that provided in the Geneva Conventions I, II, III and IV 1949, Additional Protocols I and II and the Statutes of the IRCRCM. More broadly therefore the thesis examines the relationship between the ICRC and international law, including IHL, *jus ad bellum* and international human rights law (IHRL). One unique contribution made by this thesis is to undertake a substantial analysis of the meaning and implementation of humanity, which is a principle of the IRCRCM.

The IRCRCM definition of the principle of humanity is:

<www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm> accessed 31 July 2014.

[2] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, 75 UNTS 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949, 75 UNTS 85; Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, 75 UNTS 135; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, (Protocol I), 8 June 1977, 1125 UNTS 3 (Additional Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609 (Additional Protocol II); Statutes of the ICRC, 3 October 2013 (The present Statutes replace the Statutes of the International Committee of the Red Cross of 21 June 1973, revised on 20 July 1998 and 8 May 2003) (Statutes of the ICRC).

[3] Henckaerts J-M and Doswald-Beck L, *Customary International Humanitarian Law: Volume 1 Rules* (CUP 2005).

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 human life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all people.[4]

Chapter five of the thesis shows that emerging concepts in the latter part of the twentieth century, in particular sovereignty as responsibility, human security and the Responsibility to Protect (RtoP), are indicative of a development within the international community which identified the plight of individuals within sovereign States as relevant to the international community at large. In particular, the 'humanity' and humanitarian needs of people living within states, in particular during and after conflict, became part of international discourse. Humanitarian assistance is no longer restricted to the provision of aid to soldiers.

The idea of inhumanity in internal armed conflicts also gained traction on the international stage.[5] It is evident from recent conflicts such as Libya, Syria and Ukraine that international willingness and ability to respond to such situations varies considerably.[6] This thesis, therefore, considers whether the ICRC is able

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[4] Statutes of the International Red Cross and Red Crescent Movement were adopted by consensus at the Twenty- fifth International Conference of the Red Cross, meeting in Geneva in October 1986 (Statutes of the IRCRCM) and contain a definition of humanity.

[5] Additional Protocol II.

[6] UNSC Res 1970 (26 February 2011) Peace and Security in Africa. UNSC Res 1973 (17 March 2011) The Situation in Libya; Letter dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security

to reach people on the ground in a way that more politicised actors, such as the UN, are not. It considers whether there is a case to be made for a humanitarian approach to protection during, and after, armed conflict? Is the ICRC capable of reaching individuals and communities in a promising and effective way? Has the ICRC had to adapt its humanitarian assistance and protection roles to adequately respond to the changing nature of armed conflicts? These questions permeate the analysis of the mandate of the ICRC and its current work, which is undertaken throughout this thesis.

Critically, this thesis dedicates a chapter to analyse what 'humanity' means today. In much literature humanity is considered in terms of IHL, which, it is argued, provides a limited definition of such.[7] Likewise, much literature on the ICRC centre's on its links to IHL. The ICRC often forms a subsection of a chapter on IHL or is viewed through the lens of IHL.[8] This thesis goes further than traditional accounts of the ICRC, as it presents the ICRC as key actor in the long-term protection and assistance of individuals and communities suffering through and trying to recover from armed conflict. It addresses the question of how to interpret 'humanity' and whether, perhaps, there is a case to argue that it can and should be interpreted more broadly, given the influx of human focused concepts to emerge since the end of the Second World War. This thesis focuses on sovereignty as responsibility, human security and

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Council (28 February 2014) UN Doc S/2014/136; SC Res 2166 (21 July 2014) Ukraine; SC Res 2191 (17 December 2014) Syria.

[7] Solis G, *The Law of Armed Conflict: International Humanitarian Law in War* (CUP 2010); Fleck D, *The Handbook of International Humanitarian Law* (OUP 2008); Dinstein Y, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP 2010); Teitel RG, *Humanity's Law* (OUP 2011).

[8] See ibid.

Responsibility to Protect (RtoP) as key examples of such, as they all relate to humanitarianism. Their specific links are considered in detail in chapter five.

Teitel published 'Humanity's Law' in 2011 which reflects on issues similar to those contained in this thesis. However, much of Teitel's analysis remains grounded in 'black-letter' law, whereas this thesis is taking a socio-legal approach and focuses on the law and practice of the ICRC. Humanity's Law, as a concept, is very close to this Author's interpretation and understanding of international law and the international legal order, and, as such, it is imperative to refer, throughout the thesis, to ideas put forward in 'Humanity's Law'. In terms of existing literature and academic argument on the matter of 'humanity', Teitel provides a comprehensive analysis of case law and theory. In addition much literature on the ICRC dedicates a passing comment to the Principles of the IRCRCM, which include 'humanity'.[9]

Sovereignty as responsibility, human security and RtoP are reflective of a shift away from a state-centric model of the international legal order. There is increasing awareness and political will in terms of the plight of vulnerable populations in need. The key for this thesis is whether the ICRC mandate and practice are reflective of the developing notions of humanity, that is, is the ICRC 'buying in' to security or interventionist interpretations of humanity? Or, which would be a much more daring conclusion to draw, is the ICRC actually 'feeding' the development of 'humanity' as a concept which is, in turn, permeating international legal discourse more broadly?

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[9] Statutes of the International Red Cross and Red Crescent Movement were adopted by consensus at the Twenty-fifth International Conference of the Red Cross, meeting in Geneva in October 1986.

The traditional theory of human security, as proposed by the United Nations Development Programme in 1994, considered economic, food, health, environmental, personal, community and political security to be of consequence to the people living in conflict and other insecure environments.[10] These types of security were seldom prioritised in traditional security paradigms, which focused on national security. This thesis considers human security to be of continuing importance to people on the ground during and after armed conflict and other situations of violence. For people trying to rebuild their lives, family life, food, health and community security are as important, if not more important, than the maintenance of territorial borders. In this regard, it considers the work of the Economic Security (EcoSec) Unit, which assesses needs at household level in order to obtain first-hand local information.

This thesis required the undertaking of interviews with ICRC delegates at the headquarters in Geneva. The literature in this area is somewhat limited and that which is produced comes predominantly from the ICRC. It was necessary therefore to undertake empirical research to provide an original contribution to research in this field and to comprehensively address the research questions of this thesis. Finally, this thesis uses a case study of the ongoing conflict in the DRC to examine the activities of the ICRC and shows how, and to what extent, the changes within the ICRC practice are impacting people on the ground. The case study was also informed by the interviews.

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[10] UNDP, *Human Development Report 1994* (UNDP, OUP 1994).

ACKNOWLEDGEMENTS

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ABBREVIATIONS

Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, (Protocol I), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609
ALC	Armée de Libération du Congo
ANC	Armée Nationale Congolaise
ANT	Armée Nationale Tchadienne (Chad National Army)
CESCR	Committee on Economic, Social and Cultural Rights
CNDP	National Congress for the Defence of the People
DRC	Democratic Republic of Congo
ECOSOC	Economic and Social Council
ECOWAS	Economic Community Of West African States
EU	European Union
FAA	Angolan Armed Forces
FAB	Forces Armées Burundaises
FAC	Forces Armees Congolaises
FARDC	Forces Armées de la République Démocratique du Congo
FDLR	Democratic Forces for the Liberation of Rwanda
Geneva Convention I	Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31
Geneva Convention II	Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85
Geneva Convention III	Convention (III) relative to the Treatment of Prisoners of War. Geneva, (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135
Geneva Convention IV	Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287

HDR	Human Development Report
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
ICESCR	International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3
ICISS	International Commission on Intervention and State Sovereignty 2001
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Person
IFRC	International Federation of Red Cross and Red Crescent Societies
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
ILP	International Legal Personality
INTELSAT	International Telecommunications Satellite Organisations
IRCRCM	International Red Cross and Red Crescent Movement
IRRC	International Review of the Red Cross
MEI	Micro-economic Initiative
MLC	Movement for the Liberation of Congo
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
NGO	Non-Governmental Organisation
NSA	Non-State Actor
OAU	Organisation for African Union
OECD	Organisation for Economic Co-operation and Development
OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
RCD	Rally for Congolese Dialogue

RPF	Rwandan Patriotic Front
RtoP	Responsibility to Protect
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration on Human Rights (adopted 10 December 1948 UNGA Res 217 A(III))
UN	United Nations
UN Charter	United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCHR	United Nations High Commissioner for Human Rights
UNSCR	United Nations Security Council Resolution
UNTFHS	United Nations Trust Fund for Human Security
UPDF	Uganda People's Defence Force

INTRODUCTION

    a) **The Day-to-Day Impact of Armed Conflict on Local People and Communities**

In armed conflicts today, individuals, villages, religious and other groups, within the same local community, take up arms to fight against each other. Nowadays conflicts increasingly continue for months, years, and even decades and have consequences that reach far beyond the battlefield. Protracted armed conflict tears the social fabric between communities and, until it can be repaired, feelings of resentment and fear continue to permeate the delicate balance between war and peace.[1] Recent and ongoing conflicts in, for example, the DRC, Syria and the Ukraine, have a myriad of different causes, from ethnic rivalries, to the extremes of poverty and wealth, dictatorship and religious rifts.[2] The days of battlefield conflicts where soldiers, their weapons and equipment fought away from civilians are gone. The 'end' to the battle was traditionally signified physically on the battlefield or through a declaration of peace by the government of each warring state. The human effects of conflict are, today, more pronounced than ever.

The birth of the Red Cross in 1863 was galvanised by the 'desire to bring assistance without discrimination to the wounded on the battlefield' and 'to

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[1] Call CT (ed), *Building States to Build Peace* (International Peace Institute, Lynne Rienner Publishers Inc. 2008) 1.

[2] The situations in the DRC, Ukraine and Syria are complex and continually evolving, reputable news sites such a Reuters (http://uk.reuters.com/search?blob=syria) provide up to date reports; For information on current armed conflicts see 'Global Peace Index 2014: Measuring Peace and Assessing Country Risk' (Institute for Economics and Peace) <http://www.visionofhumanity.org/sites/default/files/2014%20Global%20Peace%20Index%20REPORT.pdf> accessed 4 January 2015- 'The index gauges global peace using three broad themes: the level of safety and security in society; the extent of domestic or international conflict; and the degree of militarisation'.

prevent and alleviate human suffering wherever it may be found'.[3] The changing nature of conflict has forced the International Committee of the Red Cross (ICRC) to adapt its protection and assistance roles to respond to the human needs on the ground. In the Democratic Republic of Congo (DRC), for example, which is the case study in this thesis, the ICRC currently promotes respect for international humanitarian law (IHL) in the treatment of civilians and detainees and helps those adversely affected by conflict and internal violence to survive and become self-sufficient. It also improves water supply and sanitation, strengthens health care for the wounded and sick, including victims of sexual violence, and reunites families.[4]

In today's increasingly non-international armed conflicts (NIACs), the people involved in the fighting also live amongst the civilian population. The sight of 'perpetrators' of violence walking the streets is not unusual, neighbours become threats and the 'danger' is within, rather than outside, the local community.[5] In a personal interview with a woman whose sons were disappeared in the town of Granada, Colombia, Romero wrote her story: 'I came from church and they killed a girl in the street. The killer said to me: "pretend that nothing happened". And I did exactly that: I walked over the corpse and I went home, with pain in my soul and immense fear, but I just walked away from that place'.[6] When conflicts occur within States experiences

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[3] Durand A, *The International Committee of the Red Cross: From Sarajevo to Hiroshima* (ICRC, Geneva 1981) 55; See also Coupland R, 'Humanity: What is it and How Does it Influence International Law?' (2001) 83 IRRC 969.

[4] 'The ICRC in DR Congo' (ICRC) <www.icrc.org/eng/where-we-work/africa/congo-kinshasa/index.jsp> accessed 15 May 2014.

[5] Romero GR, 'Voices Around Us: Memory and Community Empowerment in Reconstruction Efforts in Colombia' (2012) 6 The Intl J of Transitional Justice 1, 5.

[6] ibid.

like these are not unusual; insecurity permeates every waking moment of people's daily lives and they live with the fear and possibility of conflict recurring in these circumstances. The inability or unwillingness of the State to provide for basic human needs and take steps to build sustainable peace preclude the realisation of human security in the day-to-day lives of people on the ground.

Unfortunately, current international responses fail to adequately address insecurity at ground level, for people living through and after the conflict. In fact, despite the proliferation of so-called peace building mandates operationalised by the UN, States that do not return to conflict 'have suffered extremely high rates of "violent crime", with people forced to endure levels of insecurity exceeding those in many officially designated conflict zones'.[7] The physical effects of conflicts, such as the destruction of schools, hospitals, bridges and so on, force people to live without running water, mains electricity, and access to basic social services and supply of basic goods.[8] These consequences leave people unable to provide for their families and children. In these circumstances the desperate need for 'normality' saturates every day life. In addition, weak or non-existent government institutions compound economic distress, a culture of impunity and a breakdown in the rule of law. Worryingly some estimates are that half of all 'post-conflict' countries return to war within five years.[9]

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[7] Jenkins R, *Peace Building: From Concept to Commission* (Routledge, London 2013) 1.

[8] Paris R, *At War's End: Building Peace after Civil Conflict* (CUP, 2004) 3.

[9] Collier PA and Söderbom M, 'Working Paper produced by the Centre for the Study of African Economics' (Department of Economics, Oxford University) WPS/2006-12, August 17 in Call T and Cousens EM, 'Ending Wars and Building Peace: International Responses to War Torn Societies' (2008) 9 Intl Studies Perspectives 1, 5.

The activities that can be undertaken by the ICRC are defined in Common Article 3, Article 9 Geneva Conventions I, II and III 1949 and Article 10 Geneva Convention IV 1949. Under Common Article 3 (2) Geneva Conventions I, II, III and IV 1949 'an impartial humanitarian body, such as the International Committee of the Red Cross, may *offer its services* to the Parties to the conflict'.[10] In addition, Article 18 AP II contains specific roles for relief societies and relief actions.[11]

Articles 9, 9, 9 and 10 Geneva Conventions 1949, which concern international armed conflicts, state that:

> The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organisation may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, and for their relief.

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[10] Emphasis added.

[11] AP II art 18 on Relief societies and relief actions states that 1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.

2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

In addition, under the Statutes of the IRCRCM, the ICRC may undertake humanitarian initiative as a neutral intermediary.[12] The relationship between these two 'mandates' is considered in detail in chapters one and two of the thesis, which informs analysis of the mandate throughout later chapters of the thesis. The Statutes of the IRCRCM, broadly speaking, provide the ICRC with a mandate to act in situations not amounting to armed conflict, that is, situations outside of the threshold for IHL. Finally, the 'right' to undertake its mandate in a given State is provided for in Headquarters Agreements, which the ICRC negotiates and agrees on an individual and confidential basis with each host State.[13] The process of adopting the Headquarters Agreements and their content is discussed in chapters one and two. The essential elements of these agreements are also considered in chapter one.

In addition to its mandate to act in certain circumstances and undertake specific humanitarian activities, the ICRC is guided by the Fundamental Principles of the IRCRCM. They include humanity, impartiality, neutrality, independence, voluntary service, unity and universality. Humanity and impartiality form the 'core' of the ICRC, that is, they aim to bring humanity to those affected by armed conflict and they do so for anyone who needs help. The principles of neutrality and independence are 'tools' to secure host State consent to their presence and work.

The thesis shows that 'humanity' features in a number of concepts that emerged in the latter part of the twentieth century and considers whether the

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[12] Statutes of the IRCRCM.

[13] For example, 'Agreement between the International Committee of the Red Cross and the Swiss Federal Council to Determine the Legal Status of the Committee in Switzerland' (1993) 293 IRRC 152, arts 1, 3, 4 and 5 (Headquarters Agreement 1993).

ICRC is guided by such developments, that is, whether its interpretation of its mandate appears to reflect a broader concept of humanity, that is, outside of armed conflicts. Or perhaps, but this may be stretching the analysis too far, whether the ICRC has actually driven 'humanitarian' developments on the international stage. To this end, chapter four of the thesis focuses specifically on sovereignty as responsibility, human security and the Responsibility to Protect (RtoP). Each is a concept that gained traction following the atrocities in Srebrenica and Rwanda and, this Author argues, contains 'human-centric' ideals, premised on the concept of humanity.[14]

The theory of human security broadly understood encompasses the protection of the individual from threats that may be external or internal, emanating from the State or its absence (failed State), man-made or caused by nature. The 'Outcome Document 2005' defined human security as 'the right of people to live in freedom and dignity, free from poverty and despair. We recognise that all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential'.[15] The 'Common Understanding Resolution' shows acceptance by the international community of human security.[16]

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[14] Wagner S, 'Identifying Srebrenica's Missing: The "Shaky Balance" of Universalism and Particularism' in Hinton AL, Burnet JE, Babchuk WA, *Genocide, Political Violence, Human Rights : Transitional Justice : Global Mechanisms and Local Realities after Genocide and Mass Violence* (Rutgers University Press, 2010). The collection also contains a number of chapters on Rwanda.

[15] UNDP, *Human Development Report 1994* (UNDP, OUP 1994); See also UNGA, '2005 World Summit Outcome' (15 September 2005) A/60/L.1 (Outcome Document) para 143; Report of the Secretary General, 'Follow-up to General Assembly Resolution 66/290 on Human Security' (23 December 2012) UN Doc A/68/685 para 4.

[16] Report of the Secretary General, 'Follow-up to General Assembly Resolution 66/290 on Human Security' (23 December 2012) UN Doc A/68/685 para 4 (Common Understanding).

There are two concepts of human security, in terms of the list of threats that constitute a threat to security; the broad and the narrow concept. Newman argued that 'through a broad human security lens, anything that presents a critical threat to life and livelihood is a security threat, whatever the source'.[17] In fact, the broad theory of human security is often criticised for its inability to define specific threats, as it aims to protect people from critical 'life-threatening dangers, regardless of whether the threats are rooted in anthropological activities or natural events, whether they lie within or outside States, and whether they are direct or structural'.[18]

The narrow, or minimalist, theory of human security is enunciated most obviously in the Human Security Centre 'Human Security Report 2005', which abbreviated human security to the discourses of political violence, by the State or any other organised political actor.[19] The Human Security Centre maps trends in political violence, which includes 'torture; extrajudicial, arbitrary and summary executions; the "disappearance" of dissidents; the use of death squads; and incarceration without trial'.[20] The narrow approach focuses on violent threats whereas the broad approach looks at insecurity independent of the source. Owen argued that narrow proponents have to realise that security is about more than the mere absence of a violent threat and broad proponents

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[17] Newman E, 'Critical Human Security Studies' (2010) 36 Rev of Intl Studies 77, 82.

[18] Thakur R and Newman E (eds), *Broadening Asia's Security and Discourse Agenda* (UN UP, Tokyo 2004) 347.

[19] Human Security Centre, *Human Security Report 2005: War and Peace in the Twenty-first Century* (OUP 2005) 17-54 (Human Security Report 2005); Roberts D, *Global Governance and Bio Politics: Regulating Human Security* (Zed Books, London 2010) 18.

[20] Human Security Report 2005 (n 19) 64.

have to see not all development concerns constitute a threat to human security.[21]

Imagine a village where different ethnic, religious and cultural communities live together under a central governmental authority. Over time rivalries and divides develop into tensions and eventually armed conflict. If an international organisation were to enter the conflict, identify the leaders of the warring factions and establish them as political groups, set up elections to choose one of those people to run the State and encourage all of the villagers to queue alongside recent rivals and vote for one of them. Is this truly addressing the root causes of the conflict? Is it likely to prevent the recurrence of hostilities?

The outcome of the elections would be an identifiable leader and a basis from which to build State institutions, but on the ground, within the community, but would there be any difference in feelings towards one another? It is argued that the approach to post-conflict reconstruction outlined above is commonplace in the United Nations (UN), in particular, as a peace building strategy.[22] As a neutral, impartial and independent actor, the ICRC would not be directly

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[21] Owen T, 'Human Security-Conflict, Critique and Consensus: Colloquium Remarks and a Proposal for a Threshold-Based Definition' (2004) 35(3) Security Dialogue 373, 378.

[22] Brahimi L (Chairman of the Panel on United Nations Peace Operations), 'Report of the Panel on United Nations Peace Operations' (21 August 2000) UN Doc A/55/305–S/2000/809 (Brahimi Report 2000); Report of the Secretary General, 'No Exit without Strategy: Security Council Decision-making and the Closure or Transition of United Nations Peacekeeping Operations' (20 April 2001) UN Doc S/2001/ 394 (No Exit Without Strategy); Barnett M, Kim H, O'Donnell M, and Sitea L, 'Peace Building: What is in a Name?' (2007) 13(1) Global Governance 44; Call CT (ed), *Building States to Build Peace* (International Peace Institute, Lynne Rienner Publishers Inc. 2008); Chetail V (ed), *Post-conflict Peace Building: A Lexicon* (OUP 2009); Truger A, 'Operationalisation through Training: Human Security Training and Education for Peace Building' in Benedek W, Ketteman MC and Möstl M (eds), *Mainstreaming Human Security in Peace Operations and Crisis Management: Policies, Problems, Potential* (Routledge, London 2011); Jenkins R, *Peace Building: From Concept to Commission* (Routledge, London 2013); See also Galtung J, *There are Alternatives! Four Roads to Peace and Security* (Spokesman, Nottingham 1984); See also Cockell JG, 'Conceptualising Peace Building: Human Security and Sustainable Peace' in Pugh M (ed), *Regeneration of War-Torn Societies* (Macmillan Press Ltd, London 2000).

involved in peace building per se.[23] Anecdotally, this author was informed that, on the ground, the ICRC would, at a push, advocate for elections, as in Central African Republic and Syria. It may also call for peace, as in Gaza 2014 when it demanded that the killing was stopped.[24] This Author does not pretend to have a solution to political approaches to conflict resolution, nor is this thesis aiming to find a solution to sustainable peace, but this thesis shows the increasing importance of humanitarian agencies, in this case the ICRC, to contribute to the humanity, dignity and security of individuals and communities enduring and recovering from conflict.

The scenario outlined above focuses on State building after conflict, but human security is much broader. It encompasses economic, food, health, environmental, personal, community and political security.[25] Moreover, human security priorities, whether economic, community, health and so on must be context specific. Perhaps for some communities safe drinking water and food security is a priority; for others, a school where their children can be educated side by side, and perhaps grow up to be more tolerant; for others healthcare, especially mental health, for those suffering post conflict trauma, would be the best use of resources and provide the best platform to address the root causes of conflict and prevent future recurrence of hostilities.

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[23] This was clear from the interviews undertaken in Geneva 2014. Their key contribution to the thesis is included in chapters five, six and the Case Study.

[24] Jacques de Maio, 'Palestinians' Anger at Red Cross in Gaza is Misplaced but Understandable' (25 July 2014) http://www.theguardian.com/commentisfree/2014/jul/25/palestinian-anger-red-cross-gaza-humanitarian-icrc-conflict accessed 21 February 2015.

[25] UNDP, *Human Development Report 1994* (UNDP, OUP 1994); See also UNGA, '2005 World Summit Outcome' (15 September 2005) A/60/L.1 (Outcome Document) para 143; Common Understandin (n 15) para 4.

If we take the 2011 conflict in Libya as an example, the perceived security threat by the UN was political insecurity, which is just one aspect of human security. The UN intervention supported Libya's Transitional Council and armed different rebel groups, in an attempt to build political security.[26] Libya continues to be 'engaged in what is called a tribal war and the political insecurity has been replaced by personal and communal insecurities. To ordinary Libyan citizens the security threat has merely changed in the sense that it used to come from the State and now it also comes from Non-State Actors (NSAs).[27] The changing nature of armed conflict and the adequacy of international responses both during and after conflicts, to establish and maintain peace and security, is evidently an ongoing challenge on the international stage today.

This thesis examines the potential of the ICRC, as a humanitarian actor, that is present during and after conflicts, to contribute to the establishment of human security and sustainable peace on the ground for the local communities and individuals wanting and trying to recover from conflicts.

b) Central Argument and Research Questions

This research focuses on the ICRC, as it is a unique international actor with its own history, organisational structure and legal framework. The ICRC has a mandate to provide protection and assistance to victims of armed conflict. Protection refers to its work: visiting people deprived of their liberty; its work

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[26] Power S, 'The Role of the National Transitional Council in the Economic Reconstruction of Libya-Some Legal Challenges' (2012) 1 Socio-Legal Studies Review 115, 115-39.

[27] Noortman M, 'Human Securities, International Laws and Non-State Actors: Bringing Complexity Back In' in Ryngaert C and Noortman M, *Human Security and International Law: The Challenge of Non-State Actors* (Intersentia, Cambridge 2014) 19; DeYoung K, 'Fighting in Libya Threatens Western Efforts to Help its Democracy' (*The Washington Post*, 30 July 2014).

on behalf of civilian victims and the restoration of family links during and after conflict. Assistance, on the other hand, refers to the provision of humanitarian aid to 'various categories' of victims. The ICRC has undertaken increasing roles within States and the protracted nature of many current armed conflicts has necessitated the development of activities and projects that address the ongoing needs of civilians and those involved in conflicts. This means, for example, that, instead of the ICRC providing food parcels, the ICRC is now facilitating farming project,[28] so that food production within a given community is sustainable, both during and after conflict.[29] The specifics of such projects will be examined in chapter six and the case study. They are by no means indicative of projects being undertaken in every situation that the ICRC has a presence in but are, nevertheless, specific examples of the changes in the work of the ICRC since the drafting of the Geneva Conventions I, II, III and IV 1949.

The overall thesis is that the ICRC has continued to develop its roles on the international stage and within States, in light of the changing nature of conflict. The core thread of analysis running throughout the thesis is that of the mandate of the ICRC. What is it? Where is it found? Who may interpret it? How is it currently being interpreted? Does the work undertaken by the ICRC reflect a narrow or broad interpretation of its mandate? The protection and assistance

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[28] --, 'Central African Republic: ICRC Boosts Farming in West of Country' (14 June 2014) News Release 14/103 <https://www.icrc.org/eng/resources/documents/news-release/2014/06-14-central-african-republic-farming-west.htm> accessed 3 January 2015; Satur C Ocampo, 'Relinking with ICRC at Ground Level' (The Phillipine Star, 1 June 2013) <http://www.philstar.com/opinion/2013/06/01/948687/relinking-icrc> accessed 4 January 2014; --, 'How the Red Cross and Somali Red Crescent are Fighting Famine' (25 July 2011) <http://blogs.redcross.org.uk/emergencies/2011/07/red-cross-somalia-red-crescent-famine/> accessed 3 January 2015.

[29] Ratner SR, 'Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War' (2011) 22(2) Eur J Intl L 459, 460.

work of the ICRC is provided for by its mandate but the question for this thesis is whether, and the extent to which, the ICRC is extending its work beyond the activities anticipated by the drafters of the Geneva Conventions I, II, III and IV 1949 and Statutes of the International Red Cross and Red Crescent Movement (Statutes IRCRCM).[30] The ICRC Statutes are adopted at the International Conference of the Red Cross and Red Crescent, which takes place every four years, between State parties to the Geneva Conventions I, II, III and IV 1949 and components of the International Red Cross and Red Crescent Movement (IRCRCM), including the ICRC, International Federation of Red Cross and Red Crescent Societies (IFRC) and National Societies.

The law and practice relevant to each component of the IRCRCM is explored in chapter one. In addition the thesis considers the purpose and relevance of headquarters agreements for the mandate of the ICRC.

It follows from the introductory remarks that the primary or 'meta' research question asks:

To what extent the protection and assistance activities of the ICRC have expanded beyond those provided for in the mandate of the ICRC, contained in the Geneva Conventions I, II, III and IV 1949 and Statutes of the IRCRCM?

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[30] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, (adopted 12 August 1949, entered into force 21 October 1950) art 9 (Geneva Convention I); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, (adopted 12 August 1949, entered into force 21 October 1950) art 9 (Geneva Convention II); Convention (III) relative to the Treatment of Prisoners of War. Geneva, (adopted 12 August 1949, entered into force 21 October 1950) art 9 (Geneva Convention III); Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, (adopted 12 August 1949, entered into force 21 October 1950) art 10 (Geneva Convention IV); Statutes of the ICRC, 3 October 2013 (The present Statutes replace the Statutes of the International Committee of the Red Cross of 21 June 1973, revised on 20 July 1998 and 8 May 2003) (Statutes of the ICRC) art 4.

This opens up a number of sub-questions that ask:

- Whether there is a disjunction between the legal mandate that the ICRC has and the way that it operates in practice?

- Whether the ICRC is an organisation with international legal personality (ILP)?

−To what extent the developments in IHL and International Human Rights Law (IHRL), since the drafting of the Geneva Conventions I, II, III and IV 1949, have affected the ICRC and its place within general international law?

−To what extent the definition of humanity has developed beyond a recognised principle behind IHL? In particular whether significant developments in the latter part of the twentieth century including sovereignty as responsibility, human security and Responsibility to Protect (RtoP) have informed the mandate and practice of the ICRC?

- Whether the ICRC's reputation for neutrality and independence is, or may become, compromised if the ICRC continues to develop its activities into a broader concept of humanity? And, if so, whether it is possible that States will choose to deny access to the ICRC.

c) Methodology

This research presents an objective legal analysis of the ICRC as an organisation and an ILP. It also makes an original academic contribution to the understanding of its mandate and current practice in armed conflicts and other situations of violence. This includes the post-conflict or recovery phase. This

thesis deploys a combination of research methods, including doctrinal, theoretical and empirical methods to answer the research questions above. The empirical methods, specifically, are interviews with ICRC delegates who currently work at the Geneva based headquarters but who have experience in the field. The recruitment, interviewing and analysis methodology is outlined later in the methodology.

Generally speaking, doctrinal research answers the 'what is law?' question. It analyses the black-letter law from a positivist perspective and considered the legal rules and principles without ethical or moral analysis.[31] McConville and Chui argue that as 'doctrinal law is based on authority and hierarchy'; 'statements of what the law is will be based on primary authority: that is, either legislation or case law'.[32] In international law the primary authorities are treaties, customary international law and the decisions of international courts.[33] They also include 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law'.[34] For positivists, international law is no more or less than the rules to which States have agreed through treaties, custom, and perhaps other forms of consent.[35] This research looked specifically at the

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[31] McCoubrey H and White ND, *Textbook on Jurisprudence* (2nd edn, Black Stone Press, London 1996) in Ratner SR and Slaughter AM, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 AJIL 291, 293.

[32] McConville M and Chui WH, *Research Methods for Law* (Edinburgh UP 2007) 23.

[33] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCIO 355, arts 38 (1) (a)-(c).

[34] ibid art 38(1)(d).

[35] Tucker RW (ed) (1966) 'Hans Kelsen Principles of International Law' 438-39 in Ratner SR and Slaughter AM, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 AJIL 291, 293.

Geneva Conventions I, II, III and IV 1949, Additional Protocols and Statutes of the IRCRCM and Statutes of the ICRC.

It is argued that the Geneva Conventions I, II, III and IV 1949 and Statutes of the IRCRCM should be understood as living instruments, designed to allow the ICRC to respond to the humanitarian needs on the ground in different situations. Indeed the adoption of Additional Protocols I and II 1977 and the publication of the 'ICRC Study on Customary IHL' is evidence of the necessity of interpreting and developing the law in relation to the needs on the ground.[36] To this end, this research also considers how the law works in practice. If the ICRC was caught in the vision of armed conflict and the idea of protection and assistance as defined in 1949 there would be many people living in insecurity, without their basic human needs being met, the world over. The extent to which the ICRC can expand its powers before it is usurping its mandate to satisfy humanitarian needs is questioned throughout this thesis.

From the outset this Author considered Slaughter and Ratners proposition that methods can 'conceptualise law primarily as a body of rules' or a 'dynamic set of processes'.[37] Slaughter and Ratner go on to state that 'other ways of addressing this question include ontological versus purposive inquiries, that is, what law *is* versus what it is *for'*.[38] In addition to doctrinal analysis of existing laws, therefore, this thesis also considers the theoretical and conceptual basis of human security. The key documents considered in this thesis are the Human Development Report 1994 (HDR 1994), the World Summit Outcome

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[36] Henckaerts J-M and Doswald-Beck L, *Customary International Humanitarian Law: Volume 1 Rules* (CUP 2005).

[37] Slaughter AM and Ratner SR, 'The Method is the Message' (1999) 93(2) AJIL 410, 410.

[38] ibid.

Document 2005 (Outcome Document) and the 'Follow-up to General Assembly Resolution 66/290 on Human Security' which contains the 'Common Understanding' (Common Understanding Resolution) on human security.[39] This Author considers human security to be an overarching, or perhaps underpinning, value of the international community. As a concept, human security encapsulates much of the commonalities between existing legal frameworks, notably IHL and IHRL. This relationship is explored in chapters three and four.

The ICRC has the mandate to undertake humanitarian assistance and protection, especially in conflict and post-conflict situations, and therefore, looking at a humanitarian approach to existing fields of work will add to the literature on humanity in a critical and progressive way. The utility of the theory of humanity will therefore be assessed throughout this thesis, in particular, the role of the ICRC in the creation of human security on the ground.

The doctrinal research method and consideration of humanity in theory would not be sufficient to consider the law in context or the realities on the ground for the ICRC in the armed conflict situations described earlier in this introduction. Banakar and Travers argue that it is important to see the law as adaptable and as part of the wider social, economic and political structures in which it operates.[40] To this end, this Author purposefully chose to include qualitative methods in the undertaking of this thesis, as existing literature on the ICRC remains very limited, unless the ICRC publishes it. This research was designed

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[39] Human Development Report 1994 (n 25); Outcome Document (n 25) para 143; Common Understanding (n 25) para 4.

[40] Banakar R and Travers M (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005) xi.

to identify critique and analyse the mandate of the ICRC. This includes how that mandate is interpreted and applied on the ground by ICRC delegates, to this end; qualitative research is the most appropriate method of research. Qualitative research 'is a situated activity that locates the observer in the world… qualitative researchers study things in their natural settings, attempting to make sense of, or interpret, phenomena in terms of the meanings people bring to them'.[41]

This research examines what the 'law in context' or 'law in action' looks like.[42] It uses qualitative interviews with ICRC headquarters delegates to discover the 'gap' between the law and actual practice on the ground. The interviews not only add a unique insight to the thesis but also provide context and real-life experiences to the doctrinal and theoretical research earlier in the thesis. Critically this research employed interviewing to gain insight into a somewhat opaque organisation. Indeed, there are very few academics with personal access to the ICRC, and are able to analyse their activities from an external perspective.[43]

The methodology will now explain and defend the use of interviews as a research method. It will show how the study design, including the sampling strategy, choice of elite interviewing, recruitment strategy, interview schedule and procedure, ethical consideration and analytic process, was created to

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[41] Denzin NK and Lincoln YS, *Handbook of Qualitative Research* (Thousand Oaks, California 2005) 1-32 in Sarantakos S, *Social Research* (Palgrave Macmillan, Hampshire 2013) 37.

[42] Salter M and Mason J, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Longman, London 2007) 119, 150-53.

[43] One of the most well known authors on the ICRC is David Forsythe. See Forsythe DP, *The Humanitarians: The International Committee of the Red Cross* (CUP 2005); Forsythe DP and Rieffer-Flanagan BAJ, *The International Committee of the Red Cross-A Neutral Humanitarian Actor* (Routledge, London 2007).

generate data concerning the expansion of the ICRC mandate. The methodology will then introduce the single case study in this thesis, that is, a case study on the work of the ICRC in the DRC, which focuses on the roles of the ICRC identified on its current website as key roles.[44] The interviews were also utilised to gather data on the work of the ICRC in the DRC.

Silverman stated that 'one of the strengths of qualitative research is its ability to access directly what happens in the world, i.e. to examine what people actually do in real life rather than asking them to comment on it'.[45] In a similar vein, Byrne stated that 'qualitative interviewing is particularly useful as a research method for accessing individual's attitudes and values- things that cannot necessarily be observed or accommodated in a formal questionnaire'.[46] Interviews were therefore an appropriate method to discover to what extent the activities of the ICRC have expanded beyond those provided for in the Geneva Conventions I, II, III and IV 1949 and the Statutes of the ICRC. Qualitative research, such as interviewing, is a research strategy that usually emphasizes words rather than quantification in the collection and analysis of data'.[47] The general distinction in qualitative research, as regards the data the researcher wishes to collect, is between seeking to find out what people know, what they

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[44] 'ICRC: What We Do' <https://www.icrc.org/en/what-we-do> accessed 21 January 2015.

[45] Silverman D, *Interpreting Qualitative Data: Methods for Analysing Talk, Text and Interaction* (3rd edn, SAGE, London 2006) 113.

[46] Byrne B, 'Qualitative Interviewing' in Seale C (ed), *Researching Society and Culture* (2nd edn Sage, London 2004) 182.

[47] Bryman A, *Social Research Methods* (3rd edn, OUP 2012) 366.

do and what they think or feel.[48] The interviews were used to find out what ICRC delegates knew and what they do as part of ICRC activities.

The interviews are a supplementary evidence base for the arguments made as regards the expansion of the ICRC mandate and the activities of the ICRC on the ground. The interviews were designed to elucidate accounts of how the ICRC delegates interpret the mandate and to establish the types of projects that are currently being undertaken, in terms of the roles described under the mandate and specifically in the DRC. The data collected during the interviews was used to provide context and 'real life' accounts of the work of the ICRC.

The study design, described below, was created to test the theoretical and legal conclusions drawn during the undertaking of the thesis. The data collected is intended to allow analysis of the expansion of the ICRC mandate from the Geneva Conventions I, II, III and IV 1949, the Statutes of the ICRC and the Headquarters Agreements. It also provides first hand accounts of projects on the ground, in particular in the DRC. The intention is not to provide data that can be generalised or extrapolated to indicate broader trends in humanitarianism or even the ICRC as a whole. It is designed as a mechanism to 'bring to life' the theoretical and legal analysis provided in the thesis. It is important to provide context to analysis as the thesis concerns 'humanity', humanitarianism and human security, all of which have a focus on the plight of human beings in vulnerable situations, including armed conflict, situations of violence and other fraught situations. To this end, it is important to consider the

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[48] Robson C, *Real World Research: A Resource for Social Scientists and Practitioner-Researchers* (Blackwell, Oxford 1993) 228.

work on the ground undertaken by the ICRC to see how its delegates understand and interpret their role in terms of the plight of these populations.

This methodology will now explain the study design used for the interviews, which outlines how the research topic will be addressed. It will outline and defend the use of elite interviewing, including the interviewee recruitment strategy; the sampling strategy; interview schedule and procedure; ethical considerations and analytical process.

The purpose of the interviews, as described above, was to provide context and 'real life' experiences to the legal and theoretical analysis contained in the thesis. The interviewees needed to work for the ICRC at the Geneva Headquarters and have experience working in the DRC as field staff. To this end, the interviewees must be defined as 'elites', which creates specific considerations, advantages and limitations to the use of interviews as a research method. 'Elite interviewing is when you interview someone in a position of authority, or especially expert or authoritative, people who are capable of giving answers with insight and a comprehensive grasp of what it is you are researching'.[49] The quotation below identifies the difference between standard interviewing and elite interviewing.

> In standardized interviewing…the investigator defines the questions and the problem; he is only looking for answers within the bounds set by his presuppositions. In elite interviewing… the investigator is

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[49] Gillham B, *Case Study Research Methods* (Continuum, London 2000) 63-64.

willing, and often eager to let the interviewee teach him what the problem, the question, the situation is.[50]

The interviews were undertaken with ICRC delegates at the Headquarters in Geneva. This definition of elite interviewing echoes the approach taken by this Author to interviewing. The purpose of the interviewees was to learn from ICRC delegates about the issues faced in their work in terms of the interpretation of their mandate, both in Switzerland and on the ground. The undertaking of the interviews in Geneva, rather than in the field, was a choice made in the planning stages of the interviews, that is, during the MA year of this Ph.D. research.

There were practical issues to take into account when planning and organising the interviews. The two main practical difficulties faced were access to interviewees and time management. The grandiose plan, early in the empirical research planning, was to travel to the DRC and interview a number of the ICRC delegates on the ground. In terms of answering the 'law in context' questions, this approach would provide the most detailed analysis.[51] However, UK Foreign and Commonwealth Office restrictions on travel to the DRC, financial restraints and this Author's limited French meant that interviews were conducted in Geneva. To this end, the recruitment of interviewees began early in 2014, which was the third year of the Ph.D. As stated above, the purpose of

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[50] Dexter LA, *Elite and Specialized Interviewing* (ECPR Press Classics, Colchester 2006) 19.

[51] The ICRC has 792 delegates in DRC 'The ICRC in DR Congo' (ICRC) <www.icrc.org/eng/where-we-work/africa/congo-kinshasa/index.jsp> accessed 15 May 2014; The ICRC website provides address, telephone, and fax and sometimes e-mail contacts for the ICRC delegation in Kinshasa, Goma, Bukavu, Lubumbashi and Kisangani -'ICRC Staff in DRC Contact Information' (*ICRC*, 20 May 2014) <www.icrc.org/eng/resources/documents/contact/africa-contact.htm> accessed 16 March 2014.

the interviews was to build context into the theoretical and doctrinal research undertaken earlier in the Ph. D. process and, as such, it was fitting that they came during the third year. The interviews too place over a period of one week in April 2014. The time allocated for the interviews was determined by funds and the availability of the delegates who had consented to an interview.

In terms of recruitment, I approached delegates at the ICRC in Geneva that I already knew from academic events and working with the Red Cross. Professor Nigel White also contacted colleagues at the ICRC in Geneva. This initial contact was part of a snowball sampling method.[52] By definition, snowball sampling entails choosing one or two respondents and asking them to recommend other people who meet the criteria and might be willing to participate. This method continues until there are no more respondents available.[53] For the purposes of this research, therefore, we made contact with ICRC delegates who were able to find colleagues who were willing to participate in the interviews. There are inherent limitations with snowball sampling; for example, this Author was wholly reliant on the initial contacts to find other participants. To this end, the contacts made were all connected to the initial person. It is possible, therefore, that the interviewees would have similar points of view, experiences and opinions. The advantage of this method of sampling is the efficiency of making contacts, as I was trying to reach a rather obtuse organisation and delegates who work within an inherently confidential organisation. It should be noted that, although there are advantages and

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[52] See Gabor MR, 'Types of Non-Probability Sampling used in Marketing Research: "Snowball Sampling"' (2007) 2(1) Management and Marketing PAGE; Maisel R and Persell CH, *How Sampling Works* (Sage, California 1996).

[53] Sarantakos (n 41) 179; Bryman (n 47) 424- 425

disadvantages to the snowball sampling method, for this research, it was the only sampling method available.

Prior to departure five interviewees were in place, but unfortunately an interview was cancelled at short notice due to the emerging situation in Ukraine, which the delegate had to respond to. However, the snowball method continued to work whilst this Author was in Geneva as an interviewee put me in contact with a colleague who was willing to be interviewed on the final day of my stay. The issues of consent of all delegates are discussed below.

There is no strict rule to determine an appropriate sample size, nor is there consensus amongst academics who publish on research methods.[54] In terms of sample size, there are two questions to be answered when determining whether the research has enough participants. They are sufficiency and saturation of information.[55] The latter refers to when the interviewer begins to hear the same information repeated. In terms of whether one has 'enough' participants this Author argues that this is relative to the particular research and, in this case, five interviews were undertaken. Each interview lasted between one hour and one hour and twenty-minutes. Each interviewee had at least five years experience working for the ICRC, in most cases, a host of other 'humanitarian' experience. There is an argument to be made that more interviews may have provided more examples of specific projects being undertaken by the ICRC on

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[54] Thomas SP and Pollio HR, *Listening to Patients: A Phenomenological Approach to Nursing Research and Practice* (Springer, New York 2002), Cresswell JW, *Qualitative Inquiry and Research Design: Choosing among Five Traditions* (SAGE, California 1998) and Boyd CO, Philosophical Foundations of Qualitative Research' in Munhall PL (ed), *Nursing Research: A Qualitative Perspective* (3rd edn Jones and Bartlett, Sudbury 2001) in Gubrium JF, Holstein JA, Marvasti AB and McKinney KD (eds), *The SAGE Handbook of Interview Research: The Complexity of the Craft* (2nd edn, SAGE London 2012) Chapter 16.

[55] Seidman I, *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences* (Teachers College, Columbia University, New York 1998) 47-48.

the ground. A caveat of this remark is that as an individual researcher, undertaking postgraduate research, the sample size of five was a positive number of recruits. Moreover, throughout the interviews the responses of interviewees on the mandate of the ICRC were broadly similar. The different responses were to the specific work of the ICRC on the ground as each interviewee had different field experience and could draw on specific situations to provide examples of how the ICRC works on the ground.

It was necessary for participation in the research to be voluntary. In addition the participants must be able to withdraw and to review the interview material.[56] To this end, during the interviews, the consent of the participants was an ongoing consideration. Although participants completed the consent form, I made it clear at the start of the interview that they could withdraw at any point. Indeed during the fifth interview the interviewee wished to disclose information 'off-the-record'. I turned off the recorder and the information provided during this time was not used in the thesis. The tape recorder was turned back on once the interviewee felt that what he wanted to add should go on record.

In addition to issues of consent to be interviewed, the key consideration for these interviews was the identification of interviewees in the thesis. The ICRC is an inherently confidential organisation and therefore my contacts and interviewees remained anonymous in view of the personal and professional risks in providing information. Numbers in the footnotes to this thesis, for example, INTERVIEW 001, references the information and quotations taken from interviews. The transcripts of the interviews are password protected on

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[56] Seidman (n 55) 53.

this Author's home computer and are saved by these identifying numbers. The Author knows the name of the interviewee and the time and place of the interview.

Once the interviewees had been determined and issues of participation, consent and confidentiality had been established, it was time to begin the interview schedule and procedure. The considerations were primarily, how questions were to be presented to interviewees and how the face-to-face interviews would be carried out in Geneva. The research used open questions, which facilitate more in-depth questioning about the research. The questions were worded to elicit more than yes and no answers, which allowed the interviewees to provide rich detailed answers, as it was possible to ask participants to reflect on the processes leading up to or following on from a described event.[57] The interviews contextualised the research and provided insight into work of the ICRC and the situation on the ground in the DRC.

As a practical matter, preparation for the interviews included fulfilment of the requirements of the Economic and Social Research Council (ESRC) 'Framework for Research Ethics', as this research was funded by the ESRC.[58] This process included drafting an interview guide, which was provided to each interviewee prior to the interviews. It included an information sheet for interviewees, a consent form and a project guide; the latter included the thesis research questions. Preparation of the interview guide ensured that this Author was fully prepared to undertake the interviews. The interview guide is included

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[57] Bryman (n 47) 388.

[58] Economic and Social Research Council, 'Framework for Research Ethics' <www.esrc.ac.uk/_images/Framework_for_Research_Ethics_tcm8-4586.pdf> accessed 11 May 2011.

in the Appendix to this thesis.[59] It was important to get individual consent in writing for any data collected during the interview to be used in the thesis either as quotes or to inform my understanding of particular issues.[60] An interview guide is a list of questions or fairly specific topics, which are designed to capture the aims and objectives of the research.[61] They can be asked in any order, as they are semi-structured, and therefore the interview guide allowed this Author to explore a few general topics and provided scope for the interviewee to frame and structure their own responses.[62]

The process of recruiting interviewees began with initial informal contact via e-mail explaining the research being undertaken, why this Author wanted to use interviews as a research method and how the data would be used in the thesis. If the delegate was happy to proceed I sent the interview guide to them to allow them to see the broad topics that would be covered in the interview. By sending the interview guide a few weeks before the interview the interviewee had the chance to reflect on their thoughts and experiences of their work in the ICRC and the DRC. In addition, it allowed ongoing consent on the part of the interviewees, as they could have withdrawn had they no longer wished to be interviewed. The interviewees had, on the whole, already thought about specific details they wanted to provide that linked to the specific research

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Appendix 1 360.

[60] Israel M and Hay I, *Research Ethics for Social Scientists* (Sage, London 2006) 60 ff (on consent).

[61] Bauer and Gaskell (n **67**) 40.

[62] Marshall and Rossman (n **67**) 144.

questions. In fact, the majority had written notes on a printed out copy of the interview guide.

The disadvantages of providing interviewees with the interview guide beforehand were that it might have lead interviewees discussing questions with colleagues. If colleagues react to their thoughts in an unexpected way it may lead the interviewee to change their opinions and therefore responses when the interviews were undertaken. There are also inherent limits to the interview guide as a research tool as, for example, the questions are potentially biased or harbour unacknowledged assumptions held by the interviewer. The limits of sending the interview guide out prior to the interviews have been acknowledged but it must be emphasised, as a caveat, that recruitment of elite interviewees is difficult and ultimately cooperation and consent are more likely if the interviewee is given as must information as possible before the interview. It was imperative, especially given that this Author travelled to another country and for a limited period of time, to know prior to departure the date, time and location of the interviews were in place. It should be noted that the interviewee who was recruited while I was in Geneva was also given the interview guide via email the day before the interview. They were therefore able to see the questions and decide whether they wanted to go ahead with the interview.

Bauer and Gaskell argue that in the first few interviews there may be striking differences in opinion but common themes will appear and progressively the understanding of the interviewer will develop.[63] This observation was accurate in terms of this Author's experiences. The completion of the doctrinal and theoretical research identified economic security as an area of ICRC practice

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[63] Bauer and Gaskell (n 67) 43.

that simultaneously addresses questions on the mandate and the activities of the ICRC and therefore it was important that the interviewees had personal experience in the DRC or economic security activities of the ICRC. As a caveat, the interviewees were selected if the liaison felt that they would provide 'candid' accounts of the realities on the ground for the ICRC. This inevitably created a sample bias but was unavoidable in order to establish access to elites, issues surrounding which were considered above.

The week following the interviews consisted of transcribing the recordings. I worked at home so that I could play them aloud. I slowed down the playback to make it easier to keep up with the responses. I typed out all of the questions, responses and interjections. As noted above, I did not include the conversation with interviewee number five which was 'off the record'. Once the interviews were transcribed I went through them to find thematic similarities in terms of how the delegates saw the mandate. This style of content analysis is commonplace in legal and social science research.[64] I then went through for data on specific activities of the ICRC, which are given specific attention in chapter five of the thesis. I was able to use the list of activities from the Geneva Conventions I, II, III and IV 1949, Statutes of the IRCRCM and Statutes of the ICRC and the ICRC website, which provides current and up-to-date outlines of their roles, to identify the links between the projects described by the interviewees and those included in the mandate of the ICRC. I was therefore able to combine interview responses in each section of chapter five.

There are limits to the use of interviews as a qualitative research method. Miller and Dingwall argue, for example, that data is a social construct created

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[64] See Gillham B, *The Research Interview* (Continuum, London 2000) 72-81.

by the self-presentation of the interviewee and the interactional cues provided by the interviewer. [65] Bryman recognised that a common problem with interviewing is that the research relies 'too much on the researcher's often unsystematic views about what is significant and important'. [66] As an interviewer, therefore, it is important to gather necessary information, be competent and credible in the knowledge and arguments of the research, well read in appropriate literature, have made preliminary observations and discuss matters of concern with experienced colleagues before the interviews.[67] The methodology of this thesis' interviews reduced the risks associated with lack of preparedness, as the interview was designed to test conclusions already reached.

Whilst in Geneva this Author faced specific challenges to collecting interview data. At the time, in particular, many were involved in the situation in Ukraine; indeed, as noted above, one interview was cancelled at short notice as the delegate had to travel to the country. Some interviewees preferred to guide the interview along the things that they find interesting or prominent issues they were currently dealing with. Others were keen to show their competence, which 'is an inescapable constraint on face-to-face interviewing'.[68] It was necessary to keep turning the interview back to the core questions provided in the interview guide. Moreover it was important to seek clarity when interviewees seemed to omit important details, either because they were taken

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[65] Miller G and Dingwall R (ed), *Context and Method in Qualitative Research* (Sage Publications, London 1997) 59.

[66] Bryman (n 47) 391; See also Warren CAB, 'Interviewing as Social Interaction' in Gubrium (n 54) Chapter 8.

[67] Bauer MW and Gaskell G (eds), *Qualitative Researching with Text, Image and Sound: A Practical Handbook* (Sage Publications Ltd, London 2000) 40; Marshall C and Rossman B, *Designing Qualitative Research* (5th edn, Sage, London 2011) 156.

[68] Miller and Dingwall (n 65) 59.

for granted or because experiences or feelings were difficult to put into words. This Author recognises that the interviewees potentially viewed situations through 'distorted lenses' and provided accounts, which were misleading or not open to checking or verification.[69]

The final aspect of the methodology which must be explained is the case study of the DRC. This thesis uses a single case study of the work of the ICRC in the Democratic Republic of Congo. 'A case study is an empirical inquiry that investigates a contemporary phenomenon in depth and within its real life context, especially when the boundaries between phenomenon and context are not clearly evident'.[70] Overall the case study shows how the ICRC has broadened its approach to its mandate and what its practice includes nowadays. It therefore contributes to answering the 'meta' research question.

The decision to include a case study in the thesis was made at the proposal stage of planning the thesis. It is necessary to examine the law and practice of the ICRC in a specific situation to conclude whether it is, in fact, interpreting its mandate more broadly than the specific roles included in the Geneva Conventions I, II, III and IV 1949 and the Statutes of the IRCRCM. The DRC was chosen because the ICRC has had a permanent presence there since 1978. It has therefore developed its roles on the ground and each phase of its activities has had to respond to a changing conflict landscape. The DRC is, in some parts, an example of shifting trends in ICRC practice generally, for example towards more long-term humanitarian projects, such as Health Care in Danger. It also shows that the ICRC can interpret its mandate to respond to

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[69] Bauer and Gaskell (n 67) 44.

[70] Yin RK, *Case Study Research: Design and Methods* (4th edn SAGE, London 2009) 18.

very specific situations, for example, the proliferation of sexual violence as a weapon in the DRC has necessitated victim specific projects on the ground in the DRC, which the ICRC would not create in other States. These projects will all be addressed in depth in the case study.

The current situation in the DRC is a conflation of a myriad of armed conflicts that began in Burundi, Uganda and the Sudan during the 1990s.[71] A number of peace agreements have attempted to bring peace to the region but since the armed conflict consists of many sub-conflicts fuelled by private, social and economic interests, no resolution has been reached. The ICRC has had a permanent mission in DRC since 1978. It works to promote respect for IHL amongst warring factions, facilitate the treatment of civilians and detainees and to provide relief to civilians affected by the armed conflict. It also works to improve water supplies and sanitation; strengthen health care for the wounded and sick, including victims of sexual violence.[72] It also continues to reunify families.[73] The significance of its long presence is that the ICRC has a number of projects and has adapted its humanitarian protection and assistance roles on the ground in response to the fluidity of the conflict. It also means that, as the entire State has not been 'at war' for the entire period since 1978 that the ICRC undertakes projects in situations not amounting to armed conflict.

The case study was also chosen because this thesis examines the utility of humanitarian protection and assistance for the people on the ground. One of the

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[71] Prunier G, *Africa's World War Congo, the Rwandan Genocide and the Making of a Continental Catastrophe* (OUP 2009) xxxi.

[72] 'The ICRC in DR Congo' (ICRC) <www.icrc.org/eng/where-we-work/africa/congo-kinshasa/index.jsp> accessed 15 May 2014.

[73] ibid.

issues to examine in this research is what kind of projects the ICRC carries out. Unfortunately, for the reasons described above, it was not possible to interview the local population of the ICRC to determine how they saw the ICRC and their experiences of the projects undertaken. This is a clear limitation of this Ph. D. Nevertheless, the access to ICRC delegates to find out details of on-going and new projects in the DRC is a significant addition to existing literature. Much of which is either produced by the ICRC or limited to an analysis of IHL.

The ICRC's sustained presence over a protracted period in the DRC, it was possible to use the case study as an example of more general trends within ICRC practice. To this end, a single case study is a logical design to examine the mandate and practice of the ICRC in light of the conclusions drawn in chapters one to four. These chapters were written prior to the undertaking of the interviews, which informed the analysis in chapters five and six. The single case study of the DRC provides sufficient information to determine whether this Author's conclusions about the mandate of the ICRC are reflected on the ground. Of course, a multiple-case design, drawing on more than one country, was a possibility, However, given the complexity and protracted work of the ICRC in the DRC, it was determined that more useful analysis could be undertaken should the thesis focus on the one case.

The situation in the DRC may be seen as representative of broader trends in the ICRC development of its mandate. In conversations with ICRC delegates in Australia, the UK, USA and Armenia, which were had, not as part of the thesis research directly, but which informed my understanding of the ICRC, the work of the ICRC in the DRC reflects broader trends in the interpretation of the ICRC mandate. In particular, the work of the ICRC outside of situations that

can be defined at all times as 'armed conflict' and in terms of its long-term or on going presence.

As part of the qualitative method of this research, the interviews were used to gather information on the mandate and work of the ICRC in the DRC. The interviewees had knowledge of the mandate and/ or had worked in the DRC and were thus able to provide information on specific projects being undertaken by the ICRC there. The use of qualitative methods as part of the case study, rather than relying on existing literature, ensured that the case study was an investigation into what is happening on the ground. That is, the 'law in context'. It also allows this research to show the 'informal reality, which can only be perceived from the inside'.[74] The case study therefore contributes to literature on, not only, the mandate and practice of the ICRC but also insight into a complex conflict and the myriad of humanitarian needs and protection issues that confront the day-to-day work of the ICRC.

d) Thesis Structure

This thesis starts by considering the legal nature of the ICRC and then reflects upon whether it is an ILP. The legal framework supporting the work of the ICRC is inherent to this analysis, including the Geneva Conventions I, II, III and IV 1949, Statutes of the IRCRCM and Statutes of the ICRC. It is argued that the ICRC is undertaking roles, which indicate its willingness to work towards the establishment of human security and sustainable peace. The thesis also considers the position of RtoP in the evolving human-centric security paradigm and is careful to distinguish it from human security initiatives, which are broader and do not authorise, or indeed require, militaristic responses to

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[74] Gillham (n 49) 11.

violations of international law. Finally, the role of the ICRC in the DRC is used to provide a 'real life' case study to analyse the conclusions drawn on the developing role of the ICRC, in chapters one to six of the thesis.

Chapter one of this thesis reflects on the ICRC within the structure of the IRCRCM. It describes the IRCRCM and the relationship between the three components of the Movement, including the ICRC, International Federation of the Red Cross and Red Crescent and the National Societies. It is significant to the overall thesis that the ICRC be understood both as a component of the IRCRCM and an individual entity. Chapter one also examines the Fundamental Principles of the ICRC and how its work within States relies on its reputation for impartiality and neutrality. This analysis draws on the legal frameworks applicable to the mandates of the ICRC and on existing academic literature that has examined the structure and work of the ICRC. Chapter one reflects upon international institutional law to determine what kind of organisation the ICRC should be defined as and whether it possesses ILP. It considers three types of organisation: international organisations, private international organisations and NGO's.

Chapter two considers the specific mandate of the ICRC, in particular, its protection and assistance roles, provided for in the Geneva Conventions I, II, III and IV 1949, Additional Protocols 1977, Statutes of the ICRC and Statutes of the IRCRCM. It also determines whether the ICRC is an ILP, with rights and duties on the international stage. It considers the applicability of the circumstances identified in the *Reparation for Injuries* Advisory Opinion, which led to an International Court of Justice (ICJ) determination that the UN

was an organization with ILP.[75] This Author embarked on this study as existing literature on the ICRC describes the type of organisation that the ICRC is in a myriad of different ways.

Chapter three investigates the development of the laws of war and peace. This chapter argues that the ICRC institutionalised the binary distinction between the laws of war and peace by endeavouring to develop the laws of war following the cessation of hostilities at the end of the Second World War. Chapter Three also considers the work of the UN during this time, which focused on the *jus ad bellum* and latterly IHRL. It is argued that the changing nature of conflict necessitated the development of the Human Rights in Armed Conflict agenda of the General Assembly. At a similar time, the ICRC was working on the development of Additional Protocols I and II, which better reflected the types of armed conflicts being fought around the world after the Second World War, in part, by recognizing the increasing number of NIACs. Later in the twentieth century international criminal courts adjudicated on this transformation in the nature of armed conflict, to find that both IHL and IHRL apply during armed conflict. The analysis in this chapter informs later analysis in the thesis, in particular human security research; because it shows the multiplicity of legal frameworks are applicable during modern armed conflicts. This chapter leads into later analysis, which considers the applicability, and the relevance, of IHRL to the protection and assistance work of the ICRC.

Chapters four and five of the thesis consider the principles of humanity and its developments in the international legal order and focus on sovereignty as

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[75] *Reparation for Injuries Suffered in the Service of the United Nations,* (Advisory Opinion) [1949] ICJ Rep 174, 178-79; International Legal Personality 83.

responsibility, human security and the RtoP. This thesis will show that human security and RtoP are synonymous with the sovereignty as responsibility paradigm, which Kofi Annan thrust onto the international stage during his time as Secretary-General of the UN. It is argued that human security, if properly realised, has the potential to reach people on the ground, as a more comprehensive and long-term approach to humanitarian protection and assistance. It considers whether the ICRC, in its current interpretation of its mandate to protect and assist, is actually progressively realising sustainable human security for individuals and communities recovering from conflict. Has the principle of humanity, as it has moved beyond the battlefield, pushed the ICRC to seek longer-term solutions to humanitarian needs? Is human security a viable approach to such?

Human security encourages people to take control of their own security and it covers a myriad of security risks, not just political security. As was stated earlier, under the Human Development Report 1994 they include economic, food, health, environmental, personal, community and political security. This thesis argues that there is a relationship between the concept of human security and the work of the ICRC, in part, because the ICRC is an inherently human-centric organisation. In addition, it can help establish human security because it has expanded its mandate beyond the specific roles identified in the Geneva Conventions I, II, III and IV 1949 and Statutes of the ICRC, to include economic security. Of course, its mandate to protect and assist also includes roles, which facilitate the provision of health and food security, but it is its foray into economic security, which appears most contentious, especially given

its necessary neutrality and independence. In chapter five the thesis expands on these ideas of sovereignty as responsibility and human security.

It is argued that RtoP exists on a spectrum of actions that can be taken in the interests of people living within States. RtoP allows for a militaristic response to violations of four key crimes under IHL, that is, genocide, war crimes, crimes against humanity and ethnic cleansing. This thesis considers the development of RtoP and where it rests in the sovereignty as responsibility paradigm. It also considers the roles, if any, for the ICRC in such.

Chapter six considers ICRC activities in States and communities. It considers whether, in terms of human security, as a humanitarian actor, the ICRC is well placed to provide human security on the ground. The crux of the analysis is that actually the ICRC did not foresee the human security agenda; in fact, the interviews provided context to this analysis and identified the gap between the law and practice of the ICRC. It also identifies the risks to the ICRC in being affiliated security discourse and practice. It is argued, in particular, that States may be unwilling to consent to ICRC presence if they are no longer perceived as being a neutral and independent humanitarian organisation.

The final part of the thesis is a case study on the DRC, which reflects upon the conclusions drawn in the preceding chapters, and shows how the ICRC works in practice today. Since 1978 the ICRC has had a permanent mission in the DRC, which aims to promote respect for IHL amongst warring factions and also provides relief to civilians affected by the armed conflict.[76] The case study draws particular attention to the controversial steps of the ICRC away from the

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[76] 'The ICRC in DR Congo' (ICRC) <www.icrc.org/eng/where-we-work/africa/congo-kinshasa/index.jsp> accessed 15 May 2014.

Geneva Conventions I, II, III and IV 1949 taken in the name of economic security. The case study considers the positive impact of the ICRC in terms of human security in the DRC. It builds on existing academic literature to examine the impact, or lack thereof, of the sovereignty as responsibility paradigm in the DRC. It contextualises the analysis through incorporation of interview findings. Many of the delegates interviewed at the ICRC Headquarters in Geneva have worked in the DRC and were able to provide first hand accounts of projects and events on the ground in the DRC. The case study also, therefore, considers the local implications of the work of the ICRC in the DRC.

1) CHAPTER ONE: AN INTRODUCTION TO THE ICRC

The ICRC defines itself as 'an independent, neutral and impartial humanitarian organisation whose mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance'.[1] In 2012, Peter Maurer, President of the ICRC, stated that 'the motivation behind our work has not changed since the final pages of Henry Dunant's ground breaking book "A Memory of Solferino".[2] What changes, however, is how the organization adapts its response to different patterns of conflict and different contexts'.[3] Maurer went on to state that 'the working method of the ICRC is to be close to victims, root action in response to needs rather than political agendas, to contextualise the humanitarian response and reunite assistance, protection and prevention'.[4] The focus of this research is the ICRC but it is important to describe the structure of the IRCRCM in order to understand the position of the ICRC within the IRCRCM its place within the international legal order.

When States sign up to the Geneva Conventions I, II, III and IV 1949 they agree to be bound by the duties and responsibilities contained within. In addition, they are accepting the role of the ICRC. This chapter provides an in-depth analysis of the legal structures surrounding the law and practice of the ICRC. This chapter describes the structure of the IRCRCM, in particular the status of the Statutes of the IRCRCM; the humanitarian assistance and

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[1] 'The ICRC's Mandate and Mission' (ICRC, 29 October 2010) <www.icrc.org/eng/who-we-are/mandate/overview-icrc-mandate-mission.htm> accessed 24 June 2014.

[2] Dunant H, *A Memory of Solferino* (ICRC, Geneva 1986).

[3] 'Interview with Peter Maurer' (Winter 2012) 94 (888) IRRC 1, 2.

[4] ibid 3.

initiative roles of the ICRC and the impact of the fundamental principles on the work of the ICRC.

a) The International Red Cross and Red Crescent Movement

The components of the IRCRCM are the ICRC, International Federation of the Red Cross (IFRC) and the 189 National Societies. Each component of the IRCRCM has its own legal identity, functions and rules, which are outlined in this section of the thesis. The components of the IRCRCM are united by seven fundamental principles, which are referred to throughout this thesis. They include humanity, impartiality, neutrality, independence, voluntary service, unity and universality.

The establishment of the ICRC, following the Battle of Solferino, was incited by the horrors of the battlefield. The aftermath saw wounded soldiers without food and water. Dunant wrote that 'the fields were devastated, wheat and corn lying flat on the ground, fences broken, orchards ruined; here and there were pools of blood'.[5] Since then the IRCRCM has evolved to include the ICRC, IFRC and 189 National Societies, as previously stated. The International Conference and Council of Delegates allow the Movement to respond to changes in humanitarian needs both during and after conflict. Chapter two considers whether, as an organisation, the ICRC is most closely akin to international organisations, private international organisations or NGOs.

The mission of the IRCRCM is:

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[5] Dunant (n 2) 41.

To prevent or alleviate human suffering wherever it may be found, to protect life and health, to ensure respect for human dignity (in particular during times of armed conflict and other emergencies), to work for the prevention of disease and the promotion of health and social welfare, to encourage voluntary service and a constant readiness to help and, finally, to foster a universal sense of solidarity towards all those in need of the Movement's protection and assistance.[6]

i) The Legal Status of the Statutes of the IRCRCM

It can be said that when it comes to the laws of war, States have signed and ratified 'law-making' treaties. These 'treaties create *general* norms framed as legal propositions, to govern the conduct of the parties, not necessarily limited to their conduct *inter se*— indeed the expression of an obligation in universal or 'all states' form is an indication of an intent to create such a general rule'.[7] Crawford goes on to state that:

The Declaration of Paris of 1856 (on neutrality in maritime warfare), the Hague Conventions of 1899 and of 1907 (on the law of war and neutrality), the Geneva Protocol of 1925 (on prohibited weapons), the General Treaty for the Renunciation of War of 1928, the Genocide Convention of 1948, and the four Geneva Conventions of 1949 (on the

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[6] Council of Delegates (ICRC), 'Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement -The Seville Agreement' (Council of Delegates, ICRC, 25-27 November 1997) <www.icrc.org/eng/resources/documents/misc/57jp4y.htm> accessed 30 June 2014, preamble. (Seville Agreement).

[7] Crawford J, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 30.

protection of civilians and other groups in time of war) are examples of this type'.[8]

To this end, the roles and powers provided for the ICRC in the Geneva Conventions are part of 'law-making' treaties. This is only part of its mandate.

The Statutes of the IRCRCM also confer roles upon the ICRC, as do the Statutes of the ICRC. The founding conference of the ICRC in 1863 adopted a resolution outlining the intended purpose of the national committees of the Red Cross.[9] In 1928 the Thirteenth International Conference of the Red Cross at The Hague adopted a draft set of Statutes.[10] The Statutes were seen to provide defined powers to the Red Cross statutory bodies.[11] It was not until 1982 that full consideration was given to the Statutes and steps were taken to review and revise the Statutes.[12] The 1986 Statutes of the IRCRCM provide more comprehensive details of the powers and tasks of the components of the IRCRCM, including the ICRC.[13]

The legal nature of these Statutes is complicated. Bugnion argued that 'the constitutive instrument of an organization always has two aspects: *a contractual aspect,* since it is an agreement between the parties concerned, and

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[8] ibid.

[9] Resolutions of the Geneva International Conference. Geneva, 26-29 October 1863.

[10] These statutes were revised by the Eighteenth International Conference (Toronto, July-August 1952), but their basic tenor remained unchanged.

[11] Bugnion F, 'Red Cross Law' (1995) 308 IRRC 491, 497.

[12] ibid.

[13] The new Statutes of the International Red Cross and Red Crescent Movement were adopted by consensus at the Twenty-fifth International Conference of the Red Cross, meeting in Geneva in October 1986.

a constitutional aspect, since it provides the framework that enables the organization to function'.[14] The Statutes of the IRCRCM are particularly complex as they govern the work of the bodies of the IRCRCM and the relationship between the IRCRCM and State parties to the Geneva Convention. In terms of this thesis, therefore, it is clear that any critique of the ICRC mandate must take into account this two-fold constitution. On the one hand the ICRC is an organisation with functions on the international stage, but, on the other hand, the ICRC has a relationship with States party to the Geneva Convention. What must be recognised is that although the Statutes were adopted as a resolution of the Conference, rather than a treaty (recognised as such in the law of treaties), States still assented to them. Indeed

> The fact that the Statutes were not adopted as a treaty does not mean that States are not bound by them: governments are free to give their consent in any way they choose. Although the Statutes were not adopted in the form of an international treaty, they nevertheless constitute an international instrument, which, by its nature, binds the States.[15]

It is important to remember that by signing up to the Statutes of the IRCRCM they become binding on every member of the movement. In addition to the

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[14] ibid.

[15] Richard Perruchoud, *Les Résolutions des Conférences internationales de la CroixRouge* , Henry Dunant Institute, Geneva, 1979 pp. 107-108; see also Auguste-Raynald Werner, *La Croix-Rouge et les Conventions de Genève* , Georg & Cie, Geneva, 1943, p. 79 in Bugnion (n 11) 501.

Statutes of the IRCRCM, the ICRC also has its own Statutes.[16] The ICRC
Statutes, like the ICRC itself, have a hybrid nature:

> (i) The ICRC is a private association under Swiss domestic law, within
> the meaning of Article 60 of the Swiss Civil Code. From this
> perspective, the ICRC' Statutes are like the statutes of any private
> association under Swiss law and they are registered in the Geneva
> Register of Commerce.[17]
>
> (ii) The ICRC has also a status that is equivalent to that of an
> international organization and it has the international legal personality
> in the exercise of its functions, which enables it to collaborate with
> States in the fulfilment of its mandate.[18]

The latter comes from its membership to the Movement, as conferred by the
Statutes of the Movement.[19] This status also comes from the roles and
mandates attributed to the ICRC by the High Contracting parties to the Geneva
Conventions. The Swiss Civil Code is considered in the next section of this
chapter. An analysis status of the ICRC, as an organization, is undertaken later
in this chapter.

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[16] Statutes of the ICRC, 3 October 2013 (The present Statutes replace the Statutes of the
International Committee of the Red Cross of 21 June 1973, revised on 20 July 1998 and 8 May
2003) (Statutes of the ICRC).

[17] Registre du Commerce, 'Fondation pour le Comité International de la Croix Rouge'
<http://rc.ge.ch/ecohrcmatic/> accessed 21 January 2015.

[18] As described above.

[19] Statutes of the International Red Cross and Red Crescent Movement were adopted by
consensus at the Twenty fifth International Conference of the Red Cross, meeting in Geneva in
October 1986 (Statutes of the IRCRCM).

Overall, the ICRC is thus entitled to insist on the recognition by the States party to the Geneva Conventions of the powers it has been granted by the Movement's Statutes. The Statutes of the ICRC and their importance to the mandate of the ICRC are considered in depth in chapter two. The notion that the Statutes bind States and the bodies of the IRCRCM shall be returned to in chapter two when the international legal personality of the ICRC is considered. It will be shown that the ability to create binding agreements is an element of the ILP of the ICRC. The crux of the argument here is: What would be the purpose of States signing up to the Geneva Conventions, attending and adopting resolutions of the International Conference and adopting Headquarters Agreements to facilitate the presence and work of the ICRC, if they did not see them as binding?

ii) *Red Cross and Red Crescent National Societies*

In order to preserve the bonds of solidarity that united them across national borders, the Red Cross Societies were to meet regularly, as laid down by Article 9 of the 1863 resolutions states that 'the Committees and Sections of different countries may meet in international assemblies to communicate the results of their experience and to agree on measures to be taken in the interest of the work'.

Today, National Societies, such as the British Red Cross and Red Cross of the DRC[20], provide a range of services, depending on the humanitarian needs of the population they serve. The British Red Cross, for example, provides First

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[20] IFRC, 'Democratic Republic of Congo' <www.ifrc.org/en/news-and-media/news-stories/africa/congo-democratic-republic-of/> accessed 1 July 2014.

Aid training, health and social care and refugee services.[21] The Red Cross of the DRC, on the other hand, must respond to conflict related humanitarian needs, capacity building and forced migration.[22] In order to participate in the IRCRCM, National Societies must first be recognised by the ICRC and then admitted to the International Federation. Article 4 Statutes IRCRCM provides ten conditions for recognition as a National Society, including Article 4(1) Statutes of the IRCRCM, which states that, National Societies be constituted on the territory of an independent State where the 'Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field' is in force. In addition, under Article 4(3) a National Society must be duly recognised by the legal government of its country on the basis of the Geneva Conventions I, II, III and IV 1949 and of the national legislation as a voluntary aid society, auxiliary to the public authorities in the humanitarian field.

In addition to the three constituent components of the IRCRCM, there are also three governing bodies: the International Conference of the Red Cross and Red Crescent,[23] the Council of Delegates of the IRCRCM[24] and the Standing

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[21] British Red Cross <www.redcross.org.uk/> accessed 1 July 2014.

[22] IFRC, 'Democratic Republic of Congo' <www.ifrc.org/en/news-and-media/news-stories/africa/congo-democratic-republic-of/> accessed 1 July 2014.

[23] Statutes of the International Red Cross and Red Crescent Movement 1986 (adopted by the 25th International Conference of the Red Cross at Geneva in 1986 and amended in 1995 by Resolution 7 of the 26th International Conference of the Red Cross and Red Crescent at Geneva and 2006 by Resolution 1 of the 29th International Conference of the Red Cross and Red Crescent at Geneva) arts 8-11 (Statutes of the IRCRCM); See also Rules of Procedure of the International Red Cross and Red Crescent Movement (adopted by the 25th International Conference of the Red Cross at Geneva in October 1986 and amended by the 26th International Conference of the Red Cross and Red Crescent at Geneva in December 1995) arts 4-22 (IRCRCM Rules of Procedure).

[24] Statutes of the IRCRCM arts 12-15.

Commission of the Red Cross and Red Crescent.[25] These institutions are considered below.

iii) The International Conference of the IRCRCM

Article 8 Statutes of the IRCRCM states that:

> The International Conference is the supreme deliberative body for the Movement. At the International Conference, representatives of the components of the Movement meet with representatives of the States Parties to the Geneva Conventions, the latter in exercise of their responsibilities under those Conventions and in support of the overall work of the Movement in terms of Article 2. Together they examine and decide upon humanitarian matters of common interest and any other related matter.

The International Conference describes the meeting that takes place every four years between all States that are party to the Geneva Conventions I, II, III and IV 1949. It also convenes the Red Cross and Red Crescent Societies, ICRC and IFRC. The Conference ensures Red Cross/Red Crescent unity of effort and respect for the Fundamental Principles. Article 11(7) Statutes of the Movement states that the Conference 'shall endeavour to adopt its resolutions by consensus'.

The most recent conference was the 31st International Conference of the Red Cross and Red Crescent took place in Geneva, Switzerland from 28 November

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[25] Statutes of the IRCRCM arts 16-19.

to 1 December 2011.[26] 'Over 2000 participants from 164 governments, 183 of 187 Red Cross and Red Crescent Societies and 56 observer organisations participated. They took part in thematic plenary sessions and commissions, 7 workshops and 22 side-events and adopted 9 important resolutions and 377 pledges'.[27] The Conference can also be called at other times to deal with issues faced by the Movement. The importance of the International Conference as a humanitarian forum cannot be understated as it brings together all State parties and components of the movement. The ICRC, IFRC and 189 National Societies attend the International Conference. In addition, all 194 State parties to the Geneva Conventions I, II, III and IV 1949, observers from other humanitarian organisations, the UN system and National Societies in formation or awaiting recognition.

By way of example, the first resolution of the 31st International Conference concerned strengthening IHL, specifically, 'Resolution 1: Strengthening Legal Protection for Victims of Armed Conflicts',[28] other reports and documents presented to the International Conference feed into this agenda item. They included the 'Report on Commission E: International Humanitarian Law and Humanitarian Access and Assistance';[29] workshop reports: 'Protection for

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[26] International Conference of the Red Cross Red Crescent <http://www.rcrcconference.org/en/introduction.html> accessed 21 January 2015.

[27] ibid.

[28] 31st International Conference of the Red Cross and Red Crescent, 'Strengthening Legal Protection for Victims of Armed Conflicts', (Geneva, Switzerland, 28 November – 1 December 2011) Resolution EN 31IC/11/R1.

[29] 31st International Conference of the Red Cross and Red Crescent, 'Report on the Work of Commission E on 'Humanitarian Access/ Assistance' (Geneva, Switzerland, 28 November – 1 December 2011) <http://www.rcrcconference.org/docs_upl/en/31stIC_Commission_E_Humanitan_Access_IHL -EN.pdf> accessed 21 January 2015.

Victims of Armed Conflicts- How Can a Gender Perspective on International Humanitarian Law Make a Difference?'[30] and 'Best Practices in Strengthening Child Protection'.[31] In addition, working documents including the 'Report on Strengthening Legal Protection of Victims of Armed Conflicts',[32] 'Report on IHL and the Challenges of Armed Conflicts'[33] and the 'Concept Note for the Plenary Session'[34] tackled the same agenda item. Finally, Resolution 2 concerned a '4-Year Action Plan for the Implementation of International Humanitarian Law'.

For the ICRC, therefore, the International Conference provides an opportunity to reflect on recent developments in humanitarian action and conceive of important progress that must be made in the next four years. The actual gathering of representatives at the conference in commissions, workshops and as individuals provides scope to push for developments in the practice of the IRCRCM in the coming years. This example, taken from the 31st International Conference, serves to show the myriad of components that together inform the

[30] 31st International Conference of the Red Cross and Red Crescent Workshop 'Protection for Victims of Armed Conflicts: How Can a Gender Perspective on International Humanitarian Law Make a Difference?' (Organised by the Swedish Red Cross and Ministry of Foreign Affairs, Sweden in cooperation with the Australian Red Cross and the Australian Government (28 November 2011)

[31] Uganda Red Cross Society and the Norwegian Red Cross Youth 'Best Practices in Strengthening Child Protection' (28 November 2011).

[32] 31st International Conference of the Red Cross and Red Crescent, 'Strengthening legal protection for victims of armed conflicts Report' ((Geneva, Switzerland, 28 November – 1 December 2011) 31IC/11/5.1.1.

[33] 31st International Conference of the Red Cross and Red Crescent, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts Report: Document prepared by the International Committee of the Red Cross' (Geneva, Switzerland, 28 November – 1 December 2011) 31IC/11/5.1.2.

[34] 'Concept Note: Strengthening Legal Protection for Victims of Armed Conflicts' (2nd Plenary Session) <http://www.rcrcconference.org/docs_upl/en/Concept_note_Plenary_IHL_EN.pdf> accessed 6 January 2015.

adoption of a resolution. As stated above, the resolutions are not binding in the sense that there will be repercussions should the objectives fail to be reached, but as they are adopted by consensus and include planning for the next four years; they provide a framework for the IRCRCM to build on in the pursuit of humanitarian goals.

It is pertinent to note that the 32nd International Conference will take place in December 2015, the focus of which is the 'Power of Humanity: the Fundamental Principles in action'.[35] The agenda is put together by the Presidency of the ICRC which receives submissions from ambassadors of States and the ICRC and IFRC. In addition individual national societies may make submissions. The submissions contribute to a 'Concept Note'. The opening statement of the concept is particularly relevant to this research, although, of course, published after much of the research was complete. It states that:

> We are the International Red Cross and Red Crescent Movement. We are a global humanitarian network, which helps people prepare for, deal with and recover from crisis. Whether you are facing natural or man-made disasters, armed conflict or health and social care issues, Red Cross and Red Crescent volunteers and staff are there to help, without

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[35] 'Concept for the 32nd International Conference of the Red Cross and Red Crescent: Power of Humanity: the Fundamental Principles in action' (Adopted 26 November 2014) <http://www.rcrcconference.org/images_upl/files/IC32_%20Concept%20paper_final_EN.pdf> accessed 6 January 2015. The 32nd Conference will take place on 8-10 December 2015, Geneva, Switzerland.

adverse discrimination. Guided by our Fundamental Principles, we mobilise the power of humanity to save lives and relieve suffering.[36]

It is interesting because it shows the evolution of the ICRC from a humanitarian organisation strictly concerned with the guardianship of IHL during armed conflict. The reference to 'crisis', 'disasters' and 'health and social care issues' show the expanding concerns of the ICRC. These developments, being acknowledged in the concept for the next International Conference are important in terms of the mandate of the ICRC, because only the International Conference can amend the Statues of the IRCRCM and the Conference's Rules of Procedure. The officers of the Conference are proposed by the Council of Delegates on advice from the Standing Commission supported by the ICRC and the IFRC. Moreover, members can request that it rule on 'any difference of opinion as to the interpretation and application of those Statutes and Rules'.[37] The International Conference does not direct the action of any of its participants, all of which are independent actors. Finally, it is the International Conference that determines what studies and measures are necessary to focus on over the next four years. The current study, for example, concerns 'Health Care in Danger'.[38] The Conferences must include reports on the past four years work; in 2015, therefore, this will include reflections on the

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[36] ibid.

[37] Statutes of the IRCRCM art 18(2)(a).

[38] 31st Conference of the International Red Cross and Red Crescent Movement, 'Resolution 5-Health Care in Danger: Respecting and Protecting Health Care' (Geneva, Switzerland 28 November-1 December 2011) <www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-5-2011.htm> accessed 1 July 2014.

'Health Care in Danger' project which has been the focus of the past four years.[39]

(1) What Authority do the Decisions of the International Conference have?

Under Article 10 (5) Statutes of the IRCRCM '...the International Conference shall adopt its decisions, recommendations or declarations in the form of resolutions'. Since part of the role of the International Conference is to set the agenda for the ICRC (to which State parties will consent), it is important to consider the authority of such decisions. Bugnion argued that 'among the texts which must be considered as mandatory are resolutions concerning internal regulations, such as the Rules of Procedure of the International Red Cross and Red Crescent Movement, resolutions concerning the establishment of subsidiary bodies and the rules governing the various Funds and Medals'.[40] The status of the decisions of the International Conference has a direct impact on the ICRC. Bugnion stated that 'throughout its history the ICRC has relied on resolutions of International Conferences for support, in particular those which have granted it mandates or acknowledged its authority in particular fields'.[41]

Of critical importance to this thesis is Article 10 (6) of the Statutes, which allows the Conference to assign mandates to the ICRC and to the Federation.

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[39] Health Care in Danger website <https://www.icrc.org/eng/what-we-do/safeguarding-health-care/solution/2013-04-26-hcid-health-care-in-danger-project.htm> accessed 21 January 2015.

[40] Perruchoud, *Les Résolutions*, 110-129 in Bugnion (n 11).

[41] Bugnion (n 11) 518 states that 'in this respect, particular reference should be made to Resolution IV/3 of the Berlin Conference (1869) concerning the creation of an information agency; Resolution VI of the Washington Conference (1912) concerning assistance to prisoners of war, and Resolution XIV of the Geneva Conference (1921) concerning the work of the Red Cross in the event of civil war'.

In addition, the Statutes of the ICRC Article 5 (2) (h), states that the ICRC shall carry out mandates entrusted to it by the International Conference. It is clear, therefore, that the decisions of the International Conference are binding on the ICRC. During the International Conference, as described above, the ICRC may propose a future mandate, such as Health Care in Danger, agree to it in the course of discussions or vote for it. When these conditions are met, the mandate is then binding on the ICRC.[42]

It is argued that part of the 'legitimacy' of the ICRC stems from the Conference. The ICRC may be given a project, such as Health Care in Danger, but the ICRC can also use the Conference as an opportunity to gain leverage for a particular topic that it is concerned with, as the Conference can garner support for such, or at least raise the profile of the cause. By example, the Council of Delegates reports on specific issues and 'appeals' to States and 'calls upon' members of the movement to reach for certain outcomes, for example, 'Resolution 1: Working towards the Elimination of Nuclear Weapons' states that the Council of delegates, under paragraph three:

> *Appeals* to all States: to ensure that nuclear weapons are never again used, regardless of their views on the legality of such weapons; to pursue in good faith and conclude with urgency and determination negotiations to prohibit the use of and completely eliminate nuclear weapons through a legally binding international agreement, based on existing commitments and international obligations'.

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[42] Perruchoud, *Les Résolutions*, 144-163 in Bugnion (n 11).

Under paragraph 4 it '*calls on* all components of the Movement, utilizing the framework of humanitarian diplomacy'. To this end, the International Conference guides the objectives of States parties to the Geneva Conventions I, II, III and IV 1949 and the bodies of the IRCRCM. The resolutions are not legally binding, they do not resemble UN Security Council resolutions, but they do provide detail on the upcoming work of the components of the IRCRCM. Critically this is work to which all State parties have consented to. In addition, through individual Headquarters Agreements, States have consented to the presence and work of the ICRC within their territories. It is argued that although one cannot definitively state that the resolutions of the International Conference are legally binding, they, nevertheless, indicate a willingness of States to be bound by and facilitate the upcoming work of the ICRC. Moreover, sometimes the resolutions adopted at the Conference can create mandates, which conjoin the ICRC and states. The ICRC and Switzerland, for example, undertook a study on compliance, which lasted for four years.[43] Finally, the ICRC is responsible for the recognition of new National Societies.[44] The role of the International Conference in this process was significant in the case of the Israeli National Society and the Palestinian Red Cross.[45]

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[43] 31st International Conference of the Red Cross and Red Crescent, 'Strengthening Legal Protection for Victims of Armed Conflicts', (Geneva, Switzerland, 28 November – 1 December 2011) Resolution 31IC/11/5.1.1, Part 2.

[44] Statutes of the IRCRCM art 4.

[45] 31st International Conference of the Red Cross and Red Crescent, 'Resolution 5: Implementation of the Memorandum of Understanding and Agreement on Operational Arrangements, dated 28 November 2005, between the Palestine Red Crescent Society and the Magen David Adom in Israel'

The International Conference is therefore an opportunity for the ICRC, alongside the States party to the Geneva Conventions I, II, III and IV 1949, to progress the protection and assistance work of the ICRC. The legal framework and practice of the ICRC shows the adaptation of its work on the international stage. This can be through large-scale projects, such as Health Care in Danger, which are a response to general trends in humanitarian assistance and protection, or to respond to specific situations through the adoption of Memorandum of Understanding's. This is critical in terms of the ICRC remaining relevant and useful for people on the ground that are affected by armed conflict and other situations of violence.

(2) Bodies of the International Conference

The ICRC is also part of the Council of Delegates, which includes the National Societies and the IFRC. The Council of Delegates debates and decides on 'global strategic issues, and matters that concern the Movement as a whole'.[46] In the Council of Delegates each National Society, the ICRC and IFRC maintains its independent legal status and has one vote. However, decisions are normally by consensus.[47] The final governing body of the IRCRCM is the

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<http://www.rcrcconference.org/images_upl/files/Blue%20Book%2031st%20IC_ENG.pdf> accessed 21 January 2015; See also 31st International Conference of the Red Cross and Red Crescent, 'Explanatory note to the Memorandum of Understanding and the Agreement on Operational Arrangements' (18 November 2011)<https://www.icrc.org/eng/resources/documents/red-cross-crescent-movement/31st-international-conference/31-international-conference-mou.htm> accessed 21 January 2015.

[46] Statutes of the IRCRCM (Section III 'Statutory Bodies') arts 12-15; IRCRCM Rules of Procedure arts 23-28.

[47] The International Conference, the Standing Commission, the ICRC, the Federation or National Societies can refer issues to the Council. The Council cannot, however, give an opinion, pass a resolution or make a decision in conflict with decisions already taken by an International Conference.

nine-member Standing Commission. [48] It organises the International Conferences and the Council of Delegates. Overall, therefore, it can be seen that the ICRC is one component of a much larger Movement. The Standing Commission is the 'trustee' of the ICRC. It is the highest deliberative body and all components of the ICRC are represented. In addition to its responsibilities regarding arrangements for International Conferences and meetings of the Council, the Standing Commission shall:

> Promote harmony in the work of the Movement and, in this connection, coordination among its components; encourage and further the implementation of resolutions of the International Conference; examine, with these objects in view, matters which concern the Movement as a whole. [49]

This humanitarian 'machine' has continued to develop since the end of the Second World War and new agreements and rules of procedure show that the IRCRCM and its constituent parts continue to develop in response to changing humanitarian needs on the ground. Nevertheless its internal rules and structures preclude arbitrary developments and, as with organisations much more familiar to textbooks on international institutional law, the IRCRCM has its own system

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[48] Statutes of the IRCRCM (Section III 'Statutory Bodies') arts 16-19; IRCRCM Rules of Procedure arts 29-31. The Standing Commission comprises nine members: five from different National Societies (each elected in a personal capacity by the International Conference and holding office until the close of the following International Conference), two representatives of the ICRC and two representatives of the International Federation. The Standing Commission elects a Chairman and a Vice-Chairman from among its members. Its functions have been further developed in Council of Delegates and International Conference resolutions.

[49] Standing Commission <http://www.standcom.ch> Accessed 6 January 2015.

of checks and balances, as described above. This institutional structure and the Statutes of the IRCRCM, Statutes of the ICRC and Statutes of the IFRC are borne in mind throughout this thesis.

b) Introducing the Fundamental Principles of the IRCRCM and Consent

The ICRC has a responsibility to act in all situations of armed conflict and violence and in order to do so it needs to be accepted by all actors.[50] The fundamental principles of the IRCRCM are included in the preamble to the Statutes of the IRCRCM. They include, as stated earlier, humanity, impartiality, neutrality, independence, voluntary service, unity and universality.[51] One aim of the principles is to ensure that all National Societies are a 'solid and well built edifice'.[52] The ICRC acts within politically and legally sensitive areas; it is able to do so because of its reputation for impartiality in the eyes of parties to conflicts and other actors.

In theory, the ICRC does not engage in political debates, or activities that could undermine its credibility, unity and strength. It also does not make its assistance conditional upon the legitimacy of the recourse to arms, as its aim is

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[50] For further discussion on the neutrality and independence of the ICRC see Anderson K, 'Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for UN and NGO Agencies Following the 2003-2004 Afghanistan and Iraq Conflicts' (2004) 17 Harvard Human Rights J 41; Krahenbuhl P, 'The ICRC's Approach to Contemporary Security Challenges: A Future for Independent and Neutral Humanitarian Action' (2004) 86 IRRC 505; Thurer D, 'Dunant's Pyramid: Thoughts on the "Humanitarian Space"' (2007) 89 IRRC 47; Wortel E, 'Humanitarians and their Moral Stance in War: The Underlying Values' (2009) 91 IRRC 779.

[51] ICRC, *The Fundamental Principles of the Red Cross and Red Crescent* (ICRC, Geneva 1996).

[52] See Pictet J, 'The Fundamental Principles of the Red Cross: Commentary' (International Federation of Red Cross and Red Crescent Societies, Geneva 1979) 6.

to assist rather than denounce.[53] Furthermore the ICRC does not allow 'its activities to be coordinated by the UN or anyone else, claiming its historically unique position as the custodian of the Geneva Conventions I, II, III and IV 1949 and Additional Protocols'.[54]

In addition to remaining impartial, it is important that the ICRC remain a neutral and independent actor, outside the political sphere, which allows it to intervene in humanitarian situations, even between a government and the people. Critically, no other organisation possesses this capacity on the international stage. The ICRC is clear that neutrality is not indifference, rather the ICRC, 'believes that it must steer clear of political controversies and keep its action distinct from the political or military agendas of any one actor'.[55] The ICRC insists on 'dialogue with all parties to armed conflict in order to reach and improve the lives of those most in need'.[56] The provision of humanitarian assistance must always be neutral, that is, for all sides of the conflict. States are under an obligation to allow free passage of goods through its territory intended for the civilians of another party to the conflict.[57]

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[53] Sandoz Y, 'The Red Cross and Peace: Realities and Limits' (1987) 24(3) J of Peace Research: Special Issue on Humanitarian Law of Armed Conflict 287, 288.

[54] Weiss TG, 'Humanitarian Action in War Zones' in Nederveen Pieterse J, *World Orders in the Making* (Institute of Social Studies, Macmillan Press Ltd, Hampshire 1998) 43.

[55] Krähenbühl P (ICRC Director of Operations), 'Challenges for Humanitarian Action in Situations of Armed Conflict and Internal Violence' (IRCRCM (Council of Delegates), Seoul, Republic of Korea, 16-18 November 2005) <http://extranet.icrc.org/web/eng/siteeng0.nsf/html/council-of-delegates-2005-statement-161105> accessed 4 July 2014.

[56] ICRC, 'Strengthening Legal Protection for Victims of Armed Conflict: Draft Resolution and Report' (31st International Conference of the Red Cross and Red Crescent, Geneva October 2011) 31IC/11/5.1.1 pages 28-29 <www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-strengthening-legal-protection-11-5-1-1-en.pdf> accessed 10 July 2014.

[57] Geneva Convention IV art 23; Additional Protocol I art 70 (2); Henckaerts J-M and Doswald-Beck L, *Customary International Humanitarian Law: Volume 1 Rules* (CUP 2005)

The increasing complexity of modern armed conflict and armed violence require the ICRC to gain and maintain the trust not only of States but also NSAs. The ICRC therefore relies on its reputation for neutrality and independence to facilitate dialogue and a relationship between all parties. Indeed 'principled humanitarian action is the foundation of the ICRCs success in reaching people and gaining acceptance by State and non-State parties to conflict'. It is this acceptance that gives the ICRC access and the ability to help.[58] In addition to the fulfilment of the fundamental principles, consent is also essential to the protection and assistance work of the ICRC. In 2012 Henckaerts reported that, 'today there is much discussion about the requirement to obtain consent from the parties to the conflict in order to access conflict zones and, in particular, about the prohibition on withholding such consent on arbitrary grounds'.[59] 'If the survival of the population is threatened and a humanitarian organisation fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place'.[60] State practice and the 'ICRC Study on Customary IHL' show that if action can be shown to be humanitarian and impartial then

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Rule 55; See also Hague Convention V art 14 which states that humanitarian assistance for the sick of wounded is not considered to be a violation of neutrality even if it benefits only the sick and wounded from one party to the conflict.

[58] Ki-Moon B, 'The ICRC and the Changing Humanitarian Landscape' (2012) 94 IRRC 1251, 1252.

[59] Henckaerts J-M, 'Reports and Documents-Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the Twenty-first Century' (Winter 2012) 94 IRRC 1551, 1553.

[60] Pilloud C, Sandoz Y, Swinarski C and Zimmerman B, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, The Hague 1987) 1479.

governments cannot arbitrarily refuse assistance.[61] This is particularly the case in extreme situations, where a lack of supplies would result in starvation.[62] Article 18 AP II refers to the consent of the High Contracting Party for the delivery of supplies.

The fundamental principles of the IRCRCM should ensure the acceptance by States of the ICRC providing humanitarian assistance and, in doing so, the safe working environment of ICRC delegates. However, it is important to note that, on the ground, despite the fundamental principles, the activities of the ICRC are continually disturbed, hindered and halted by targeted attacks against humanitarian personnel; complicated and lengthy visa regimes and humanitarian workers needing permits for travel to certain areas.[63] If neutrality cannot be upheld then the 'warring parties- local warlords, bandits and thieves, religious fanatics, thugs and terrorists- are willing to kidnap, bomb and kill humanitarian aid workers, thereby escalating the dangers of relief work in the field'.[64] These incidents are evidence of the necessity of the ICRC's maintenance of its reputation for neutrality and impartiality, as well as ensuring States consent to its presence.

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[61] ICRC, 'Rule 55: Access to Humanitarian Relief for Civilians in Need' https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule55> accessed 21 January 2015.

[62] Additional Protocol I art 54; See also Bond J, 'International Conflict and Article 3 of the Geneva Conventions' (1971) 48 Denver LJ 266; Gasser HP, 'International Non-International Armed Conflict: Case Studies of Afghanistan, Kampuchea, and Lebanon' (1982) 31 American U L Rev 911; Henckaerts and Doswald-Beck (n 57) 105, 193; Barber R, 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law' (2009) 91 IRRC 371, 372.

[63] Humanitarian Practice Network, 'Operational Security Management in Violent Environments' (Overseas Development Institute, London 2010) 39-40.

[64] See Anderson K, 'Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for UN and NGO Agencies Following the 2003-2004 Afghanistan and Iraq Conflicts' (2004) 17 Harvard Human Rights J 41, 42.

c) The Seville Agreement and the Swiss Civil Code

The Seville Agreement between the members of the IRCRCM was adopted in 1997 and sought to create a 'profound change' between the Members of the IRCRCM. It sought to foster a 'stronger sense of identity, of solidarity, of mutual trust and of shared responsibility'.[65] The ICRC is a constituent component of the IRCRCM. The requirement that the ICRC maintain 'close contact' with National Societies and the IFRC is described in Article 5 Statutes of the ICRC. In addition, Article 2 Statutes of the ICRC states that the ICRC is 'association governed by Article 60 and following of the Swiss Civil Code, the ICRC has legal personality'.

Article 60 (1) Swiss Civil Code concerns the formation of associations and states that 'associations with a political, religious, scientific, cultural, charitable, social or other non-commercial purpose acquire legal personality as soon as their intention to exist as a corporate body is apparent from their articles of association'.[66] Under the Swiss Civil Code an association must equip itself with organs provided for in the law and in the statutes, namely: A General Assembly (comprising all members of the association); a Committee (comprising at least a president, a secretary, and a treasurer) and an auditor. Only the General Assembly has the authority to amend the Statutes, but an

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[65] Seville Agreement (n 6).

[66] Swiss Civil Code of 10 December 1907 (Status as of 1 July 2014). The statutes must be in writing and adopted by a constitutive General Assembly. They should be concise, precise and clear. Details not formally related to the statutes may be set out in rules of procedure or other *ad hoc* document. The statutes do not need to be authenticated before a notary. See Geneva Welcome Centre (CAGI), 'Creating an Association' <www.cagi.ch/en/service-ong/creation-transfert/creation-dune-association.php> accessed 21 June 2014.

elected committee may amend the rules of procedure.[67] The Swiss Civil Code determines that as soon as the statutes have been adopted by the General Assembly, the association has legal personality and may exercise its legal rights.[68] The ICRC fulfils these requirements, as the statutory bodies of the ICRC include the Assembly, Assembly Council, Presidency, Directorate and Internal Audit. Articles 9-14 Statutes of the ICRC describe the roles of each statutory body. The ICRC is therefore a legal person under the Swiss Civil Code. Whether it possesses ILP is explored in chapter two. It is important to situate the ICRC within the wider IRCRCM, which includes the IFRC and the 189 National Societies. The IFRC has its own constitution.[69] It was established in 1919 and is made up of National Societies. The IFRC inspires, facilitates and promotes all humanitarian activities carried out by its member National Societies on behalf of the most vulnerable people.

d) What Kind of Organisation is the ICRC?

i) Intergovernmental Organisation

The landscape of the international stage began to change when States became more closely connected in trade, politics and relations. It was necessary to establish *ad hoc* international conferences to bring States to one table to enter into agreements or make decisions that affected more than one State. The Concert of Europe, for example, was the 'international system within which

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[67] Rule 32 Rules of Procedure of the IRCRCM (adopted by the 25th International Conference of the Red Cross at Geneva in October 1986 and amended by the 26th International Conference of the Red Cross and Red Crescent at Geneva in December 1995).

[68] Swiss Civil Code (n 66).

[69] IFRC, 'Constitution: Revised and Adopted by the 16th Session of the General Assembly' (*IFRC, Geneva, Switzerland* 20-22 November 2007 <www.ifrc.org/Global/Governance/Statutory/Constitution_revised-en.pdf> accessed 1 July 2014.

European governments formulated and conducted policy'; it was established to deal with the 'balance-of-power' politics.[70] In time these *ad hoc* conferences became the building blocks for international organisations to which States ceded elements of sovereign power.[71] The era following the Second World War saw the greatest proliferation of intergovernmental organisations, as, in some instances, they were seen as entities that could guarantee the 'salvation of mankind'.[72] In this period, States needed to coexist and work together to make decisions.[73] States were still the dominant actor on the international stage and their interests guided the development of international law. It was, in fact, the dependence on the consent of the State and the importance of State sovereignty that led to calls for a greater institutionalisation of the system in order to ensure the development of a stronger notion of the rule of law. Nevertheless, it should be recognised that even Grotius saw 'an intimate connexion between the rejection of ideas of 'reason of State' and the affirmation of the legal and moral unity of mankind'.[74]

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[70] Elrod RB, 'The Concert of Europe: A Fresh Look at the International System' (1970) 28(2) World Politics 159, 160-62.

[71] Brownlie I, *Principles of Public International Law* (7th edn, OUP 2008) Chapter 31; Collins R and White ND, 'International Organizations and the Idea of Autonomy, Introduction and Overview' in Collins R and White ND, *International Organisations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge, London 2011) Ch 1.

[72] Klabbers J, *Organisations: The Library of Essays in International Law* (Ashgate/ Dartmouth Publishing Company, Surrey 2005) 164.

[73] Jessup P, *A Modern Law of Nations* (Macmillan, New York 1948) 17.

[74] Lauterpacht H, 'The Grotian Tradition in International Law' (1946) 23 British YB Int'l L 31 in Teitel RG, *Humanity's Law* (OUP 2011) 23- 24.

The institutional landscape continued to evolve during the latter half of the twentieth century and the beginning of this century.[75] At the end of the Cold War, Frank pleaded with the world to 'create a global system for the new millennium, one which preserves peace, fosters economic growth, and prevents the deterioration of the human physical and environmental condition'.[76] This section considers the characterisation of international organisations today and whether the ICRC can be defined as such.

There is no generally accepted definition of an international organisation.[77] Nevertheless three components are included in almost all definitions; firstly, that an international organisation is an association of States, secondly that it was established under international law, that is, by an international agreement and finally that it has organs with capacity on the international stage to pursue common interests.[78] Well known international organisations include the UN, World Trade Organization and the International Monetary Fund. Theoretically, therefore, if the ICRC fulfils all three of these criteria it ought to be considered an international organisation. The UN is utilised throughout this analysis as it fulfils all three of the requirements for an entity to defined as an 'international

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[75] McCorquodale R, 'Beyond State Sovereignty: The International Legal System and Non-State Participants' (2006) *International Law: Revista colombiana de derecho internacional, junio-noviembre, número 008* Pontificia Universidad Javeriana Bogotá, Colombia 103, 108.

[76] Franck T, 'United Nations Based Prospects for a New Global Order' (1990) 22 New York U J Intl L and Politics 601, 601-602.

[77] White ND, *The Law of International Organisations* (Manchester UP, Manchester 2005) 1; Brölmann C, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart, Oxford 2007) 13.

[78] Virally M, 'Classification of International Organizations: A Legal Approach' in Abi-Saab G, *The Concept of International Organizations* (UNESCO, Paris 1981) 51; Gautier P, 'The Reparation for Injuries Case Revisited: The Personality of the European Union' (2000) 4 Max Planck UNYB 331, 333; Schermers H and Blokker N, *International Institutional Law: Unity within Diversity* (4th edn, Martinus Nijhoff Publishers, Amsterdam 2003) 32-46; Brölmann (n 77) 17; Klabbers J, *An Introduction to International Institutional Law* (2nd edn, CUP 2009) 6-12.

organisation', whether the ICRC is, by its nature, an international organisation will therefore be determined largely by comparing it to the UN.

The ICRC is comprised of the Assembly, the Assembly Council and the Directorate (the executive body). Both the Assembly, with up to 25 co-opted members of Swiss nationality, and the Assembly Council are chaired by Peter Maurer, who has been President of the ICRC since 1 July 2012. He is assisted by a Vice-President, Christine Beerli. The Directorate, with five members, is chaired by the Director-General, Mr. Yves Daccord. These three organs 'have overall responsibility for ICRC policy, strategy and decisions related to the development of IHL. These bodies oversee all the activities of the organization, including field and headquarters operations and the approval of objectives and budgets. They also monitor implementation by the Directorate of Assembly or Assembly Council decisions and are assisted in this task by a Control Commission and the internal and external auditors'.[79]

(1) Associated by States

During the 1940s, against the backdrop of the Second World War, sovereign States began to join together at meetings and conferences to jointly engage in a fight against aggression. This is evidenced by the early outcomes, of such, including the Dumbarton Oaks Conversations of 1944.[80] These conversations led up to the UN Conference on International Organization, which was convened in San Francisco from 25 April to 26 June 1945, where fifty allied

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[79] 'ICRC Decision Making Structures' < https://www.icrc.org/en/document/icrc-decision-making-structures-0#.VOih50JZFNM> accessed 21 January 2015.

[80] Kelsen H, 'The Old and the New League: The Covenant and the Dumbarton Oaks Proposals' (1945) 39(1) AJIL 45; Hilderbrand RC, *Dumbarton Oaks: The Origins of the United Nations and the Search for Post War Security* (U of North Carolina Press, North Carolina 1990).

nations agreed to give certain powers to an international organisation, the UN.[81] The UN is a State-centric organisation, which continues to admit new Member States; the most recent State to be recognised by the General Assembly was South Sudan in 2011.[82]

The ICRC, on the other hand, is associated by Swiss nationals and is usually defined as a private organisation, as Swiss law governs it.[83] It does not have member States and is therefore independent in its governance and operational decisions. The ICRC was 'born in private, among private people'.[84] Its instigator was Henry Dunant, whose experience of the aftermath of the Battle of Solferino in 1859 pushed him to consider how battles should fare for soldiers. Dunant imagined national societies of volunteers ready to help the wounded from all States whenever armed conflict broke out. He always intended therefore for the movement to be international. His reverie, backed in the initial months by General Dufour and Gustave Moynier, was of a cohort of volunteer nurses on battlefields, volunteers transporting the wounded to hospitals and the care of soldiers in hospitals. In a speech to the Public Welfare Society on 9 February 1863 Dunant outlined his vision that such an international voluntary service needed a permanent committee with a covenant, supported by 'Europe's crowned heads', to 'adhere to some basic code of

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[81] For a comprehensive account of the San Francisco conference see Schlesinger S, *Act of Creation: The Founding of the United Nations: A Story of Superpowers, Secret Agents, Wartime Allies and Enemies, and their Quest for a Peaceful World* (Basic Books, New York 2004); See also Buzo A, *Pacific Union: The Story of the San Francisco-Forty Fivers* (Currency Press, Monash University of Melbourne 1995).

[82] UNGA, 'Admission of the Republic of South Sudan to Membership' (25 August 2011) Res A/RES/65/308.

[83] The International Red Cross and Red Crescent M 40.

[84] Moorehead C, *Dunant's Dream: War, Switzerland and the History of the Red Cross* (Carol and Graf Publishers, New York 1999) 21.

behaviour in wartime'.[85] The principle of voluntary service is now contained in the preamble to the Statutes of the IRCRCM.

On 17 February 1863 Dunant, Dufour, Moynier and two new supporters, Louis Appia and Theodore Maunoir, a private group met and decided to become the International Committee for Relief to the Wounded, also known as the Committee of Five.[86] From February to October 1863 the Committee worked to harness the support of ministers and royals in a number of European capitals for their international committee. On 26 October 1863 sixteen States and four philanthropic institutions sent representatives to a diplomatic conference, which adopted ten articles on the wounded and the neutrality of medical personnel.[87] They are contained in the 'Resolutions of the Geneva International Conference' and provide for each nation to establish a committee 'whose duty it shall be, in time of war and if the need arises, to assist the Army Medical Services by every means in its power'.[88] It also accepted the proposals made by Dunant and the Committee for the establishment of national committees.

It is perhaps difficult to reconcile the ICRC with the UN in terms of classifying it as 'associated by states'. However, it is argued that although the Committee was made up of five individuals, it would have been a nonentity without State representatives and State support at the conference, including ratification of the articles agreed upon by States. Indeed the following year, in 1864, the Swiss Federal Council, on the initiative of the Geneva Committee, invited the

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[85] ibid 14-15.

[86] ibid 17.

[87] 'From the battle of Solferino to the Eve of the First World War' (ICRC, 28 December 2004) <www.icrc.org/eng/resources/documents/misc/57jnvp.htm> accessed 1 July 2014.

[88] Resolutions of the Geneva International Conference (Geneva, 26-29 October 1863).

governments of Europe and several American States to a diplomatic conference.[89] The outcome of the conference was to be the 'Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, of 22 August 1864', which had sixteen State signatories. Pictet stated:

> It is difficult to imagine today the vast influence exercised by the first Geneva Convention on the evolution of the law of nations. For the first time in history, the States, in a formal and permanent document, accepted a limitation on their own power, for the sake of the individual and an altruistic ideal. For the first time, war had yielded to law.[90]

In 1875 the Committee of Five adopted the name, the ICRC.[91] It is submitted that without the collaboration of States and State parties to a number of international conventions, the Committee of Five would never have become the ICRC. It would also not be the international presence that it is today. Although the Committee of Five were the original members of the ICRC, it was always Dunant's intention, and in fact need, for States to come together at the International Conference to support the initiatives as regards the wounded. The work of the International Conference was described in chapter one, but, nevertheless, its significance should be emphasised. The International

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[89] Schindler D and Toman J, *The Laws of Armed Conflict: A Collection of Conventions, Resolutions, and Other Documents* (Brill, Leiden 1998) 280-81.

[90] Pictet J, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff Publishers, Dordrecht and Henry Dunant Institute, Geneva 1985) 30, see also ch 2.

[91] See Introduction to the Resolutions of the Geneva International Conference (Geneva, 26-29 October 1863).

Conference cannot be matched, on the international stage, as a humanitarian forum. The presence of each component of the IRCRCM and the 194 State parties to the Geneva Conventions I, II, III and IV 1949 ensure that current issues in IHL and humanitarian needs are the focal point of each International Conference.

To this end, it is argued that, although the ICRC cannot be defined as 'associated by States'; it is, nevertheless, inextricably linked in its law and practice to States and the people living within them. The International Conference therefore supports the work of the ICRC and facilitates the drafting of conventions, to which States became signatories. The need for State consent for ICRC missions precludes a wholly autonomous ICRC, as is the same in the UN.

(2) Established by International Agreement

The second component of an international organisation is that it be established by international agreement between States. Under the 'Vienna Convention on the Law of Treaties 1969, as amended in 1986', an international agreement is concluded between States (or international organisations) in written form and governed by international law.[92] As regards an international organisation such an agreement would be constitutional. As a caveat of such an organisation being established by an international agreement between States, those States must have freely consented to be bound by such an agreement. Schermers and Blokker stated that an organisation's functions and rights depend upon the

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[92] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

constituting treaty provisions and the general limitations of international law.[93]

An example of such a constitutional international agreement is the UN Charter, which describes the rights and obligations of Member States.[94]

The International Conferences, initially convened by the efforts of the Committee of Five, facilitated agreement upon the Geneva Conventions, under which the ICRC actions were mandated, including the protection of the wounded and sick in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war; and civilians who find themselves under the rule of a foreign power in the event of international conflict. Nowadays the ICRC receives instructions from the International Conferences, for example, to conclude a 'Study on Customary IHL' and, most recently, to study the provision of health care in armed conflict.[95] It is argued that directions to the ICRC to undertake such work are evidence of the freely expressed will of States to endow the ICRC with specific rights and duties.

(3) Organs with Capacity on the International Stage

The final element usually attributed to an international organisation is that it has organs with capacity on the international stage. The UN, for example, is not merely a forum for State interaction, as its organs act on the international stage; creating law, policy and practice in specific areas. The UN principal

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[93] Schermers and Blokker (n 78) 992; See also Cassese A, *International Law in a Divided World* (Clarendon Press, Gloucestershire 1986) 86.

[94] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI (UN Charter).

[95] In December 1995, the 26th International Conference of the Red Cross and Red Crescent officially mandated the ICRC to prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts. See 'Twenty-sixth International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Resolution 1: International Humanitarian Law: From Law to Action. Report on the Follow-up to the International Conference for the Protection of War Victims' (7 December 1995) <www.icrc.org/eng/resources/documents/resolution/26-international-conference-resolution-1-1995.htm> accessed 1 July 2014.

organs are the General Assembly, the Security Council, Economic and Social Council (ECOSOC), the Secretariat, the International Court of Justice (ICJ) and the Trusteeship Council.[96] The UN also has specialised agencies for technical areas such as the International Labour Organization, the International Civil Aviation Organization (ICAO) and the Food and Agriculture Organization (FAO).[97] Finally, professionals, academics and staff can work in an individual capacity for a very specific mandate, in UN specialised agencies, such as the International Atomic Energy Agency (IAEA).[98] In the ICRC, the Presidency takes responsibility for its external relations.[99]

ii) Private International Organisations

The analysis above, concerning whether the ICRC should be defined as an international organisation, showed that without Member States, the ICRC couldn't be defined as such. However the ICRC does fulfil some of the requirements. This section will therefore consider whether the ICRC, as an organisation, could be labelled as a private international organisation. The ICRC's decision-making capabilities are in the hands of private individuals, rather than States. This indicates that the ICRC possesses some commonalities with private international organisations. In economic and market driven spheres, the globalisation of economic activity has meant the 'construction of private international regimes in many industry sectors as a form of self-

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[96] For a general overview of the UN structure see Conforti B and Focarelli C, *The Law and Practice of the United Nations* (4th edn, Martinus Nijhoff Publishers, The Hague 2010).

[97] Abbott KW and Snidal D, 'Why States Act through Formal International Organisations' (1998) 42(1) J of Conflict Resolution 3, 4.

[98] 'List of Specialised Agencies' <www.un.org/Overview/uninbrief/institutions.shtml> accessed 24 June 2014.

[99] Statutes of the ICRC art 11.

regulation or rule setting in the absence of an overarching global political regime'.[100] It is submitted therefore that the self-regulation and competence to establish rules that govern commerce shows that organisations do not always need Member States to control areas of international law and relations. Members of the private sector therefore often replace State-to-State negotiations or member States based international organisations.[101] Is it possible to draw parallels between private international organisations and the ICRC? This part of the chapter uses Intelsat Ltd, as an existing private international organisation, to show how the ICRC might be consistent with the definition of such.

On 20 December 1961 General Assembly Resolution 1721 decided that global satellite communication should be made available on a non-discriminatory basis.[102] On 24 August 1964 the International Telecommunications Satellite Organisations (INTELSAT), a multilateral public intergovernmental treaty entity, was established by governments and operating entities signing an agreement.[103] On 30 November 1998 INTELSAT transferred working capital, five in-orbit satellites, one in-construction satellite and their associated orbital roles to the newly created company, New Skies NV. On 18 July 2001 INTELSAT became a private company called Intelsat Ltd. It provides satellite services worldwide that facilitate media and entertainment communications for

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[100] Haufler V, 'Private Sector International Regimes' in Higgot RA, Underhill GRD and Bieler A (eds), *Non-State Actors and Authority in the Global System* (Routledge, London 2000) 122-23.

[101] ibid 121.

[102] UNGA, 'International Co-operation in the Peaceful Uses of Outer Space' (20 December 1961) Res 1721 (XVI).

[103] 'Intelsat Ltd: About Us' <www.intelsat.com/about-us/our-history/> accessed 25 June 2014.

media and network companies; multinational corporations; Internet service providers and government agencies.[104] Finally on the 28 January 2005 it was sold to private investors.[105]

During the privatisation of INTELSAT a residual treaty organisation was instituted called the International Telecommunications Satellite Organization (ITSO).[106] It is charged with ensuring that the new owners of INTELSAT's former satellite system preserve global connectivity and continue to serve those poor or underserved countries, but without the technological facilities to provide such a service. It therefore relies on political and legal tools to accomplish its mandate.[107] Its member States include most UN members.[108] The maintenance of an intergovernmental organisation within a private company was seen as necessary to protect the 'global connectivity and global coverage' of the system,[109] as it must safeguard 'non-discriminatory access to the [privatized] company's system' and ensure privatized INTELSAT LLC 'serve(s) its lifeline connectivity customers'.[110] Is it possible to draw an analogy between Intelsat Ltd and the ICRC?

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[104] ibid.

[105] ibid.

[106] Katkin K, 'Communication Breakdown?: The Future of Global Connectivity after the Privatisation of INTELSAT' (2005) Intl J of Communications L and Policy 1.

[107] ibid 4-5.

[108] 'International Telecommunications Satellite Organization' <www.itso.int> accessed 25 June 2014.

[109] Katkin (n 106) 28.

[110] ITSO Agreement (17 November 2000) arts III (b) (iii), IX (c) (ii) and (iii) <www.itso.int/index.php?option=com_content&view=article&id=13&Itemid=208&lang=en> accessed 1 July 2014.

Intelsat became a private company as necessitated by the demands of the market, whereas the ICRC was always a private enterprise but with State support. Nevertheless in their functioning and infrastructure there are similarities; both need independent and non-political decision-making and, theoretically, both provide services worldwide without agenda. Indeed telecommunications, by the time of sale, were considered a necessary part of all territories/ States and the fear was that commercial enterprises could render some developing States with no alternative service provider and become 'cut off' from the rest of the world.[111] The role of the ICRC is likewise a necessary actor on the international stage. It has private Swiss citizens at the helm; its impartiality, neutrality and independence must be maintained. For INTELSAT/ Intelsat Ltd, it was necessary to maintain government support. It is an intermingling of international organisation creation and private organisation functionality.

iii) Non-Governmental Organisations

The final type of organisation to be considered is the NGO. Charnovitz and Amerasinghe define the ICRC as an NGO.[112] This section will clarify and argue against existing literature, which sees the ICRC as 'just' an NGO. There is no generally accepted definition of the term NGO in international law.[113] If we take the list of elements of NGOs from just four academics it includes: independence; non-profit, non use of or promotion of violence; formal

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[111] 'Intelsat Ltd: About Us' <www.intelsat.com/about-us/our-history/> accessed 25 June 2014.

[112] Charnovitz S, 'Nongovernmental Organizations and International Law' (2006) 100(2) AJIL 348, 348; Amerasinghe CF, *Principles of the Institutional Law of International Organizations* (2nd edn, CUP 2005) 3, 6.

[113] Lindblom A-K, *Non-governmental Organizations in International Law* (CUP 2005) 36.

existence and structure; public not private interests; transnational scope of activists; individuals join voluntarily; independent of States; self- appointed; exist outside of international law; consist of a small group of people and represent the opinion of a relatively small number of people.[114] Indeed, confusingly, Kaczorowska states that the ICRC is an NGO, with personality similar to the UN.[115]

The term NGO is found in Article 71 UN Charter, which recognised the possibility of NGOs interacting with the UN.[116] It did not, however, provide any definition of such an organisation. In 1950 ECOSOC stated that 'any international organization which is not created by intergovernmental agreement shall be considered as an NGO'.[117] A simple argument would be that since the ICRC was not actually created by an international agreement, it is therefore an NGO. We could add to this that the historical background of the ICRC shows that it emerged because of a profound normative change at a societal level, just like NGOs.[118] Its creation was symptomatic of a feeling amongst people, in particular the Committee of Five, not States, that some kind of external body was necessary during armed conflict. Furthermore much like an NGO, the

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[114] Hobe S, 'Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations' (1997-98) 5 Global Legal Studies J 191, 193-94; Martens K, 'Examining the (Non-) Status of NGOs in International Law' (2003) 1 Indiana Global L Studies J 1, 1-2; Lindblom (n 113) 46-52; Lindblom A-K, 'NGOs and Non-state Actors in International Law' in Reinalda B (ed), *Ashgate Research Companion to Non-State Actors* (Ashgate, Surrey 2011) 147-48.

[115] Kaczorowska (n 7) 181.

[116] Charnovitz S, 'Two Centuries of Participation: NGOs and International Governance' (1997) 18 Michigan J of Intl L 183, 186-describes using UN criteria to define NGOs.

[117] ECOSOC, 'Review of Consultative Arrangements with NGOs' (27 February 1950) E/RES/ 288 (X) para 8; See also ECOSOC, 'Consultative Relationship between the UN and NGOs' (25 July 1996) E/RES/1996/31 para 12.

[118] West K, *Agents of Altruism: The Expansion of Humanitarian NGO's in Rwanda and Afghanistan* (Ashgate, Aldershot 2001) 20.

ICRC has a non-profit, independent identity. Finally there are no Member States or State representatives in the ICRC, although it must be recalled that the ICRC is part of the International Conference.[119]

It is recognised that the role of NGOs on the international stage is developing. In addition to international organisations, for example, NGOs may take part during all stages of the negotiation processes at global conferences;[120] they seek to influence governmental representatives through informal lobbying, advance international standards such as on human rights and the environment. The legal status of NGOs endows them with rights and obligations on the international stage, provides the possibility of acting before international courts and tribunals, to enter formal relationships with international organisations and endows them with the ability to conclude agreements under international law.[121] The ICRC is privy to these rights too but, in addition, governments have accorded rights that are typically only granted to inter-governmental organisations, including privileges and immunities on the international stage and it has signed headquarters agreements with numerous States.[122] These rights are considered in depth in the ILP analysis in the next part of this chapter.

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[119] Muller AS, *International Organisations and their Host States: Aspects of their Legal Relationship* (Kluwer Law International, The Hague 1995) 5.

[120] Gheciu A, 'Divided Partners: The Challenges of NATO-NGO Cooperation in Peace building Operations' (2011) 17 (1) Global Governance 95, 95-113; See also Chadwick A, 'The Emerging Roles of NGOs in the UN System: From Article 71 to a People's Millennium Assembly' (2002) 8(1) Global Governance 93.

[121] Lindblom (n 113) 149.

[122] 'Agreement between the International Committee of the Red Cross and the Swiss Federal Council to Determine the Legal Status of the Committee in Switzerland' (1993) 293 IRRC 152, arts 1, 3, 4 and 5 (Headquarters Agreement 1993); See also Kamminga MT, 'The Evolving Status of NGOs under International Law: A Threat to the Inter-state System?' in Alston P (ed), *Non-State Actors and Human Rights* (OUP 2005) 93, 98-99.

The ICRC is a private association with close ties to Switzerland including its location, the Swiss nationality of Committee members and senior staff, and frequent contacts with the Swiss Foreign Ministry.[123] These elements confer upon the ICRC a profile unique amongst NGOs and international organisations.[124] The subtleties and nuances of the establishment and functioning of the ICRC shows that the ICRC cannot simply be defined as an international organisation, private international organisation or an NGO. From its inception the ICRC was not restricted to internal conflicts in Switzerland. Dunant's plan was for all wounded soldiers in all States to be afforded neutrality and medical care. The realisation of this vision came with the International Conference, an association of States, agreeing to the 1864 Convention and beginning a process of drafting and facilitating the adoption of international legal instruments from which the ICRC would derive rights and duties on the international stage. These aspects of its creation and its subsequent development set it apart from the UN, Intelsat Ltd and NGOs, such as Human Rights Watch and Amnesty International. It is concluded therefore that the ICRC can only be understood as a *sui generis* entity. The ICRC is an organisation, which, through its principles of humanitarianism, neutrality and independence, is able to reach people on the ground.

How then, can the ICRC be clearly distinguished from an NGO? The ICRC mandate was created by States and is developed by the International Conference, and interpreted and applied by ICRC delegates on the ground.

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[123] 'ICRC Directorate' (1 February 2014) <www.icrc.org/eng/resources/documents/misc/icrc-directorate-010710.htm> accessed 24 June 2014.

[124] See International Law Commission, 'First Report on the Responsibility of International Organisations' (26 March 2003) A/CN.4/532 para 21.

This process will be returned to in chapter two. It provides the ICRC with authority on the international stage, as the guardian of IHL and with activities to be undertaken in States. The situations in which it works and the activities it undertakes develop over time. This is different to NGOs whose mandate is created by the people who found the organisation for the specific purposes of that body. For example MSF, which is a private, international association, has the mandate to 'brings humanitarian medical assistance to victims of conflict, natural disasters, epidemics or healthcare exclusion'.[125] Amnesty International has a mandate to 'to undertake research and action focused on preventing and ending grave abuses of these rights'.[126] Local NGOs aim to achieve specific purposes. For example, in the DRC, which forms the case study for this research, a local NGO Eben Ezer Ministries International (EMI) has been working with Children in Crisis, a London based NGO, to support educational initiatives on the remote High Plateau of South Kivu in Eastern DRC.[127]

Indeed, Bugnion argued that 'from the outset, the Red Cross differed from other charitable organizations that flourished during the second half of the nineteenth century in two basic respects: the permanent nature and the international aspirations of the institutions set up on the basis of the resolutions

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[125] Medecins sans Frontiers <http://www.msf.org/msf-activities> accessed 21 January 2015.

[126] Statute of Amnesty International (as amended by the 31st International Council, meeting in Berlin, Germany, 18 to 22 August 2013 http://files.amnesty.org/AIStatute/AIStatuteAsAmendedAt2013ICM_EN.pdf (accessed 6 January 2015)

[127] Democratic Republic of Congo http://www.childrenincrisis.org/our-work/democratic-republic-congo; See also https://secure.thebiggive.org.uk/projects/view/12314/school-building--democratic-republic-of-congo (accessed 6 January 2015)

adopted at the Geneva Conference of October 1863 which gave birth to the Red Cross'.[128] This author is in agreement with Bugnion on that point.

The ICRC is different from an NGO given the organisational structure and involvement of States. If anything it has the 'best of all worlds': it has the support of States and enters into Headquarters Agreements with them; it has the local contacts and support that NGOs are often privy to, and, yet, it remains humanitarian to its core and the people who work in the ICRC are staunch advocates of the fundamental principles, often to the frustration of other organisations who might be working in the same conflict affected area.

e) Conclusion to Chapter One

In 1859 Henry Dunant witnessed the horrors of the aftermath of the Battle of Solferino. Soldiers were wounded, without water and medical supplies. Dunant envisaged the establishment of national societies of volunteers who would come to the aid of wounded soldiers in armed conflicts. By 1863 the ICRC was established and for the past 150 years this unique humanitarian organisation has continued to respond to the plight of soldiers in armed conflict. The IRCRCM is composed of the ICRC, IFRC and 189 National Societies which each follow the seven fundamental principles of humanity, impartiality, neutrality, independence, voluntary service, unity and universality.

This chapter has described the structure of the ICRC, within the IRCRCM, in order to introduce the organisation and its mandated roles on the international stage and within States. The focus of the ICRC is the provision of protection and assistance to victims of armed conflict, within the parameters of activities

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[128] Bugnion (n 11) 492-3.

that adhere to the seven fundamental principles. This chapter provides the basis of analysis throughout this thesis. In light of this, the question of what type of organisation it is, in terms of international institutional law, will be answered in chapter two. Whether it is a subject of international law, capable of bearing rights and obligations under international law, is also a matter for chapter two. The analysis will draw on the considerations in this chapter of the structure of the ICRC, its humanitarian assistance and initiative rights and its reputation for being an impartial and neutral organisation.

This chapter showed that it is difficult to define the legal nature of the ICRC, but it can be said to be a *sui generis* entity. The definition of the ICRC as an international organisation could have helped justify, or perhaps explain, the autonomous expansion of ICRC functions into long- term projects. It shares aspects of international organisations, private international organisations and NGOs. It has a relationship with sovereign States. This includes the role of States in the Movement and the International Conferences, in particular resembling the workings of an international organisation. It is also a private association made up of Swiss individuals. In fact, it has close ties to Switzerland, including its location, the nationality of Committee members and senior staff, and frequent contacts with the Swiss Foreign Ministry. It is this unique status that sets it apart from other organisations. This is compounded by its reputation as an impartial, neutral and independent organisation. The ICRC markets itself as an organisation to be trusted by all parties, by States because of its confidentiality and by the people on the ground because of its neutrality and independence.

As a humanitarian organisation, the ICRC is focused on the protection and assistance of those in need. This chapter has explored its organisational structure and its relationship with the IRCRCM. It is argued that ultimately the ICRC has evolved from an NGO, which it essentially was when it was established by five Swiss nationals, to a Swiss organisation, recognised as such under the Swiss Civil Code and, finally, in 1993 Switzerland signed an agreement with the ICRC which conferred privileges and immunities upon it. This agreement, and others like it, will be explored in depth in the next chapter when the thesis looks at the ILP of the ICRC. These agreements give the ICRC a status somewhat akin to an international organisation. To this end, it is argued that ultimately the ICRC cannot be pigeonholed into a specific definition, which other organisations fit neatly into. It has evolved over time and developed relationships with States to facilitate and fulfil its humanitarian mandate. To support the claim that the ICRC is not easily definable, we can look to Article 5 Statutes of the IRCRCM, which state that the ICRC is 'an independent humanitarian organization having a status of its own'. Academic commentary supports of this finding that the ICRC is both an NGO and international organisation[129] or that it is *sui generis.*[130] The international community has opened up for the possibility for *sui generis* entities to possess international legal personality, entities such as the Holy See and the Sovereign Order of Malta.[131]

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[129] Koenig C, 'Observer status for the ICRC at the United Nations: A Legal Viewpoint' (1991) 280 IRRC 47.

[130] Lavoyer J-P and Maresca L, 'The Role of the ICRC in the Development of International Humanitarian Law' (1999) 4 International Negotiation 501, 508.

[131] Crawford (n 7) 124, Bisaz C, *The Concept of Group Rights in International Law: Groups as Contested Right-Holders, Subjects and Legal Persons* (Martinus Nijhoff Publishers, 2012) 37;

Rossi I, *Legal Status of Non-Governmental Organizations in International Law* (Intersentia 2010) 36.

2) CHAPTER TWO: THE LEGAL NATURE AND INTERNATIONAL LEGAL PERSONALITY OF THE ICRC

a) Introduction

Historically only States were considered to possess ILP, which made them subjects of international law and allowed them to exercise sovereign power.[1] The consequences of the proliferation of actors on the international stage means that, in addition to States, organisations are also 'subjects' of international law, that is, they possess ILP. The first international organisations were intergovernmental conferences for cooperation among sovereign States.[2] Increasingly emphasis was placed on an international organisations 'separate will' and ultimately ILP.[3]

An organisation with personality can act as a distinct personality rather than just providing a forum for member States to pursue their own interests.[4] The ICRC must, accordingly, possess ILP to be recognised as an autonomous entity and participate meaningfully in legal life, as personality enables an

[1] Meijknecht A, *Towards International Legal Personality: The Position of Minorities and Indigenous Peoples in International Law* (Intersentia, London 2001) 26; *Case of the SS Lotus*, 1927 PCIJ (Ser A) No 10, 18; See also Case Concerning the Payments of Various Serbian Loans Issued in France (Judgment), 1929 PCIJ Series A No 20 at 41, which principally adhered to the States only concept of ILP.

[2] Sands P QC and Klein P, *Bowett's Law of International Institutions* (6th edn, Sweet and Maxwell, London 2009) 469.

[3] Reuter P, *International Institutions*, Translated by J.M. Chapman from the French *Institutions Internationales* published by Presses Universitaires de France 1955, (George Allen and Unwin, London 1958) 195; Bedermann DJ, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel' (1996) 36 Virginia J of Intl L 275, 371-74; Kennedy D, 'The Move to Institutions', (1987) 8 Cardozo L Rev 840, 841-42; White ND, *The Law of International Organisations* (Manchester UP, Manchester 2005) 1-2; Brölmann C, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart, Oxford 2007) 66; Brownlie I, *Principles of Public International Law* (7th edn, OUP 2008) 676-679; Klabbers J, *An Introduction to International Institutional Law* (2nd edn, CUP 2009) 11-12.

[4] Wessel RA, 'Revisiting the International Legal Status of the EU' (2000) 5 Eur Foreign Affairs Rev 507, 515.

organisation to manifest itself on the international stage and enter into relationships with other subjects of international law.[5] Currently recognised ILPs include independent States; *sui generis* entities; internationalised territories, such as the Free City of Danzig; UN Missions established by the UN Security Council to administer territories in transition to self-government including East Timor and Kosovo; intergovernmental organisations such as the UN; in limited circumstances individuals[6]; de facto regimes such as Taiwan and insurgents, belligerents; and national liberation movements such as the Palestine Liberation Organization. Other candidates for ILP are NGOs, multinational corporations and indigenous peoples.[7]

This chapter shows categorically that the ICRC should be defined as an ILP and secondly shows that ILP could justify or explain the changes to the ICRC mandate which take place at the International Conference or on the ground, which are not necessarily explicitly or impliedly referred to in the Geneva Conventions I, II, III and IV 1949 or the Statutes of the IRCRCM. This chapter will include an introductory section on ILP and its purposes, which will reflect on the significance of international organisations being defined as international legal persons. The chapter will go on to consider the ICRC's significant power that stems from ILP, that is, humanitarian initiative. The chapter will break down the Geneva Conventions, Additional Protocols and Statutes of the IRCRCM in terms of what they say about humanitarian initiative and

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[5] Wessel (n 4) 509; Barbara C, 'International Legal Personality: Panacea or Pandemonium? Theorizing about the Individual and the State in the Era of Globalization' (2008) 20(1) Sri Lanka JIL 243, 245.

[6] *La Grand (Germany v. United States of America)* (Judgment) [2001] ICJ Rep 466.

[7] Kaczorowska A, *Public International Law* (Taylor and Francis, London 2010) 176.

assistance. It will ultimately therefore show that the ICRC is an ILP and that the specific outcome of such a conclusion for the ICRC is that its ability to undertake humanitarian and initiative can be adapted autonomously by the ICRC without recourse to new international agreements. Importantly, for this thesis, the ability of the ICRC to respond to constantly changing and evolving situations on the ground is essential for its humanitarian activities.

b) International Legal Personality

The corollary of ILP is the possession of rights and duties on the international stage, but these are not universal.[8] It is a legal concept enabling the community to distinguish between the entities that are capable of acting with legal effects in a given legal system. The rights of an organisation 'depend upon its purposes and functions as specific or implied in its constituent documents and developed in practice'.[9] As was stated in the introduction, it was traditionally States that possessed ILP but increasingly this has come to include other actors. This section considers whether the ICRC possesses ILP, not just legal personality as contained in Article 60 of the Swiss Civil Code.

The ICRC 'has no historical or current connection to territory, nor any aspirations to Statehood. Rather it came to be recognised as having a measure of international personality in view of its special status under IHL'.[10] Indeed

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[8] Sands and Klein (n 2) 473-474; ILC, 'Documents of the Thirty-Seventh Session of the ILC, Yearbook of the ILC 1985, Volume II, Part One' (1985) A/CN.4/SER.A/1985/Add.1, Part 1, 112.

[9] *Reparation for Injuries Suffered in the Service of the United Nations,* (Advisory Opinion) [1949] ICJ Rep 174, 180 (*Reparation for Injuries*).

[10] Partlett K, *The Individual and the International Legal System: Continuity and Change in International Law* (CUP 2011) 34; See also C Dominicé, 'La Personalité Juridique International du CICR' in Swinarski C (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff Publishers, The Hague 1984).

the International Criminal Tribunal for the Former Yugoslavia (ICTY) stated that it is generally acknowledged that the ICRC has ILP.[11] How have academics and the judiciary been able to draw this conclusion?

Klabbers stated that 'a subject of international law is a legitimate subject of international research and reflection'.[12] Whether ILP is just a label[13] or has actual impact on 'rights, duties, and powers distinct from its members or its creators…'[14] has been debated for years. It is this chapter's contention that for the ICRC, ILP is an essential component of its ability and willingness to forge its own path in the interests of humanitarian assistance and protection. If the ICRC needed the consent of all State parties at the International Conference or a new set of Geneva Conventions or Statutes of the IRCRCM or ICRC were necessary for it to undertake new roles in States affected by conflict then it would render the ICRC useless. The utility of the ICRC as a humanitarian actor comes in part from the international law component of its mandate, that is, a mandate to which States have consented to by signing up to the Geneva Conventions. It also comes from State consent at the International Conference and the conclusion of Headquarters Agreements. It also, which is essential to its functionality, comes from decisions made on the ground by delegates coming face to face with humanitarian disasters and partly from the ICRC Assembly, Directorate and Presidency in Geneva. It is essential to prove that

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[11] *Prosecutor v Simic et al* (Decision on the Prosecution Motion under Rule 73 for a Rule Concerning the Testimony of a Witness), ICTY Trial Chamber 27 July 1999 para 46; See also Portmann R, *Legal Personality in International Law* (CUP 2010) 110-14.

[12] Klabbers J, *An Introduction to International Institutional Law* (CUP 2002) 43.

[13] Clapham A, *Human Rights Obligations of Non-State Actors* (OUP 2006) 63.

[14] Amerasinghe CF, *Principles of the Institutional Law of International Organizations* (5th edn, CUP 2005) 68 and 78.

the ICRC is an ILP as evidence of its place in the international legal system and also as an organisation able to develop its mandate without constant recourse to State consent.

c) The Consequences of International Legal Personality

The possession of ILP entails the ability to have rights and duties, the contents of which are relative to the particular entity in question. States, for example, 'possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice'.[15] In terms of organisations, rights and duties will be contained in the founding legal instrument of the organisation. To this end, analysis of the rights and duties contained in the Geneva Conventions I, II, III and IV 1949 and the Statutes of the IRCRCM will be considered below.

In addition, for some, ILP implies a set of inherent powers for all organisations, independent of their size, function and so on. To this end, this chapter will explore the three elements of ILP outlined in the *Reparation for Injuries* case: the capacity to make claims in respect of breaches of international law, the capacity to make treaties and agreements valid on the international plane and the enjoyment of privileges and immunities from national jurisdictions.[16] For some academics the diversity of functions performed by international

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[15] *Reparation for Injuries* (n 9).

[16] *Reparation for Injuries* (n 9) 179 and 188; Brownlie I, *Principles of Public International Law* (OUP 2003) 7; See also ILA, 'The Hague Conference 2010: Non-State Actors' (First Report of the Committee) (2010).

organisations suggests that there is no set of capacities inherent within ILP[17], whereas, for others, there is a presumption of certain inherent capacities so long as the international organisation is 'in a practical position to perform them'.[18] This analysis works from the latter perspective. For this author, the three examples of capabilities that are a consequence of the possession of ILP are a sensible place to start critiquing whether the ICRC is an ILP. Not least because chapter one has already provided extensive credibility to the conjecture that the ICRC is more than a simple NGO. The ICRC is a law-maker, it has an international presence and works within sovereign States and it has an organisational structure similar to an international organisation or private international organisation. Although the ICRC is difficult to define in terms of its organisational status, it is quite clearly a key actor on the international stage, on matters concerning IHL, humanitarian assistance and protection and as a key actor in the International Conference. It would seem that such an important actor would naturally possess ILP, in order to work without the need of consent of all States who signed the Geneva Conventions and without reference to the International Conference. To this end, the following analysis will clear up any doubt that the ICRC is an ILP.

This analysis uses existing 'tests', taken from the *Reparation for Injuries* Advisory Opinion, for ILP to provide conclusive analysis of whether the ICRC should be considered as an ILP. Four years after the creation of the UN, the ICJ was asked for an Advisory Opinion on whether the UN, as an international

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[17] Sands and Klein (n 2) 473; Rossi I, *Legal Status of Non-Governmental Organizations in International Law* (Intersentia 2010) 33.

[18] Amerasinghe (n 14) 101; Seyersted F, 'Objective International Personality of Intergovernmental Organizations: Do their capacities really depend upon the conventions establishing them?' (1964) 34 Nordisk Tidsskrift Int`l Ret 3, 28, 55-56.

organisation, had the legal capacity to bring an international claim and whether it had specialist organs that exhibited a separate will from its Member States.[19] The ICJ was careful to ground any 'progressive' change in international law upon the interests and needs of States to interact with such non-State entities.[20] The ICJ stated that the UN was 'in fact exercising and enjoying functions and rights'.[21] It failed, however, to determine whether a specific attribute of the UN was crucial to its finding of personality or whether it was a unique combination of factors.[22] The ICJ continued to use this approach to ILP in a number of subsequent cases.[23] The courts overarching approach was to be one of pragmatic, progressive development.[24] It is argued that, as there is no 'specific attribute' that leads to a finding of ILP, it is possible that the ICRC has ILP, based on a number of contributing factors.

Brownlie defines the three 'principal formal contexts' in locating ILP, which echo those in the *Reparation for Injuries* Advisory Opinion, including the capacity to make claims in respect of breaches of international law, the

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[19] *Reparation for Injuries* (n 9) 178-9; Portmann (n 11) 105.

[20] Hernández GI, 'Non-state Actors from the Perspective of the International Court of Justice' in d'Aspremont J (ed), *Participants in the International Legal System: Multiple Perspectives on Non-state Actors in International Law* (Routledge, London 2011) 142.

[21] *Reparation for Injuries* (n 9) 179.

[22] Alvarez JE, *International Organizations as Law-makers* (OUP 2005) 133.

[23] *Certain Expenses of the United Nations (Article 17 paragraph 2 of the Charter),* (Advisory Opinion) [1962] ICJ Rep 151, 159; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16; *Interpretation of the Agreement of 25 March 1951 between the WHO and the Egypt* Case [1980] ICJ Rep 73, 89-90; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* (Advisory Opinion) [1996] ICJ Rep 226; Vienna Convention on the Law of Treaties (with annex) concluded at Vienna on 23 May 1969 art 31.

[24] Green F, 'Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-state Actors and International Legal Personality' (2008) 9(1) Melbourne J of Intl L 47, 51.

capacity to make treaties and agreements valid on the international plane and the enjoyment of privileges and immunities from national jurisdictions.[25] This approach is echoed throughout ICJ cases and academic commentary, which is referred to within this chapter. Leroux stated that 'under the so-called "restrictive" conception of international personality, international persons are those who can sign treaties, establish diplomatic relations with States and participate in the mechanism of international personality *de plano*'.[26] The link between personality and an organisation's capacity to bring claims, sign treaties and have privileges and immunities is therefore considered in this chapter. This thesis shows that, on the contrary, the ICRC can be shown to possess the principal elements identified by Brownlie and furthermore it is actually exercising these functions. It is recognised that there is no concrete list of functions and rights required showing ILP, rather each must be taken in turn and can make a 'portfolio' of evidence for ILP. The objective test is after all about proving practice that could not be undertaken without ILP; the possession of a certain measure of ILP.

It is recognised that there is also scholarship that vehemently denies that the ICRC possesses ILP. The International Law Association Committee on NSA's, for example, stated that 'there are no absolutely compelling arguments for the ILP of the ICRC in the traditional sense of possessing international rights and duties and having the capacity to maintain its rights by bringing international

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[25] *Reparation for Injuries* (n 9) 179 and 188; Brownlie I, *Principles of Public International Law* (OUP 2003) 7; See also ILA, 'The Hague Conference 2010: Non-State Actors' (First Report of the Committee) (2010).

[26] Leroux N, 'Non-State Actors in French Legal Scholarship: International Legal Personality in Question' in d'Aspremont (n 20) 87.

claims'.[27] Moreover it is recognised that 'individuals and corporate bodies also derive myriad rights from innumerable treaties and conventions are not classified as international persons by the same authors'.[28] Indeed treaties can be concluded by international organisations deprived of ILP, such as the Organization for Security and Co-operation in Europe (OSCE).[29] Finally, the IFRC derives similar or even more extraordinary rights from agreements with Switzerland and is still not classified as international persons.[30]

The capacity of organisations to make claims in respect of breaches of international law is arguably the most reliable indicator of ILP.[31] On 13 December 1961 an ICRC delegate, Georges Olivet, a Swiss national, and two volunteers, Mrs Vroonen and Mr Smeding, from the Katanga Red Cross were killed in a Red Cross ambulance during a UN intervention in the Congo, now the DRC.[32] Olivet had reported that UN troops on guard at UN headquarters were stopping him getting by; he had wanted to negotiate a truce for the evacuation of civilians in the battle areas.[33] The UN and the ICRC established

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[27] Gazzini T (ILA Committee on Non-State Actors), 'A Unique Non-State Actor: The International Committee of the Red Cross' (Provisional Draft) (26-28 March 2009) 5.

[28] Leroux (n 26) 88.

[29] *Agreement on OSCE Kosovo Verification Mission*, Belgrade (16 October 1998) UN Doc S/1998/978.

[30] Leroux (n 26) 88-89.

[31] Gazzini T, 'The Relationship between International Legal Personality and the Autonomy of International Organizations' in Collins R and White ND, *International Organisations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge, London 2011) 198.

[32] 'Following the Death of Georges Olivet: Delegate of the International Committee of the Red Cross' (1962) 2 IRRC 84, 84-88; See also 'In Memory of an ICRC Delegate' (1967) 7(74) IRRC 271; Beigbeder Y, *The Role and Status of International Humanitarian Volunteers and Organizations: The Right and Duty to Humanitarian Assistance* (Martinus Nijhoff Publishers, London 1991) 321.

[33] 'After the Death of Georges Olivet: Delegate of the International Committee of the Red Cross' (1962) 2 IRRC 21, 21-28.

a commission charged with conducting an impartial and independent enquiry into the circumstances of the death of Georges Olivet, Mrs Vroonen and Mr Smeding.[34] The UN paid compensation to the ICRC, without admitting responsibility.

The ICJ took the power of the UN to conclude agreements with its members as a representation of the manifestation of distinct will.[35] This section therefore concerns the treaties to which the ICRC is a party. The ICRC has concluded seventy-four headquarters agreements with host States that facilitate the independence of the ICRC and its delegates during missions. The ICRC argues they are 'plainly treaties under international law'.[36] 'The very first Headquarter Agreement was signed between ICRC and the Government of the Cameroon in 1973 and lay the foundation for the agreements to come'.[37] The most recent Headquarters Agreement was signed on 24 November 2014 between the ICRC and Morocco.[38] Article 1 'Agreement between the International Committee of the Red Cross and the Swiss Federal Council to Determine the Legal Status of the Committee in Switzerland' of 19 March 1993, for example, recognised the 'international juridical personality and legal capacity' of the ICRC, which does not substantially differ in form or content from the host agreements concluded

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[34] 'News Items' (June 1962) IRRC 295, 315.

[35] *Reparation for Injuries* (n 9) 178-79.

[36] ICRC Annual Report 2003, 21 in Partlett (n 10) 35 (The number of Headquarters Agreements has increased since this book was published); Letter from the ICRC Legal Division, 22 June 2001 (on file with Anna-Karin Lindblom) in Lindblom A-K, *Non-governmental Organizations in International Law* (CUP 2005) 496.

[37] Beigbeder Y, *The Role and Status of International Humanitarian Volunteers and Organizations: The Right and Duty to Humanitarian Assistance* (Martinus Nijhoff Publishers 1991) 324.

[38] 'Morocco: ICRC signs Headquarters Agreement with Government' <https://www.icrc.org/en/document/morocco-icrc-signs-headquarters-agreement-government#.VOnRHkJZFNM> accessed 22 January 2015.

between the UN specialised agencies and Switzerland.[39] Headquarters agreements facilitate the independent action of the ICRC delegates and the ICRC itself.

The agreements create a legal framework for the provision of humanitarian assistance and protection by the ICRC in sovereign States. The ICRC has created a Standard Proposed ICRC Headquarter Agreement, which is used as guidelines for the individual agreement.[40] Rona argued that 'by entering into agreements normally signed with IGOs, States chose to treat ICRC as an IGO and thereby allowing the organization to take part in international relations as a legal person'.[41] In terms of the recognition of legal personality by States, these agreements are therefore key to determination of such. Not only have States signed up to the Geneva Conventions I, II, III and IV 1949 but have also provided for specific roles within their territory within the Headquarters Agreements. Of course, this is still dependent on consent.

Although the ICRC has concluded international agreements, they are not subject to registration by the UN Secretary General in accordance with Article 102 UN Charter, as the UN states that, as the ICRC is not an international organisation, its agreements cannot be considered 'international agreements' for the purposes of Article 102 UN Charter.[42] It is argued therefore that despite

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[39] Headquarters Agreement 1993 (n 122).

[40] Rona G, 'The ICRC Privilege not to Testify: Confidentiality in Action' (*ICRC*, 28 February 2004) <www.icrc.org/eng/resources/documents/misc/5wsd9q.htm> accessed 24 June 2014 Annex 2.

[41] ibid.

[42] 'Article 102, Repertory, Supplement 5, Volume V (1970-1978): ANNEX Registration and Publication of Treaties and International Agreements: Regulations to give effect to Article 102 of the Charter of the United Nations' para 6 <http://legal.un.org/repertory/art102/english/rep_supp5_vol5-art102_e.pdf> accessed 4 July 2014.

the ability of the ICRC to conclude agreements with States, they will not be seen as such by the UN. Nevertheless, they should be considered evidence of the 'principal formal contexts' in locating ILP.[43]

Finally, in the *Reparation for Injuries* Advisory Opinion, the ICJ considered the privileges and immunities of the UN, in the territory of each of its member States to be evidence of its ILP.[44] The headquarters agreements usually recognise the legal personality of the ICRC delegation or offices, the inviolability of its premises, the usual functional immunities and privileges related to the performance of official duties, tax exemption on ICRC salaries, exemption from custom duties, freedom of entry into the country, freedom of movement and communications and freedom to transfer funds.[45] Finally ICRC delegates are authorised to display the emblem of the Red Cross and they enjoy immunity from judicial process.[46] In a sense, therefore, the ICRC legal status can be analogised to that of intergovernmental organisations and the legal status of ICRC delegates to those of intergovernmental civil servants.[47] The privileges and immunities of the ICRC are comparable to those of the UN, its agencies and other intergovernmental organisations.

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[43] Crawford J, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 115.

[44] *Reparation for Injuries* (n 9) 178-79.

[45] ICRC Headquarters Agreement 1993 arts 1, 3-5; See also ICRC, *Discover the ICRC* (booklet) (Geneva, September 2005).

[46] Rona G, 'The ICRC's Status: In a Class of its Own', (*ICRC*, 17 February 2004) <www.icrc.org/eng/resources/documents/misc/5w9fjy.htm> accessed 23 June 2014; Beigbeder (n 32) 325.

[47] See Headquarters Agreement between the Federal Military Government of the Federal Republic of Nigeria and the ICRC, 5 July 1988 (Article XIII).

The ICRC also enjoys immunity from legal process, which protects it from judicial and administrative proceedings. [48] This includes the right to confidentiality before international courts and tribunals, which was recognised in the *Simic Case* before the ICTY.[49] The court was asked whether a former ICRC interpreter who volunteered to give evidence before the ICTY could do so on behalf of the prosecutor's office. The ICTY answered the question of whether the ICRC possessed ILP and determined whether an employee could be called as a witness or whether the ICRC had a right under international law to confidentiality. The ICTY stated that 'it is widely acknowledged that the ICRC, an independent humanitarian organisation enjoys a special status in international law, based on the mandate conferred upon it by the international community', to this end it is 'generally acknowledged that the ICRC, although a private organization under Swiss law, has ILP'.[50] As an ILP the ICRC could be afforded privileges and immunities and, therefore 'need not give testimony'.[51]

The ICTY found that the ICRC has a position not only under the Geneva Conventions but also under customary international law. [52] Moreover, according to the 'Rules of Procedure for the International Criminal Court' (ICC), information provided by the ICRC is privileged, and consequently not

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[48] Jeannet S, 'Non-disclosure of Evidence before International Criminal Tribunals: Recent Developments Regarding the ICRC' (2001) 50 ICLQ 649.

[49] Simic ICTY (n 11) para 49.

[50] Simic ICTY (n 11) para 46.

[51] Rona G, 'The ICRC Privilege not to Testify: Confidentiality in Action' (*ICRC*, 28 February 2004) <www.icrc.org/eng/resources/documents/misc/5wsd9q.htm> accessed 24 June 2014.

[52] Simic ICTY (n 11) paras 73-74; 'Trial Chamber III Rules that ICRC Need Not Testify before the Tribunal', (Press Release, The Hague, 8 October 1999) JL/P.I.S./439-E.

subject to disclosure, unless the ICRC waives this privilege or the information is contained in public statements and documents of the ICRC.[53]

The ICTR confirmed in Prosecutor v Tharcisse Muvunyi that international law has granted the ICRC 'the exceptional privilege of non-disclosure of information' relating to ICRC's activities.[54] In addition, 'such privilege is not granted to national Red Cross societies', which further evidences the unique position of the ICRC's right to confidentiality.[55] Moreover, Amnesty International or Save the Children, for example, would not be able to claim similar rights.[56] The right to confidentiality supports the ICRC's ability to maintain its neutrality and independence. It assures States, when entering into Headquarters Agreements, that the ICRC keeps information between itself and the State. Finally, in addition to the ICTY recognition of ICRC personality, under Rule 73 of the ICC Rules of Procedure, the ILP of the ICRC is recognized.[57]

This analysis shows that the ICRC participates on the international stage in a number of ways, in particular, through its ability to bring claims, the conclusion of international agreements and the possession of privileges and immunities. There are alternative understandings of ILP that suggest that, in addition, changing sociological circumstances on the international scene also

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[53] ICC, 'Rules of Procedure and Evidence', Adopted by the Assembly of State Parties (3-10 September 2002) ICC-ASP/1/3, Rule 73(4).

[54] *Prosecutor v Tharcisse Muvunyi* (Judgment and Sentence), ICTR-2000-55A-T (12 September 2006).

[55] ibid.

[56] ibid, section 16.

[57] Rule 73 Rules of Procedure and Evidence of the ICC, ICC-ASP/1/3.

impact upon ILP.[58] Indeed Portmann argues that the ICJ did not determine ILP directly from the UN Charter, rather they considered 'sociological observations', including 'factual changes on the international scene in order to open the possibility of including non-State entities into international law'.[59] The ICJ's *Reparation for Injuries* Advisory Opinion, emphasised social developments as one of the main factors influencing its decision to find that the UN possessed ILP, in other words, its 'nature depends upon the needs of the community'.[60] It is argued that the humanitarian principles of the ICRC make it an invaluable organisation. Between 1863 and 1947 Moynier, Ador and Huber were key actors in the development and progression of the ICRC, Sandoz remarks that, for these three men, 'the ICRC's role went without saying- it existed because it was needed, because it fulfilled a useful function in the international community'.[61] It is argued therefore that one cannot help but think the ICRC's international personality derives in equal part from the nature of the rights it enjoys under the Geneva Conventions I, II, III and IV 1949 and from the actual importance of the ICRC on the international stage.

It is argued, overall, that the development of the ICRC as an ILP is evidenced by a number of principle factors. They include the conclusion of several international treaties, between the ICRC and States or international organisations, including headquarter agreements; recognition by its host country of Switzerland, as well as many other States in headquarters

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[58] Meron T, 'Subjects of International Law: International Law in the Age of Human Rights' (2003) Receuil des Cours de l'Academie de Droit Intl 301, 371.

[59] Portman (n 11) 99-100, 104.

[60] *Reparation for Injuries* (n 9) 178.

[61] Sandoz Y, 'Max Huber and the Red Cross' (2007) 18(1) Eur J Intl L 171, 176.

agreements; enjoyment by the ICRC of immunities from the jurisdiction of several States; the maintenance of diplomatic relations between the ICRC, States and other organisations; and finally, the recognition by the ICTY in the *Simic case* of the international legal status of the ICRC. The ICRC has also brought claims against subjects of international law, such as the UN. The practice of the ICRC is essential analysis of the ICRC. This thesis examines the exercise of functions under various international humanitarian and other agreements including the mandate in the Geneva Conventions I, II, III and IV 1949.

d) International Legal Personality and the Mandate of the ICRC

The question of ILP must be considered in terms of the ability of the ICRC to expand its mandate beyond the specific activities provided for in the Geneva Conventions and the Statutes of the IRCRCM. The extent to which the ICRC relies on the principle of humanity to justify such developments will be considered in chapter four. The Geneva Conventions I, II, III and IV 1949, Additional Protocols and Statutes of the IRCRCM, consented to by States, provide the international mandate for the ICRC and are often explicit in terms of outlining specific roles that the ICRC may undertake. The provisions of the Geneva Conventions I, II, III and IV 1949 enable it to bring humanitarian aid to victims of war, exchange messages between prisoners of war and their families, trace the fate of disappeared people and care for the wounded and sick. [62]

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[62] See Fleck D, The Handbook of International Humanitarian Law (2nd edn, OUP 2008) para 117, 503, 513, 516, 524-5, 542, 562, 564, 576, 584, 591, 706, 710, 734, 816 and 1422.

These functions allow the ICRC to protect and assist victims of armed conflict. However, if we look at the ICRC Strategy 2015-2018 it is evident that the ICRC work on the ground is developing beyond the specific provisions.[63] The current objectives include:

1. Strengthen the ICRC's capacity to protect through law, operations and policy;

2. Enhance the ICRC's distinctive response to growing needs;

3. Secure the widest possible support for ICRC action;

4. Contribute to a more significant response by the Movement to large-scale emergencies, and

5. Adapt and strengthen organizational capacities to sustain growth and the continued relevance of ICRC action.

What this section seeks to clarify is the extent to which ILP supports the ability of the ICRC to develop its competences, lawfully, without having to return to the International Conference each time it wants to develop its activities, or even less likely, draft new Geneva Conventions.

This chapter will now outline the specific international mandate and activities of the ICRC provided for in the Geneva Conventions I, II, III and IV 1949 and the Statutes of the IRCRCM. The origins of which were described in chapter one, as was their status. The overall analysis in chapters one and two therefore builds the basis for analysis throughout the thesis on how the ICRC is

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[63] 'ICRC Strategy 2015-2018: Adopted by the ICRC Assembly 24 June 2014' <https://www.icrc.org/eng/assets/files/publications/icrc-002-4203.pdf> accessed 22 January 2015.

developing its mandate and activities on the international stage and within States. The legitimacy of such developments is considered with reference to ILP, the principles of humanity and neutrality and with consideration of the changing nature of conflict and the application of other areas of international law to situations of armed conflict and other situations of violence.

The ICRC undertakes activities as part of its humanitarian protection and assistance mandate. The purpose of this section is to analyse the contents of humanitarian assistance roles and the right of humanitarian initiative. This will inform the research in later chapters, which address how the protection and assistance roles of the ICRC have expanded to include those that work towards the establishment of human security and sustainable peace.

Humanitarian assistance can describe methods 'to alleviate human suffering during war time'.[64] The 'aim of the ICRC's assistance programmes is to preserve life and restore the dignity of individuals and communities affected by armed conflict or other situations of violence', as the humanitarian mission is at the heart of the ICRC activities on the international stage.[65] Indeed, the first of the seven fundamental principles of the IRCRCM is humanity.

The activities that can be undertaken by the ICRC stem from Common Article 3, Article 9 Geneva Conventions I, II and III 1949 and Article 10 Geneva Convention IV 1949. Under Common Article 3 (2) Geneva Conventions I, II, III and IV 1949 'an impartial humanitarian body, such as the International Committee of the Red Cross, may *offer its services* to the Parties to the

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[64] West K, *Agents of Altruism: The Expansion of Humanitarian NGO's in Rwanda and Afghanistan* (Ashgate, Aldershot 2001) 13.

[65] ICRC, 'Assistance for People Affected by Armed Conflict and other Situations of Violence' (ICRC Geneva, February 2011) 2, 13.

conflict'.[66] This provision is somewhat open ended; it therefore affords the ICRC wide discretion to act in NIAC. Article 18(2) Additional Protocol II provides that:

> If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

In terms of international armed conflicts, Geneva Conventions I, II, III and IV 1949 each state that:

> The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organisation may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, and for their relief.

The commentary to Article 9 Geneva Convention I states that:

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[66] Emphasis added.

All humanitarian activities are covered in theory, and not only those
for which express provision is made. They are, however, covered
subject to certain conditions with regard to the character of the
organization undertaking them, their own nature and object and, lastly,
the will of the Parties to the conflict.[67]

In addition, as regards the activities of the ICRC, Article 81(1) Additional
Protocol I 1977 states that:

The Parties to the conflict shall grant to the International Committee of
the Red Cross all facilities within their power so as to enable it to carry
out the humanitarian functions assigned to it by the Conventions and
this Protocol in order to ensure protection and assistance to the victims
of conflicts; the International Committee of the Red Cross may also
carry out *any other humanitarian activities* in favour of these victims,
subject to the consent of the Parties to the conflict concerned.[68]

Article 23 Geneva Convention IV 1949 provides that parties to an international
armed conflict and other transit states are required to 'allow free passage' to

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[67] 'Article 9 Commentary: Convention (I) for the Amelioration of the Condition of the
Wounded and Sick in Armed Forces in the Field' (Geneva, 12 August 1949)
<www.icrc.org/ihl/1a13044f3bbb5b8ec12563fb0066f226/bcb0d20422c82f18c12563cd004204
59?OpenDocument> accessed 4 July 2014.

[68] Emphasis added.

medical supplies, items for religious worship, and religious goods intended for civilians of other parties to the conflict, even if from the enemy side. [69]

They must also allow 'consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases'. This is subject to the condition that the party is satisfied that the consignments are unlikely to be diverted, particularly for military purposes. Moreover, the *consignments must be forwarded as quickly as possible, subject to 'technical arrangements'* under the control of the power permitting free passage. [70] Finally, under Article 30 Geneva Convention IV 1949, 'humanitarian organisations must be granted all facilities possible' such that they can carry out their humanitarian functions. [71]

In addition to the provisions on humanitarian assistance contained in the Geneva Conventions I, II, III and IV 1949, the Seville Agreement introduced the idea of 'Lead Agency' into the IRCRCM. It means that the ICRC has specific areas in which it will take the lead in relief operations.[72] Under Article 5(1) Seville Agreement 1997 the term 'direct results of a conflict' is said to include the time 'beyond the cessation of hostilities and extends to situations where victims of a conflict remain in need of relief until a general restoration of peace has been achieved'. It is argued that this detailed explanation of

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[69] See Gasser H-P, 'Protection of the Civilian Population' in Fleck D (ed), *The Handbook of International Humanitarian Law* (2nd edn, OUP 2008) para 503, 513.

[70] Under Geneva Convention IV art 61, relief consignments must be 'exempt in occupied territory from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory'. In addition, the occupying power must facilitate their free passage and rapid distribution.

[71] Gasser (n 69) para 516, see also para 524-5 on Humanitarian Assistance.

[72] Seville Agreement (n 66) arts 4.3, 4.4, 5.3.1, 5.4 and 6.1.2.

'direct results of a conflict' is key to any understanding, analysis or critique of the roles of the ICRC beyond those described in the Geneva Conventions I, II, III and IV 1949.

The Geneva Conventions I, II, III and IV 1949 'not only place primary legal obligations on warring parties, but legitimise the role of 'impartial' humanitarian organisations, such as the ICRC, in promoting the protection of and providing relief assistance to, non-combatants'.[73] Under the Geneva Conventions I, II, III and IV 1949 and Additional Protocol I the ICRC also has the mandate to perform functions traditionally performed by protecting powers, as a neutral humanitarian organisation.[74] A protecting power is intended to secure the supervision and implementation of the Geneva Conventions I, II, III and IV 1949 and Additional Protocols. Traditionally a protecting power was appointed by a State, which was party to the conflict, to safeguard the respective interests during the conflict. The ICRC can replace a contracting power and perform its functions or it can enjoy protecting power status, in both situations it is afforded automatic powers to carry out its activities, thus putting the ICRC on same footing as a State. The difference is that the ICRC is neutral and must work in the interests of all sides to a conflict. Indeed, under Article 6 Statutes of the ICRC 'the ICRC shall maintain relations with government authorities and any national or international institution whose assistance it considers useful'.

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[73] Torrente N de, 'Humanitarian Action under Attack: Reflections on the Iraq War' (2004) 17(1) Harvard Human Rights Journal 2 in Abiew KF, 'Humanitarian Action under Fire: Reflections on the Role of NGOs in Conflict and Post-Conflict Situations' (2012) 19(2) Intl Peacekeeping 203, 205.

[74] Geneva Convention I art 10; Geneva Convention II art 10; Geneva Convention III art 10; Geneva Convention IV art 11; Additional Protocol I art 5(3)-(4).

There are other conditions placed on the right to provide humanitarian assistance. Organisations undertaking humanitarian action 'must be concerned with the condition of man, considered solely as a human being without regard to the value which he represents as a military, political, professional or other unit. And the organization must be impartial'.[75] Its activities must be purely humanitarian in character; they must be concerned with human beings as such, and must not be affected by any political or military consideration.[76] These stipulations firstly give humanitarian organisations criteria for authorising their involvement in conflict and secondly, it is argued, they provide apparatus for organisations to secure humanitarian access. That is to say, that the ICRC uses its reputation for neutrality and independence to gain access to those in need. It also encourages States to cooperate with the provision of humanitarian aid.

In addition to the right to provide humanitarian assistance, the ICRC has the right to take humanitarian initiative. This is a much broader right than that contained in the legal provisions discussed above. Under paragraph 4(2) Statutes of the ICRC 'the ICRC may take *any humanitarian initiative* which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution'.[77] This broad power of initiative is also found in the Statutes of the IRCRCM, which again state that the ICRC 'may take any humanitarian

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[75] 'Article 9 Commentary (n 67); See Right to Humane Treatment Art 27 Geneva Convention IV; Geneva Convention IV arts 55 and 56 provide that the occupying power has the duty to ensure food, medical supplies, medical and hospital establishments and services, and public health and hygiene to populations in the occupied territory. Under Additional Protocol I art 69, this duty was extended to include the duty to ensure bedding, means of shelter and other supplies essential to the survival of the civilian population; See Gasser (n 69) para 562, 564, 576.

[76] Article 9 Commentary (n 67).

[77] Emphasis added.

initiative which comes within its role as a specifically neutral and independent institution and intermediary' and it must 'endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results'.[78]

This right to humanitarian initiative is flexible and therefore practical as 'no one can foretell what a future war will consist of, under what conditions it will be waged and to what needs it will give rise'.[79] It is therefore right that 'a door should be left open to any initiative or action, however unforeseeable today, which may help effectively in protecting, caring for and aiding the wounded and sick'.[80] Ratner states that 'this significant grant of authority, while not legally binding on States – which must consent to the ICRC's involvement – has permitted the ICRC to visit detainees in countries not experiencing war and work in States and on issues where human rights law, not IHL, is the governing legal framework'.[81] This latter statement, concerning the development of the role of the ICRC into situations where IHRL is the governing legal framework is considered in chapter three.[82] This thesis argues that, in fact, the ICRC's foray into these situations allows it to use humanitarian action, whether under

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[78] Statutes of the IRCRCM art 5(2)(d) and 5(3); Statutes of the ICRC art 4(2).

[79] Article 9 Commentary (n 67).

[80] Article 9 Commentary (n 67); See Jakovljević B, 'The Right to Humanitarian Assistance-Legal Aspects' (1987) 27 IRRC 469, 471; 'Guiding Principles on the Right to Humanitarian Assistance' (1993) 33 IRRC 519.

[81] Ratner SR, 'Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War' (2011) 22(2) Eur J Intl L 459, 464.

[82] International Human Rights Law in Armed Conflict 130.

the guise of assistance or initiative, to work towards the establishment of human security.

i) Interpretation of the Mandate

The analysis earlier in this chapter on international legal personality showed that for international organisations their competences are attributed to them. As has been examined above, the ICRC international mandate is provided for in the Geneva Conventions I, II, III and IV 1949, Additional Protocols and the Statutes of the IRCRCM. Organisations are 'invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them'.[83] It is necessary for organisations to interpret their mandate so as to allow the achievement of their objects and purposes. To this end, the subsequent practice within organisations might not follow a strict interpretation of the constituent instrument.[84]

This chapter is focused on the ILP of the ICRC and the interpretation and implementation of the mandate, without constant recourse to State parties or new international agreements. The ability of the ICRC to interpret its own mandate must therefore be discussed in practical terms. Which bodies or organs of the ICRC can interpret the international mandate?

The Assembly of the ICRC, composed of Members of the ICRC, decides on the content of the Statutes.[85] Regarding the interpretation of the articles pertaining to the roles, relations with the Movement or outside of the

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[83] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* (Advisory Opinion) [1996] ICJ Rep 226 para 25;

[84] ibid; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(3)(b).

[85] Statutes of the ICRC art 17.

Movement, the Assembly also makes such interpretation, but the interpretation cannot go against what was established in the Statutes of the Movement. In addition, other individuals will use the Statutes without necessarily interpreting them. By example, legal advisers and Heads of Delegations can use the Statutes to negotiate access or an agreement with the authorities, such as, during the negotiation of a new Headquarters Agreement.

The process of interpreting the mandate goes from the field, to Geneva and back. The team on the ground has to plan ahead each year and identify the projects it wishes to undertake, the objectives of such, the impact they will have, how that impact will be measured.[86] These reports are area specific and will then be compiled with reports from other parts of the region. They are then presented to the Director of Operations in Geneva who will consider the reports. In practice, therefore, there is a working relationship between the ICRC delegates on the ground and the Geneva offices. To this end, exploratory or innovative proposals must be justified, in other words, delegates on the ground must justify every project and initiative to Geneva. The only decisions that are predominantly taken on the ground are security related; as such decisions are taken closely to the people, rather than the Geneva Headquarters.

The ICRC derives its mandate from the Geneva Conventions and the Statutes of the Movement. It is rarely the subject of any interpretation per se. What is subject of interpretation may be whether a country is or not in a situation of armed conflict and what if any rights of initiative the ICRC may have in such a

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[86] 'ICRC Overview of Operations 2015' (ICRC, Geneva 2014) < https://www.icrc.org/en/document/icrc-presents-record-budget-2015-meet-vastly-expanding-needs#.VOn1i0JZFNM> accessed 22 January 2015.

context.[87] Closely related to such interpretation is the recent issue facing the ICRC which is its interpretation of its role in what it terms 'other situations of violence', that is, situations under the threshold of applicability of IHL in which ICRC may have a statutory right of initiative.[88] In practice, this means that the ICRC will can refer to its mandate as coming from the Statutes of the ICRC rather than Common Article 3.

Another potential point of contention is the signature of Headquarters Agreements recognizing privileges and immunities to ICRC staff, as some States may not recognise the ICRC's international legal personality and would, as a consequence, fail to agree that its staff should benefit from any privileges and immunities. Ultimately, the ICRC has to persuade its hosts of the added value of its presence and of the importance of allowing it to act according to its principles. No law or Statute alone can overcome a State's decision not to allow the ICRC to operate within its borders.

For the ICRC, therefore, interpretation of the mandate comes from within when thinking about its international mandate. The specific mandate between the ICRC and a given host State will be unique to that State. It is, therefore, for the ICRC itself and its delegates and host States to decide upon the humanitarian protection and assistance to be provided. The ICRC can review its own roles and responsibilities as they are found in its Statutes, while keeping in mind that it cannot 'take [a] decision contrary to the [Statutes of the Movement] or to the

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[87] Vité S,'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91 IRRC 69.

[88] 'Interview with Kathleen Lawand of the ICRC: Internal Conflicts or other Situations of Violence – What is the Difference for Victims?' (10 December 2012) < https://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm> accessed 22 January 2015; ICRC, 'Enhancing Protection: For Civilians in Armed Conflict and Other Situations of Violence' (ICRC, Geneva 2012).

resolutions of the [Conference]'.[89] There is no doubt that the Conference can review the Statutes of the Movement under article 10(3), but it is not clear whether it could review the mandate of the ICRC by changing the relevant articles of the Statutes of the Movement. This is unclear because the roles and responsibilities of the ICRC found in the Statutes IRCRCM are a copy-paste of the Statutes of the ICRC and such modification procedure is not specifically allowed, nor prohibited in the Statutes. Amending the relevant articles of the Statutes of the IRCRCM could be perceived as modifying the corresponding articles in the Statutes of the ICRC and article 11(6) prohibits such modification, as it states that, 'the International Conference shall not modify either the Statutes of the International Committee or the Constitution of the Federation nor take decisions contrary to such statutes'.

ii) Responsibility of the ICRC for Breach of Mandate

If States were to accuse the ICRC of not abiding by its mandates, are there any consequences? Hypothetically, if there was a problem between a State and the ICRC regarding its mandate, it could be related to the fact that the State is not pleased with the ways in which the ICRC operates in the said State. This situation could be interpreted as if the ICRC is not abiding by its mandate or more specifically, not according to what was agreed with the authorities. For the ICRC, this could have an impact on obtaining access to the victims it seeks to help. At the moment the most serious consequence for the ICRC is that the State could withdraw its consent. In 1986, for example, the ICRC delegation was asked to leave South Africa country following a decision by the 25th International Conference of the Red Cross and Red Crescent to suspend the

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[89] Statutes of the IRCRCM art 11(6).

participation of the South African authorities at the conference.[90] On 1 February 2014, 'the Sudanese authorities suspended the ICRC's activities in Sudan on 1 February, citing technical issues, and asked the organization to review the country agreement that sets out its legal and diplomatic status in the country'.[91] The ICRC negotiated a new agreement that has been in force since August 2014.[92]

It should be noted that for other international legal persons, a corollary of such is the responsibility of that ILP for breach of legal obligations. Indeed, the existence of duties as a corollary of rights is central to ensuring the effectiveness of any legal system.[93] Responsibility has long been accepted as fundamental in performing this function within the international legal system. Nowadays this includes international organisations.[94] However, if someone outside the ICRC wanted to call into question its license to operate in situations of armed conflict, it would have to be a State and it would have to either be raised at High Contracting Parties Meeting of the Geneva Conventions or at an International Conference.

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[90] 'South Africa: ICRC Honoured for Work during Apartheid Era' (13 November 2003) < https://www.icrc.org/eng/resources/documents/misc/5t9klb.htm> accessed 22 January 2015.

[91] 'Sudan: ICRC Signs Country Agreement with Government' (28 August 2014) < https://www.icrc.org/en/document/sudan-icrc-signs-country-agreement-government#.VOn9EUJZFNM> accessed 22 January 2015.

[92] ibid.

[93] A.Pellet, 'The Definition of Responsibility in International Law', in Crawford J, Pellet A and Olleson S (eds) *The Law of International Responsibility* (OUP 2010) 4; *Reparations for Injuries* (n 9) 179.

[94] UNGA Resolution 56/82 (12 December 2001); ILC, 'Report of the on the work of its fifty-fourth session' (2002) A/57/10, See generally, Chapter VIII Responsibility of International Organizations; Draft Articles on the Responsibility of International Organizations, with Commentaries 2011; UNGA Res 66/100 (9 December 2011).

e) Conclusion to Chapter Two

Although the ICRC does not neatly fit into the international organisation definition, due to its non-governmental character, it nevertheless possesses ILP. The UN was found to have ILP; otherwise it would not be able to perform its requisite functions. In the wider context of this thesis, it is argued that although the ICRC does, in fact, have a unique organisational structure and legal nature, the pertinent question was whether it possessed ILP. The thesis considers whether the ICRC has extended its protection and assistance mandates beyond activities outlined in the Geneva Conventions I, II, III and IV 1949 and the Statutes of the ICRC, the latter of which can be amended by the International Conference. The Geneva Conventions I, II, III and IV 1949, Additional Protocols and the Statutes of the ICRC confer rights and duties on the ICRC. It is able to make claims on the international stage, enter into international agreements with States and it enjoys privileges and immunities, all of which were considered to be evidence of the UN possessing ILP in the *Reparation for Injuries* Advisory Opinion.

Traditionally the possession of ILP correlates to the 'powers' of an organisation, express or implied, as necessary to fulfil the obligations of the organisation on the international stage. This chapter showed that this approach is somewhat difficult to reconcile with an analysis of the ICRC; in fact, it is argued that if the ICJ were to consider the 'powers' of the UN today, it would not concentrate so much on the UN Charter but on the practice of the UN. It is argued that, just has the UN has continued to develop its functions on the international stage, the ICRC has also been forced to adapt its humanitarian role to respond to international and NIAC armed conflicts. It is this

development of competencies to which this thesis turns to in the following chapters.

This chapter has shown that the ICRC is an ILP. The intention of the founders and the States parties to subsequent Geneva Conventions has been for the ICRC to participate in the international community, not least, as a creator of international humanitarian law, to which States consent to be bound. The ICRC acts as an independent person, through its delegates and the Assembly, Presidency and Directorate situated in Geneva. The Headquarters Agreements concluded between the ICRC and host States support the argument that the ICRC is an ILP. If we were to reflect on the *Reparation for Injuries* Advisory Opinion, it seems to be beyond doubt that the ICRC 'is intended to exercise and enjoy, and is to this day exercising and enjoying functions and rights that can only be explained on the basis of the possession of international legal personality'.[95]

In order to take this thesis forward, into analysis of the developing roles of the ICRC, it must be emphasised that there is a distinction to be drawn between the mandate the ICRC gets from the Geneva Conventions and Additional Protocol I and II, it's international mandate and that that comes from its status as a Swiss Association, consisting of Swiss nationals, who are able to make autonomous decisions. In addition a distinction must be drawn between the mandate it gets from the Geneva Conventions and the one it gets from the Statutes of the Movement: the latter being agreed to at the International Conference and more likely to adapt to changes on the international stage. Finally, it is the Headquarters Agreements that allow it to work in a State, but

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[95] *Reparation for Injuries* (n 9) 179.

they are secret and difficult to access, much like SOFA agreements between the UN and host States.[96] The exact content of each individual Headquarters Agreement cannot be known.

In terms of its work, therefore, member states have some say in the presence of the ICRC on their territories but not it's over arching projects, such as Health Care in Danger, as agreed to at the International Conference. This chapter showed that the ICRC is still grappling with establishing its right of initiative in such internal troubles, as it gets this from the Statutes IRCRCM, not the Geneva Conventions I, II, III and IV 1949 or Additional Protocols I and II 1977.

It is this myriad of sources for the mandate of the ICRC and the ever-changing situations on the ground that the ICRC finds itself in that inform the analysis in the next four chapters of the thesis. The legal status and personality of the ICRC is the basis of analysis of international law applicable to and relied upon by the ICRC in the execution of its protection and assistance mandate. Its legal status and personality is also closely linked to later analysis on the principles of humanity and neutrality and the development of such. Finally, chapter six analyses the specific roles of the ICRC today and the extent to which they have been adapted from the specific provisions of the Geneva Conventions, Additional Protocols and Statutes of the IRCRCM. It addresses the extent to which the ICRC is adapting its mandate to respond to new and ever evolving situations   requiring   humanitarian   protection   and   assistance.

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[96] Report of the Secretary-General, 'Model Status-of-Forces Agreement for Peace-keeping Agreements' (9 October 1990) A/45/594.

3) CHAPTER THREE: THE ICRC AND INTERNATIONAL LAW IN ARMED CONFLICT

a) Introduction

The battlefield experience of Henry Dunant, which inspired the creation of the ICRC, is a far cry from the armed conflict situations seen across the world today. Nevertheless, the ICRC continues to strive to provide protection and assistance to victims of armed conflict. Chapter one outlined the structure and roles of the ICRC on the international stage and within States. It is a *sui generis* organisation with ILP, as was shown in chapter two. These chapters showed that the protection and assistance mandates of the ICRC have developed through the International Conferences, specifically the Statutes of the ICRC and IRCRCM, and through diplomatic means and new international laws, in particular, Additional Protocol's I and II.

This thesis argues that there is a disjunction between the legal mandate that the ICRC has and the way that it operates in practice. Despite distinct beginnings, nowadays it is widely accepted that human rights and IHL frameworks overlap during armed conflict.[1] In 2004, whilst determining the legal consequences arising from the construction of the wall being built by Israel, the ICJ

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[1] 'Final Act of the International Conference on Human Rights, Tehran' (n); Res 2444 (XXIII) (n); UNGA, 'Respect for Human Rights in Armed Conflict' (9 December 1970) Res 2674 (XXV); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* (Advisory Opinion) [1996] ICJ Rep 226 para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* (Advisory Opinion) [2004] ICJ Rep 136 para 137; In the *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)*, Judgment, ICJ Reports 2005 para 207. This judgment was reinforced in *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation)*, Provisional Measures Order, ICJ Reports 2008 paras 111-12; See also Droege C, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 IRRC 501, 503ff; Schabas W, '*Lex Specialis*? Belts and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum' (2007) 40 Israel L Rev 592.

confirmed the applicability of IHRL to situations of military occupation.[2] It stated by thirteen votes to two 'some rights may be exclusively matters of IHL; others may be exclusively matters of IHRL; yet others may be matters of both these branches of international law'.[3] Furthermore the commentaries to the Geneva Conventions identify when the Geneva Conventions reflect specific human rights guarantees. They include, for example, the inalienability of rights;[4] treatment of protected persons,[5] prohibition of torture and corporal punishment,[6] penal procedure,[7] civil capacity,[8] and complaints and petitions from internees.[9]

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[2] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 1) paras 106-13.

[3] ibid para 106.

[4] Geneva Convention I art 7; Commentary on Geneva Convention I, 82 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleU NID=47CC1F5C9494F52CC12563CD00519ECC> accessed 28 July 2014; Geneva Convention III art 3; Commentary on Geneva Convention III, 91 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleU NID=E160550475C4B133C12563CD0051AA66> accessed 28 July 2014; Geneva Convention IV art 8; Commentary on Geneva Convention IV, 78 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleU NID=764DC780D25C9D75C12563CD0051BA36> accessed 28 July 2014.

[5] Geneva Convention IV art 27; Commentary on Geneva Convention IV, 200 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleU NID=FFCB180D4E99CB26C12563CD0051BBD9> accessed 28 July 2014.

[6] Geneva Convention IV art 32; Commentary on Geneva Convention IV, 223 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleU NID=0146C998773B1496C12563CD0051BC2F> accessed 28 July 2014.

[7] Geneva Convention III art 99; Commentary on Geneva Convention III, 470 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleU NID=57CAB484520D699FC12563CD0051B2E2> accessed 28 July 2014; Geneva Convention IV art 71; Commentary on Geneva Convention IV, 353 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleU NID=102B74614C048640C12563CD0051BF7E> accessed 28 July 2014.

[8] Geneva Convention IV art 80; Commentary to Geneva Convention IV, 374 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleU NID=C9B26888AE27CC48C12563CD0051C050> accessed 28 July 2014.

[9] Geneva Convention IV art 101; Commentary to Geneva Convention IV, 436. <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleU NID=3EC165139DFBE208C12563CD0051C278> accessed 28 July 2014.

Milanovic argues that the current debate has progressed and no longer focuses on the relationship between the two legal regimes, as such, but on 'the relationship of the particular norms belonging to the two regimes that are controlling specific factual situations'.[10] There are, for example, specific situations in which IHL and IHRL both apply during armed conflict, for example, lawfulness of preventive detention, and necessity in targeting and transformative occupation.[11] To this end, IHL is not simply '*lex specialis*' of human rights law.[12] The thesis is not an IHL thesis. It is focused on the legal frameworks available to the ICRC when it engages with States and actors on the ground. What this chapter shows is that it will be pragmatic in its dialogue and use the framework most able to communicate humanitarian values to try and ensure that all actors in international and NIAC respect 'humanity'. This concept and its implications for the work of the ICRC are considered in chapters four and five.

The changing nature of conflict has created a situation where the activities of the ICRC are no longer limited to the period of time during the conduct of hostilities. The armed conflict scenario described in the introduction to this thesis indicates the myriad of long term humanitarian needs frequently seen in today's conflicts. The ICRC has the autonomy to respond to new situations on the ground without having to renegotiate its mandate. Chapter one considered the humanitarian assistance and humanitarian initiative powers of the ICRC.

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[10] Milanovic M, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) 14 J of Conflict and Security L 459, 462.

[11] ibid.

[12] Jennings R and Watts A (eds), *Oppenheim's International Law* (9th edn, Longman, London 1992) para 636; Sivakumaran S, 'International Humanitarian Law' in Moeckli D, Shah S and Sivakumaran S (eds), *International Human Rights Law* (OUP 2010) 532- 35.

This chapter questions whether the provisions in the Geneva Conventions I, II, III and IV 1949 and the Statutes of the ICRC provide enough scope for the ICRC to meaningfully respond to the needs of people during and after armed conflicts and other situations of violence.[13] It also considers the ICRC within the wider international community and posits that it is inevitable, perhaps necessary, for other legal frameworks to apply during the same situations that the ICRC is working in. This chapter focuses in particular on IHRL, including considering whether IHRL is relevant to the protection and assistance work of the ICRC.

This chapter begins with an analysis of the normative and legal development of the laws of war. It is argued that the ICRC and the UN institutionalised the traditional binary distinction between the laws of war and peace after the Second World War. As a consequence, in the post war years, the development of the *jus in bello*, *jus ad bellum* and IHRL was undertaken by two distinct organisations. In 1968, the International Conference on Human Rights took place in Tehran.[14] This pre-empted a number of UN General Assembly resolutions and Secretary-General reports on the respect for human rights in armed conflicts. This chapter therefore shows that the international community recognised that IHL does not cover all circumstances during armed conflict and that it is also necessary to draw on IHRL for the protection of populations. The synergy between these two legal frameworks is therefore a consequence of

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[13] Geneva Convention I art 9; Geneva Convention II art 9; Geneva Convention III art 9; Geneva Convention IV art 10; Additional Protocol I art 81; Additional Protocol II art 18; Statutes of the ICRC para 4(2); Statutes of the IRCRCM art 5(2)(d).

[14] Proclamation of Tehran, 'Final Act of the International Conference on Human Rights, Teheran' (22 April to 13 May 1968) UN Doc A/CONF. 32/41

both the changing nature of conflict and the humanitarian core of both IHL and IHRL, which seek to protect people.

The issue at hand is the extent to which IHRL impacts upon the protection and assistance work of the ICRC. This thesis will not go so far as to argue that IHRL binds the ICRC and its delegates; it will question, however, to what extent the work of the ICRC is now impacted upon by IHRL. Later chapters examine the issue of to what extent ICRC delegates make use of IHRL when working with combatants, encouraging respect for the local people. Human security reflects a human-centric progression within the international legal order and that the protection and assistance work of the ICRC, IHRL and the concept of human security therefore have overlapping components, grounded in their fundamental respect for humanity. To this end, in chapter four, this thesis considers the potential role of the ICRC in the establishment of human security.

b) The ICRC and Humanity's Law[15]

Teitel states that:

> The shift to the language of humanity law aims to construct a bridge between the discourse of state power and that of trans political moralism. The emergence of an ethical-legal discourse reflects, in part, the apparent agreed-on common political principles that are adequate for managing current crises… Humanitarian legalist discourse offers an alternative set of principles and values for global governance.[16]

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[15] See also Oberleitner G, Human Rights in Armed Conflict: Law, Practice, Policy (CUP 2015) 59 ff.

[16] Teitel R, *Humanity's Law* (OUP 2011) 35.

This statement fits with the current shift in international focus from a state-centric paradigm of international law to a human-centric one. If one views the international legal order as a myriad of actors from States, to intergovernmental organisations, regional human rights bodies, NGO's, civil society and individuals, the list is potentially endless, then doesn't humanitarianism, or humanity's law, provide a common focus for all concerned? If 'humanity' was at the forefront of decisions about law, intervention, and security and so on, would consensus on the appropriate course of action be more readily reached? Or, do people need to rely on the neutrality and independence of the ICRC to truly take account of humanity? What this analysis of the emerging legal framework and relevant institutions in the development of jus ad bellum, jus in bello and IHRL shows is that a) humanity is a common thread but that b) it is insufficient as a tool for protection and assistance from States or other self-interested actors. The ICRC provides a pathway for individuals and communities suffering through or recovering from conflict, to have 'humanity' as the focus of protection and assistance. To this end, the next two chapters of the thesis give specific attention to humanity and human-centric developments of the last twenty or so years, with a view to assessing the current position of the ICRC in its interpretation and application of the principle of humanity.

It is argued that although traditionally, the ICRC was framed under IHL, the humanitarian character of its work necessitates reference to IHRL too, as applicable during peace and armed conflict. There is nothing in international law or the Statutes IRCRCM that 'establishes expressly the way the ICRC

must or must not deal with it'.[17] In terms of the analysis provided in chapter two, the ICRC mandate is treaty based, taken from the Geneva Conventions I, II, III and IV 1949 and Additional Protocols 1977, non-treaty based, that is, as exists in the Statutes of the IRCRCM and finally the ICRC has 'humanitarian initiative' which is 'one of the most practically important tools of the ICRC'.[18]

Torreblanca argues that the doctrine of implied powers may assist in the determination of whether the ICRC can legitimately develop its mandate as entrusted to it by the international community.[19] Torreblanca posits that 'the ICRC's own mandate- and the provisions' wording that enshrined it- seem to acknowledge the need for great flexibility in contexts where the dynamics of the conflicts and situations of internal violence may require from the ICRC fast changes and adaptation in order to fulfil its pivotal aim, that is, the protection of persons affected by these events'.[20] This Author argues that, in fact, the ICRC must and does embrace IHRL. Although much of the interview data informs later analysis in the thesis, it is pertinent, perhaps revelatory, to state that the ICRC delegates on the ground do, in fact, utilise IHRL in their dialogue with community stakeholders and non-state armed groups.[21] If IHL and the rules applicable to the situation are not convincing the actors of their responsibilities to others, in particular civilians, the ICRC may draw on other

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[17] Torreblanca G, 'The International Committee of the Red Cross and Human Rights Law' in Kolb R and Gaggioli (eds), Research Handbook on Human Rights and Humanitarian Law (Edward Elgar Publishing Ltd, Cheltenham 2013) 546.

[18] Kolb R and Hyde R, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing, Oxford 2008) 117.

[19] Torreblanca (n 17) 546.

[20] Torreblanca (n 17) 546-7.

[21] INTERVIEW 003.

'humanitarian' legal frameworks including IHRL. Given that the ICRC mandate is to protect and assist, broadly speaking, it seems logical that it would draw on a myriad of legal sources to convince those on the ground to respect civilians and so on. To this end, the practice of the ICRC supports Teitel's conjecture that there is a 'humanity's law' that underpins the exigencies of IHL, IHRL and international criminal justice.

Can the ICRC, therefore, also ground its action in IHRL? This thesis has referred to NIAC and 'other situations of violence', that is, circumstances which would not have legally provided scope for ICRC action. Nevertheless the Third Carlist War in Spain (1872-1876), the insurrection in Herzegovina (1875), acts of violence in Argentina (1890), Brazil (1894), Venezuela (1894-5) and Macedonia (1903) all benefited from the assistance of the ICRC.[22] During the 10th International Conference in Geneva, the adoption of the resolution XIV recognised that the ICRC might intervene in social disturbances and revolutions.[23] This never led to adoption into a legal instrument. Nevertheless, Schindler stated that:

> [i]dependently of the development of international humanitarian law [and the emergence of the international law of human rights]… has acted also in various other ways to protect the victims of armed conflicts and, as a consequence, to work for the defence of human rights… [and] has also carried out a wide range of relief operations to

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[22] Torreblanca (n 17) 549; See also Sivakumaran (n 12) 30-39.

[23] Perruchoud R, *Les Résolutions des Conférences Internationales de la Croix-Rouge* (Institut Henry Dunant, Geneva 1979) in Torreblanca (n 17) 549.

bring aid to persons affected by international or non-international conflicts and to the victims of internal strife and tension'.[24]

This chapter will address the relationship between different legal regimes governing the conduct of hostilities and times of peace. It will show the institutionalisation, particularly following the Second World War, of two distinct legal regimes and how they increasingly overlap. It will therefore assess the relationship of different legal frameworks to the protection and assistance mandate of the ICRC and its day-to-day activities. The latter will be considered in greater depth in chapter six.

c) The Normative and Legal Development of the Laws of War

The *jus ad bellum* and the *jus in bello* both regulate the use of force, firstly by circumscribing its legality and, secondly, by limiting the means and methods used in warfare, aiming at preventing total war and preventing unnecessary suffering.[25] The spirit of both normative frameworks is to minimise human suffering through the regulation of the use of force.[26] The principle of humanity theoretically fosters a reciprocal relationship between parties at war, as fighting ought to be based on notions of chivalry and civilised behaviour.[27]

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[24] Schindler D, 'The International Committee of the Red Cross and Human Rights' (1979) 208 IRRC 5.

[25] Eide A, 'International Law, Dominance, and the Use of Force' (1974) 11(1) J of Peace Research 1, 4.

[26] See generally Best G, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (George Weidenfeld and Nicolson Ltd, London 1980).

[27] Droege C, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Israel L Rev 310, 313; See also Instructions for the Government of Armies of the United States in the Field (Lieber Code) 24 April 1863.

In fact, during the Thirty Years War, which began in 1618 and which Kunz referred to as the first 'total war', there were basic rules of humanity such as the distinction between civilians and combatants.[28] However the *jus ad bellum* affords the aggressor and the victims of the use of force unequal status before the law, whereas all people are afforded the protections of the *jus in bello*.[29] The *jus in bello* is purely humanitarian, it comprises a set of treaty-based and customary rules that govern belligerents' rights and duties in the conduct of hostilities, including on the legality of methods and means of warfare and the safeguarding of protecting persons, notably those *hors de combat,* prisoners of war and civilians not taking part in hostilities. These rules are based on basic axioms of IHL, including military necessity, the principle of distinction and proportionality.[30]

The Battle of Solferino 1859 stimulated international focus on the laws of war and lead to the creation of the first internationally agreed upon legal framework for the conduct of hostilities. The 'Convention for the Amelioration of the Condition of the Wounded in Armies in the Field' was adopted in Geneva on 22 August 1864.[31] Pictet stated that this treaty, and subsequent Geneva Conventions, 'are all founded on respect for the individual and for his dignity: they embody the principle of selfless relief, without discrimination, to all

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[28] Kunz JL, 'The Laws of War' (1956) 50(2) AJIL 313, 313.

[29] ibid 318.

[30] Greenwood C, 'Historical Development and Legal Basis' and Oeter S, 'Methods and Means of Combat' in Fleck, D. *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 35ff, 126-36.

[31] For a good outline of the laws of war prior to 1864 see Schindler D, 'The International Committee of the Red Cross and Human Rights' (1979) 208 IRRC 3, 3-5; See also Bossier, P. *History of the International Committee of the Red Cross: From Solferino to Tsushima* (Henri Dunant Institute, Geneva 1985).

human beings in distress whether they be wounded, prisoners of war or shipwrecked, and thus defenceless and no longer to be regarded as enemies'.[32] Whilst in Europe the Battle of Solferino led to the adoption of new laws of war, across the Atlantic US President Lincoln was signing the 'Lieber Code'. The 'Lieber Code' was adopted in 1863 and concerned how the Union forces should conduct themselves during armed conflict.[33] Shortly after the adoption of the 'Lieber Code', the '1868 St Petersburg Declaration' was adopted, which prohibits the use of certain types of weapons in war.[34] Progress in the codification of the laws of war was later made at the Brussels Conference in 1874 and stimulated the adoption of the Hague Convention on land warfare of 1907.[35] These laws aim to protect human beings, either from each other or certain weapons. In terms of this thesis, it is important to note that these laws were not made considering physical injury to soldiers, rather than the impact of war on civilians. It was the world wars of the twentieth century drew international interest and the attention of the ICRC to the inadequacies of the existing legal frameworks for the protection of victims of armed conflicts.

The assassination of Franz Ferdinand and Germany's declaration of war against Russia in the summer of 1914 began four years of conflict where all States flouted the laws of war, until war officially ceased with the Treaty of Versailles on 28 June 1918. Unfortunately, although the First World War

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[32] Pictet JS, 'The New Geneva Conventions for the Protection of War Victims' (1951) 45(3) AJIL 462, 462.

[33] Lieber Code (n 27) art 152.

[34] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868.

[35] 1907 Hague Convention IV Respecting the Laws and Customs on War on Land (adopted 18 October 1907, entered into force 26 January 1910).

showed the insufficiency of the laws of war, the ideology of extreme pacifists afterwards caused it to be fashionable to ignore the problem. Indeed Kunz argued that 'it was part and parcel of an officially created illusion of wishful thinking fostered by States and utopian writers'.[36]

It took a few years for the war to be back on the international agenda. The 'Pact of Paris', also referred to as the 'Kellogg- Briand Pact' 1928, reflected a 'feeling' in the international community. It did not 'outlaw' or 'abolish' war, even for its signatories, rather it contained a 'renunciation of war as an instrument of national policy'.[37] Mr Kellogg's circular letter stated that 'every state retains the inherent right to self-defense, and is itself the only judge to decide whether there is a given case of self-defense'. War remained lawful therefore as a means of a legally permissible self-defense, a measure of collective action, as between signatories of the Pact and non-signatories and as against a signatory who has broken the Pact by resorting to war in violation of its provisions.[38]

Article 7 International Law Association 'Articles of Interpretation of the 1928 Pact of Paris' provided that 'the pact does not affect such humanitarian obligations as are contained in general treaties, such as the Hague Conventions 1899 and 1907, the Geneva Conventions of 1864 and 1906, and the "International Convention relating to the Treatment of Prisoners of War

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[36] Kunz JL, 'The Chaotic Status of the Laws of War and the Urgent Necessity for their Revisionwis' (1951) 45(1) AJIL 37, 38.

[37] ibid 46.

[38] Lauterpacht H (ed), *International Law: A Treatise by L Oppenheim* Vol II (6th edn, Longmans, Green and Co, London 1947) 149-50.

1929"'.[39] The hope for the Pact, therefore, 'was that in the long run this change in international law would induce governments and people to view war in a new way and that this moral, social and psychological change would profoundly affect the occurrence of hostilities'.[40] For the ICRC, its raison d'être in 1859 was to assist the victims of armed conflicts. By 1928 there was a focus on the abolition of war, but whilst the Pact recognised that whilst peace is the ideal; it acknowledged certain circumstances may arise whereby a State may lawfully use force.

Unfortunately, on 1 September 1939, just over a decade after the adoption of the Pact, Germany invaded Poland, thus beginning the Second World War and from 1939-1945 the laws of war 'were regularly and on a mass scale violated by all the belligerents'.[41] So shocking were the violations, that Veale postulated that the conduct of the Second World War threatened a new 'advance to barbarism'.[42] Kunz echoed such a fear in 1956, when he stated that 'we have arrived where we started, in the sixteenth century, at the threat of total, lawless war, but this time with weapons which may ruin all human civilization, and even threaten the survival of mankind on this planet'.[43]

For the ICRC, its work during the Second World War focused on activities to protect and assist prisoners of war. The Geneva Convention 1929 included

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[39] ILA, *Briand-Kellogg Pact of Paris (August 27, 1928): Articles of Interpretation as adopted by the Budapest Conference, 1934, together with the report of the relevant proceedings* (Sweet and Maxwell, London 1934) art 7.

[40] Wright Q, 'The Outlawry of War and the Law of War' (1953) 47(3) AJIL 365, 369.

[41] Morgenthau HJ, *Politics Among Nations* (Knopf, New York 1948) 218.

[42] Veale FJP, *Advance to Barbarism: The Development of Total Warfare from Sarajevo to Hiroshima* (Original Publication, 1953) <www.vho.org/aaargh/fran/livres10/VEALAdvance.pdf> last accessed 20 June 2014.

[43] Kunz (n 28) 313.

rules governing the treatment of prisoners of war but civilians, including civilians held in concentration camps, were not protected under IHL.[44] During the Second World War the ICRC sent delegates to France, Germany, Poland and the United Kingdom; heir principal role was to visit prisoners of war, although access was routinely denied by Germany.[45] The ICRC also struggled to carry out its visits to prisoners of war in the Philippines, the Dutch East Indies and Borneo, Singapore and Thailand as the Japanese authorities refused accreditation to delegates.[46] This prevented ICRC delegates from working in an 'official' capacity. Sadly, these circumstances led to accusations of spying against ICRC delegates trying to bring relief to prisoners of war in Borneo; Dr Matthaeus Visher and his wife, after a mockery of a trial, were sentenced to death by a Japanese naval court, and beheaded.[47]

The international community sought a solution, to the violations of *jus in bello* and *jus ad bellum*, and on 14 August 1941 the 'Atlantic Charter' was completed. It spoke of a 'wider and permanent system of general security', which would 'afford to all nations the means of dwelling in safety within their

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[44] Geneva Convention 1929 Relative to the Treatment of Prisoners of War.

[45] '1939-1945: Descent into Hell' (11 May 2010) < https://www.icrc.org/eng/who-we-are/history/second-world-war/overview-2-world-war.htm> accessed 23 January 2015.

[46] Crossland J, *Britain and the International Committee of the Red Cross 1939-1945* (Palgrave Macmillan, Lodon 2014).

[47] 'The ICRC in WW II: Overview of Activities' (ICRC, 2 February 2005) <www.icrc.org/eng/resources/documents/misc/history-world-war-2-overview-020205.htm> accessed 7 July 2014; See also 'ICRC in WW II: Delegations throughout the World' (ICRC, 4 February 2005) <www.icrc.org/eng/resources/documents/misc/57jnwt.htm> accessed 7 July 2014.

own boundaries' at the war's end.[48] This idea pre-dated the UN but arguably pre-empted the collective security provisions of the UN Charter.

The ICRC was, and still is, *the* humanitarian organisation. Before the League of Nations or the UN, States had seen fit to sign up to The Hague and Geneva Conventions. The UN was created out of the ashes of the Second World War and, on the one hand, was a protector of State sovereignty and territorial integrity, whilst, buried in Article 55 UN Charter, it had the ability to develop human rights law. In 1943 Corbett published an article in the 'American Journal of International Law', which stated that 'most plans of post-war settlement advocate curtailment of national sovereignty and propose extensive and vigorous supranational organization', as the world legal order needed a community of States or individual human beings, or in the alternative an amalgamation of both.[49] For many, the UN is the epitome of such a supranational organisation. Ultimately, it is argued that such an ideal was to be realised through the ICRC, not the UN. Its amalgamation of State participation, in the International Conference, and the neutrality and independence afforded by the ICRC members being Swiss Nationals, not member States, makes it best placed to take into account State and human interests. Of course, much existing academic analysis suggests that the UN was intended to fulfil the Corbett proposal of a 'supranational organisation', one that would continue to prevent and address insecurity and violations of international law. This thesis aims to change such presuppositions and posit the potential of the ICRC to build security in the face and aftermath of armed conflict.

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[48] Luard E, *A History of the United Nations: Volume 1-The Years of Western Domination, 1945-1955* (The Macmillan Press Ltd, Hong Kong 1982) 17.

[49] Corbett PE, 'World Order: An Agenda for Lawyers' (1943) 37(2) AJIL 207, 210.

This chapter now turns to the institutionalisation of the binary distinction between the laws of war and the law of peace. Following the atrocities of the Second World War there were two distinct beliefs as regards the laws of war, either, that war should be outlawed, or, on the other hand, significantly developed. The proponents of the first belief questioned the necessity of the laws of war, if war was to be outlawed.[50] The question therefore was whether there was a need for such laborious preparation of new conventions to be implemented during hostilities when every endeavour was being made to abolish war?[51] The vigorous and perhaps dominant scholarly opinion in the period following the Second World War was that it was undesirable to deal with the actual conduct of war, as it would weaken the central drive to eliminate war entirely.[52] Arguably this opinion was institutionalised with the adoption of the UN Charter and the establishment of a new international organisation.

Pictet argued that the debates, as to whether to develop the laws of war or not, echoed those following the First World War and the conclusion at that time was that 'so long as States maintain powerful armies, they obviously do not rule out the possibility of war breaking out once more'.[53] In fact, at the same time, quite separate from the debates surrounding the development of two distinct legal frameworks, it was suggested that there is in fact an inherent

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[50] Wright (n 40) 365.

[51] Pictet (n 32) 463.

[52] Schindler (n 31) 7; See also Kolb R, 'The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions' (1998) 324 IRRC 409, available online <www.icrc.org/eng/resources/documents/misc/57jpg2.htm> accessed 23 July 2014.

[53] Pictet (n 32) 463.

relationship between the *jus ad bellum* and the *jus in bello*. The requirement, for example, for military necessity appears in both.[54] This relationship will be explored later in this chapter.

The UN's resolve not to undermine its determination to prevent war, or rather not to work on laws of war, was embedded in the UN law developed by the International Law Commission (ILC) in 1948. In fact, the 'Survey of International Law' by Professor Lauterpacht, which surveyed the 'whole field of international law' in accordance with Article 18 of the Statute of the ILC, does not mention the laws of war.[55] During the First Session of the ILC 1949 'it was considered that if the Commission, at the very beginning of its work, were to undertake this study [on the laws of war], public opinion might interpret this action as showing a lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace'.[56] It was left, therefore, to the ICRC to continue its work on the development of the laws of war, as we know; this led to the adoption of the Geneva Conventions I, II, III and IV 1949.

In 1956 Kunz suggested that, although there had been a new positive law created in the Geneva Conventions 1949, there were 'doubts whether the laws of war dealing with the actual conduct of war, including methods and weapons, [had] any value at this juncture of history and whether there [was] any chance

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[54] Kunz (n 28) 316.

[55] Lauterpacht H, *International Law: Being the Collected Papers of Hersch Lauterpacht. Volume 1: The General Works* (E Lauterpacht ed, CUP 2009) 445.

[56] '(1949) ILC Yearbook 281 paragraph 18' in Kalshoven F, 'Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts, 24 May-12 June 1971' (1971) 2 Netherlands YB of Intl L 68, 68; See also Lauterpacht H, 'The Revision of the Laws of War' (1952) 29 British YB Intl L 360.

for their revision'.[57] Despite this negative perspective, Kunz went on to state that the:

> Rules for the actual conduct of war are absolutely necessary, even in time of peace, because they correspond not only to humanitarian sentiments, but to military necessity; they are a requisite pre-condition for the punishment of war crimes: and are needed today to guarantee the survival of civilization and even, perhaps, the physical survival of humanity.[58]

The times before the First World War, the interwar years and after the Second World War all had their own trials and tribulations and the situation on the ground stimulated legal developments. It has been shown that following the Second World War the ICRC was the actor willing to take responsibility for the development of a legal framework to regulate the conduct of hostilities. The ICRC is continually developing the laws of war. Following the end of the Second World War it helped develop the Geneva Conventions, in the 1970's the Additional Protocols and most recently it published the 'Customary Study on IHL'.[59] The developments of these new laws reflect not only the changing nature of conflict, as described in the introduction, but also the changing needs of people on the ground during conflict. The content of these laws was

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[57] Kunz (n 28) 321.

[58] Kunz (n 28) 322.

[59] Henckaerts J-M and Doswald-Beck L, *Customary International Humanitarian Law: Volume 1 Rules* (CUP 2005).

described in chapter one and will continue to inform the legal analysis in this thesis.

d) International Human Rights Law in Armed Conflict

This chapter will now turn to consider the development of IHRL and its relationship with the laws of armed conflict. The purpose of this section is to show that the international community recognised that despite protestations following the end of the Second World War of 'never again', wars were continuing to occur. Unfortunately neither the ICRC nor the UN were prepared for the myriad of conflicts occurring within States. The UN pursued the Human Rights in Armed Conflict agenda. The UN human rights in armed conflict agenda of 1968 and the following decade, building up to the adoption of Additional Protocol I and II 1977, are analysed in terms of ICRC involvement in each organisations legal framework development.[60] It is argued that these significant legal developments show the beginnings of an inherent and necessary overlap between IHL and IHRL and ultimately the development of the role of the ICRC.

The first two chapters of this thesis showed that, for the ICRC, its mandate has developed to include 'other situations of violence'. In such situations IHRL would apply, not IHL. Before this chapter can analyse the impact of IHRL on the mandate of the ICRC, it is important to introduce the normative and legal content of IHRL and its relationship with armed conflict. The common understanding is that modern human rights can be traced back to the visionaries of the Enlightenment who sought a more just relationship between

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[60] See XVIth International Red Cross Conference, London, 1938, 'Resolution XIV: Role and Activity of the Red Cross in Time of Civil War' in Sivakumaran, S. *The Law of Non-International Armed Conflict* (OUP 2012) 36.

the State and its citizens.[61] Human rights remained a subject of national law until after the Second World War and the adoption of the UDHR 1948.[62] Just one year later, the four Geneva Conventions were adopted. At the time, although 'general political statements referred to the common ideal of both bodies of law, there was no understanding that they would have overlapping areas of application'.[63] Indeed historically IHL and IHRL were two distinct legal frameworks and there was little interaction between them.[64] IHRL concerns the inherent rights of the person to be protected at all times against abusive power, whereas IHL regulates the conduct of parties to an armed conflict.[65] Another basic distinction to note is that human rights apply between the State and its own nationals, whereas the Geneva Conventions I, II, III and IV 1949 do not generally apply to the relations of a State with its own nationals. Rather their objectives are to govern relations between a between belligerent

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[61] Doswald-Beck L and Vité S, 'International Humanitarian Law and Human Rights Law' (1993) 293 IRRC 94, 94-119.

[62] Universal Declaration on Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR); Droege (n 27) 313; For an overview of the development of the UN human rights legal framework Provost R, *International Human Rights and Humanitarian Law* (CUP 2002); For a simple and brief overview of human rights in war see Baxter R, 'Human Rights in War' (1977) 31(2) Bulletin of the American Academy of Arts and Sciences 4.

[63] Droege (n 27) 314.

[64] See Sivakumaran S, 'Re-envisioning the International Law of Armed Conflict' (2011) 22(1) Eur J Intl L 219, 234; See also Robertson AH, 'Humanitarian Law and Human Rights' in Swinarski C (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff Publishers, The Hague 1984).

[65] For 'doctrinal' discussions on the relationship between IHL and IHRL see Schindler (n 31); Robertson (n 64) 793; Gasser H-P, 'International Humanitarian Law' in Haug H, *Humanity for All, the International Red Cross and Red Crescent Movement* (Henry Dunant Institute, Geneva 1993) 507-508; Doswald-Beck and Vité (n 61); Krieger H, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11(2) J of Conflict and Security L 265; Sayapin S, 'The International Committee of the Red Cross and International Human Rights Law' (2009) 9(1) Human Rights L Rev 95; Milanovic M, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) 14(3) J of Conflict and Security L 459; Scobbie I, 'Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict' (2010) 14(3) J of Conflict and Security L 449.

and enemy civilians who, as a result of the occupation of the territory of the State of which they are nationals, are under the control of the adverse power.[66] Of course, there is an exception in Common Article 3. It must also be made clear that the UDHR presupposed application in times of peace, as this was what the UN sought to achieve.[67] The UDHR 1948 therefore completely bypasses the question of respect for human rights in armed conflicts, and at the same time human rights were scarcely mentioned during the drafting of the Geneva Conventions I, II, III and IV 1949.[68]

It is argued that, in fact, IHL and IHRL share common ground in their 'humanitarian core', or as Teitel would call it, 'Humanity's Law'.[69] It is agued that the principle of humanity Pictet characterised humanitarian law as 'that considerable portion of international law which is inspired by a feeling for humanity and is centred on the protection of the individual in time of war'.[70] Droege stated that 'human rights and humanitarian law share a common ideal, protection of the dignity and integrity of the person, and many of their guarantees are identical, such as the protection of the right to life, freedom from torture and ill-treatment, the protection of family rights, economic and/or

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[66] Kolb (n 52).

[67] ECOSOC, 'Report of the Drafting Committee to the Commission on Human Rights, suggestions submitted by the representative of France (R Cassin)' (1 July 1947) UN Doc E.CN.4/21, 48 and 68; 'Draft International Declaration of Human Rights (E/8OO)' (29 October 1948) UN Doc A/C.3/SR.116, 268; 'Draft Article 26 Economic and Social Council, Third Year, Seventh Session, Supplement No 2, page 11' and 'Doc A/C.3/SR.152 page 639' in Kolb (n 52); Droege (n 27) 314.

[68] Schindler (n 31); See also Lossier LG, 'The Red Cross and the International (sic) Declaration of Human Rights' (1949) 5 IRRC 184.

[69] Teitel (n 16).

[70] Pictet J, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff Publishers, Dordrecht and Henry Dunant Institute, Geneva 1985) 1.

social rights.[71] Furthermore, Kellenberger, former President of the ICRC, stated that 'the common underlying purpose of international humanitarian and IHRL is the protection of the life, health and dignity of human rights'.[72]

Okimoto argued that although the UN Charter does not specifically mention the laws of war, Article 1(3) and 55 allow the Security Council to take decisions that would ensure respect for the Geneva Conventions I, II, III and IV 1949 in case a State party is not complying with them.[73] Ignatieff argued that there are also synergies between the UDHR 1948 and the Geneva Conventions 1949, as the UDHR 1948 was 'part of a wider reordering of the normative order of post war international relations, designed to create firewalls against barbarism'.[74] The 1949 Geneva Conventions were to prove, along with the UDHR 1948, 'one of the two main moral pillars for international relations after 1945'.[75] Morsink argues that 'there is a clear reminiscence of war in the debates on the Universal Declaration. It is probably fair to say that 'for each of the rights, [the delegates] went back to the experience of the war as the epistemic foundation of the particular right in question'.[76] Moreover, the

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[71] Droege (n 27) 312.

[72] Address by Jakob Kellenberger, President of the ICRC, 'International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence' (2003) 85 IRRC 645, 646.

[73] Okimoto K, *The Distinction and Relationship between* Jus ad Bellum *and* Jus in Bello (Hart Publishing, Oregon 2011) 119.

[74] Ignatieff M, *Human rights as Politics and Idolatry* (Princeton UP, Princeton 2001) 5.

[75] Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims, 'Final Record of the Diplomatic Conference of Geneva of 1949' (Geneva, 21 April-12 August 1949), Vol II, Section A, pages 165-66, 323, 619ff , 692-95 (delegates notes) and 813; Kunz (n 28) 322; Forsythe DP, *The Humanitarians: The International Committee of the Red Cross* (CUP 2005) 55.

[76] Morsink J, 'World War Two and the Universal Declaration' (1993) 15 Human Rights Q 357, 358.

application of the Geneva Conventions I, II, III and IV 1949 should not deprive people of their human rights.

The President of the Geneva Conventions conference, Max Petitpierre also spoke of the parallelism between and the common ideal of the Geneva Conventions and the UDHR. He stated that:

> Our texts are based on certain of the fundamental rights proclaimed in it- respect for the human person, protection against torture and against cruel, inhuman or degrading punishments or treatment. Those rights find their legal expression in the contractual engagements that your Governments have today agreed to undertake. The UDHR and the Geneva Conventions are both derived from one and the same ideal.[77]

In 1968 the 'Final Act of the International Conference on Human Rights' stated that 'peace is the underlying condition for the full observance of human rights and war is their negation'.[78] The subsequent General Assembly Resolution 2444 (XXIII) of 1968 urged the Secretary-General to study measures for a better application of existing law and described the need for

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[77] Final Record of the Diplomatic Conference of Geneva of 1949 (n 75) 536; See also Gutteridge JAC, 'The Geneva Conventions of 1949' (1949) 26 British YB Intl L 300, 325; Draper GIAD, 'The Relationship Between the Human Rights Regime and the Law of Armed Conflict' (1971) 1 Israel YB on Human Rights 205.

[78] Final Act of the International Conference on Human Rights para 10 states that 'massive denials of human rights, arising out of aggression or any armed conflict with their tragic consequences, and resulting in untold human misery, engender reactions which could engulf the world in ever growing hostilities. It is the obligation of the international community to co-operate in eradicating such scourges'; Proclamation of Tehran, 'Final Act of the International Conference on Human Rights, Teheran' (22 April to 13 May 1968) UN Doc A/CONF. 32/41, 3; For a general overview of this period see Suter, K. *An International Law of Guerrilla Warfare: The Global Politics of Law-Making* (Palgrave Macmillan, Hamps 1984); Sivakumaran (n 60) ch 2.

new instruments to better protect civilians, prisoners and combatants in all armed conflicts.[79] Interestingly, despite the title of the resolution being 'Respect for Human Rights in Armed Conflicts', it only mentions IHL, except for a statement in the preamble that war amounts to a negation of human rights.[80] It is curious therefore how the General Assembly hoped to better apply IHRL to situations of armed conflict.

The UN's interest in increasing the legal framework applicable during NIACs was ignited during the Korean conflict and the invasion of Hungary by Soviet troops.[81] The preamble to Geneva Convention I states that in all armed conflicts the inhabitants and belligerents are protected in accordance with 'the principles of the law of nations derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience'. It was recognised by the Conference of Government Experts that convened in 1971 to consider the 'Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts' that the Geneva Conventions were 'not sufficiently broad in scope to cover all armed conflicts'. Furthermore the conference stated that 'States parties to the Geneva Conventions sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other

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[79] 'Final Act of the International Conference on Human Rights, Tehran' ibid paras 2-3; Kalshoven (n 56) 70; See discussion in Schindler (n 31) 3; See also Miyazaki S, 'The Application of the New Humanitarian Law' (1980) 20 IRRC 184, which focuses on IHL and human rights in NIAC; Calogeropoulos-Stratis AS, 'The Humanitarian Dimension of War: Protection of the Individual, whether Military or Civilian' (1992) 32 IRRC 183.

[80] UNGA, 'Respect for Human Rights in Armed Conflict' (19 December 1968) Res 2444(XXIII).

[81] UNGA, 'Question of Atrocities Committed by the North Korean and Chinese Communist Forces Against United Nations Prisoners of War in Korea' (3 December 1953) Res 804 (VIII); UNGA, 'Invasion of Hungary by Soviet Troops' (12 December 1958) Res 1312 (XIII) UN Doc A38/49.

States, even if they are not themselves directly involved in an armed conflict'.[82] This Resolution 2444 and General Assembly Resolution 2675 (XXV) (1970) 'with their various protections for the civilian population were considered to reflect the state of customary international law applicable to all armed conflicts'.[83] Indeed Kellenberger stated that 'in political terms, the 1968 resolution signalled the international community's recognition that armed conflicts "continued to plague humanity" despite UN Charter's prohibition on threats or use of force in international relations'.[84]

The Secretary-General wrote two reports on the 'Respect for Human Rights in Armed Conflicts' in 1969 and 1970, at the request of the General Assembly. They postulated that human rights instruments, in particular the International Covenant on Civil and Political Rights 1966 (ICCPR)[85], afforded more comprehensive protection to persons in times of armed conflict, than the Geneva Conventions only.[86] In fact, a couple of months after the second report, the UN General Assembly confirmed that human rights continue to apply in

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[82] ICRC, 'Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts, 24 May-12 June 1971' 37 <www.loc.gov/rr/frd/Military_Law/pdf/RC-conference_Vol-8.pdf> accessed 11 July 2014.

[83] Sivakumaran (n 64) 223-24.

[84] Address by Jakob Kellenberger, President of the ICRC, 'Protection Through Complementarity of the Law' (27th Annual Round Table on Current Problems of International Humanitarian Law, San Remo, Italy, 4-6 September 2003) <www.icrc.org/eng/resources/documents/statement/5rfgaz.htm> accessed 23 July 2014.

[85] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[86] Report of the Secretary General, 'Report on the Respect for Human Rights in Armed Conflict' (20 November 1969) UN Doc A/7729, ch 3; Report of the Secretary General, 'Respect of Human Rights in Time of Armed Conflicts' (18 September 1970) UN Doc A/8052, annex 1.

situations of armed conflict.[87] Subsequently, the General Assembly directed the
Human Rights Commission to consider the Secretary-General's report on
'Respect of Human Rights in Armed Conflicts'.[88] The UN Secretariat worked
in close cooperation with the ICRC during the process.[89] The two reports
influenced the preparation of new draft treaties by the ICRC, which became
Additional Protocols I and II. Meanwhile the UN continued its human rights in
armed conflict agenda.[90]

In terms of Additional Protocols I and II, from 1974 to 1977 the 'Diplomatic
Conference on the Reaffirmation and Development of International
Humanitarian Law' took place in Geneva.[91] The world in which the Additional
Protocols were launched was very different from the one in existence following
the end of the Second World War and the adoption of the Geneva Conventions
I, II, III and IV 1949. In particular, the Third World had risen up against

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[87] UNGA, 'Principles for the Protection of Civilian Populations in Armed Conflict' (9
December 1970) UN Doc A/8028 Basic; GA Res 2675.

[88] UN Doc A/8052 (n 86).

[89] See Miscellaneous, 'Human Rights in Armed Conflicts' (1970) 10 IRRC 220.

[90] Res 2444(XXIII) (n 80); UNGA, 'Respect for Human Rights in Armed Conflict' 16
December 1969) Res 2597 (XXVI); (9 December 1970) Res 2677 (xxv); (9 December 1970)
Res 2676 (xxv); (9 December 1970) Res 2674 (XXV); (20 December 1971) Res 2852 (XXVI);
(20 December 1971) Res 2853 (XXVI); (20 December 1972) Res 3032 (XXVII); (12
December 1973) Res 3102 (XXVIII); (14 December 1974) Res 3319 (XXIX); (15 December
1975) Res 3500 (XXX); UNGA, 'Basic Principles for the Protection of Civilian Populations in
Armed Conflicts' (9 December 1970) Res 2675 (XXV); UNGA, 'Basic Principles of the Legal
Status of the Combatants Struggling against Colonial and Alien Domination and Racist
Regimes' (12 December 1973) Res 3103 (XXVIII); Report of the Secretary General, 'Respect
for Human Rights in Armed Conflicts' (20 November 1969) UN Doc A/7720; UN Doc A/8052
(n 86); (1971) UN Doc A/8370; (20 September 1972) A/8781; (1973) A/9123; (1974) A/9669;
(11 November 1975) A/10195/Add.1.

[91] For details of the preparatory work on the Additional Protocols see Bothe M, Patsch KJ and
Solf WA, with Eaton M, *New Rules for Victims of Armed Conflicts: A Commentary on the Two
1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff Publishers,
The Hague 1982); Pilloud C, Sandoz Y, Swinarski C and Zimmerman B, *Commentary on the
Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus
Nijhoff Publishers, The Hague 1987).

colonialists; the 'capitalist' and 'socialist' blocks were engaged in a battle of wills, later to be named the 'Cold War'; and the Vietnam conflict was still fresh in the minds of the international community.[92]

Prior to the Diplomatic Conference the ICRC advocated a parallel approach to the rules governing international and NIAC but with the focus of the world on the armed national liberation movements it was impossible to achieve consent for such a proposition.[93] There were therefore two protocols, one on international armed conflict and one on NIACs.[94] The protocols updated the rules on the conduct of hostilities, which afforded non-combatants, and civilians enhanced protection.[95] Moreover the UN General Assembly called on States to become parties to the 1977 Additional Protocols.[96] UN bodies were also called upon to work for a strengthening of IHL: Reaffirmation and progressive codification of IHL (standard setting), ensuring prosecution and punishment of persons who have committed serious violations of that law, and increasing respect on the part of parties to specific conflicts for their obligations under IHL, that is, humanitarian diplomacy.[97]

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[92] Kosirnik R, 'The 1977 Protocols: A Landmark in the Development of International Humanitarian Law' (1997) 320 IRRC 483, 483.

[93] 'Report submitted to the 21st International Conference of the Red Cross (Istanbul, 6-13 December 1969)' (1969) 51 IRRC 33, 33-35.

[94] For an overview of the significant developments in the law contained in Additional Protocol I see Aldrich GH, 'New Life for the Laws of War' (1981) 75(4) AJIL 764; Heike Spieker AP, 'Twenty-five Years after the Adoption of Additional Protocol II: Breakthrough or Failure of Humanitarian Legal Protection?' (2001) 4 YB of Intl Humanitarian L 129.

[95] Additional Protocol I arts 35-67; Additional Protocol II arts 13-17.

[96] UNGA, 'Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts' (9 December 1994) Res 49/48; UNGA, 'Resolution of the United Nations General Assembly on the 1977 Additional Protocols' (12 December 2000) A/RES/55/148.

[97] UNGA, 'United Nations Resolution on the Development of International Humanitarian Law: Respect for Human Rights in Armed Conflicts' (1977) Res A/C.6/32/L.6.

e) Conclusion to Chapter Three

Since the creation of the ICRC the landscape of war has changed. Traditionally IHL was the law in force during armed conflict and when there was no war the landscape was peaceful and IHL did not apply. The nature of NIAC and protracted armed conflict has changed this. Nowadays conflict ebbs and flows, within a sovereign State some areas can be considered 'at war' whilst others are 'at peace'. Not only can these labels change from place to place but one area can sometimes be engaged in armed conflict, then not, then perhaps engaged in armed violence not amounting to a conflict, and so on. The application of laws to each situation has therefore become increasingly complex.

This chapter has shown that human rights law, including the soft law created by the General Assembly resolutions on human rights in armed conflicts, has developed and is now applicable at all times. Indeed, it is argued that a 'human-being-oriented approach' to international law, as identified in the *Tadic* Appeals Chamber decision, is in existence.[98] The inherent overlaps between human rights and IHL therefore lead to the convergence of legal framework. The differing normative basis of the UN and ICRC explored earlier in the chapter appears therefore to have been subsumed by the necessary development of the laws and rules applicable during international and non-international armed conflict. This analysis will feed into the next chapter of the thesis, which considers human security. It is argued that the development of human rights since the end of the Second World War is part of a wider human-

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[98] *Prosecutor v Tadic* (Appeals Chamber Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-1995-IT-49-I-AR72 (2 October 1995) para 97.

centric progression within the international community. Human rights fit into a jigsaw, so to speak, of human-centric norms. The ICRC is an important organisation within this human-centric paradigm, as the Geneva Conventions I, II, III and IV 1949 and the Statutes of the ICRC underpin the ICRC as an international actor, legal person and 'guardian' of IHL. Legally the ICRC is still unique, as was shown in chapter one and two, but the humanitarian norms that filter through international law are relevant to the ICRC.

The ICRC applies IHRL when necessary to promote its humanitarian agenda, despite no reference to IHRL in its mandate. The ICRC is increasingly working in situations not amounting to armed conflicts and interviewees disclosed that where need be, to impart the message of humanity, they will refer to IHRL in order to convince NSAG of the importance of humanity in armed violence. This thesis is conscious of the fact that the ICRC is a humanitarian actor, tasked with the provision of humanitarian assistance and protection during IAC and NIAC. It also shows, however, that such a limited idea of what the ICRC is and does fails to reflect the full corpus of situations in which it acts and the activities that it undertakes. Analysis of the ICRC must, therefore, draw on the existing knowledge we have of the ICRC, its mandate and principles and reflect on broader 'humanitarian' notions to see whether they impact on the ICRC. Moving into the next chapter therefore, these considerations must be kept in mind, as the argument moves from the ICRC mandate in terms of treaty and statute law to how it is being interpreted and implemented on the ground today. What broader ideas and activities is the ICRC seemingly drawing on in its work? Is it interpreting its mandate more broadly than in the past?

4) CHAPTER FOUR: HUMANITY AND NEUTRALITY

a) Introduction

At the beginning of this thesis it was posited that humanitarian protection and assistance are currently inextricably linked with the concept of human security. For this author there is a noticeable shift in the international legal order, a 'humanisation' of existing public international law. This shift places human beings as the beneficiaries of law. For Peters, this makes 'humanity' a 'grundnorm' of an otherwise still State-based system.[1] Oberleitner makes a connection between the concept of humanity and human security, which is a key component of this thesis.[2] Oberleitner's text is not focused specifically on the ICRC but the conjecture that humanity and human security are inextricably linked, as they each focus on making human beings the reference point for decisions, is echoed throughout this thesis.[3] Essentially this chapter builds on the analysis provided in chapter three which presented the humanisation of international law and provides a literary bridge into the analysis of humanitarian action today, namely human security and RtoP.

Critically this chapter is a prelude to chapter five which examines current humanitarian focused concepts, including sovereignty as responsibility, human security and RtoP. In this concise chapter on humanity and neutrality, humanity is examined in terms of its legal content. This chapter will show that humanity is, at its very core, a call for human beings to be put first by States,

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[1] Peters A, 'Humanity as the Alpha and Omega of Sovereignty' (2009) 20(3) Eur J Intl L 513.

[2] Oberleitner G, *Human Rights in Armed Conflict: Law, Practice, Policy* (CUP 2015) Chapter 16.

[3] ibid 235.

perhaps also by each other. Traditionally the notion of humanity manifested itself in the laws of war through notions of chivalry, distinction, necessity and proportionality.[4] However, the idea that humanity is a principle limited to times of war seems a little odd. To this end, it is argued that, in fact, humanity as a concept permeates times of peace and other situations of violence too. If war is changing, to be more 'internal', long-term, involving non-State actors and civilians and so on, then does the concept of humanity (and inhumanity) also have to change? If humanity were to be described in terms of armed conflicts today would it be much different to that provided in the Statutes of the IRCRCM?

Ultimately, it is this Author's belief that as human beings we have an inherent understanding of humanity. Even if our humanity is put into question, the very fact that we recognise 'inhumanity' is evidence of our empathy towards one another. An absence of humanity is perhaps easier to identify than the positive existence of such. Inhumanity is more than 'bad behaviour' towards another. To this end, 'crimes against humanity' provide a sensible reference point for understanding inhumane treatment.[5] It is the 'positive' idea of humanity that needs more thought. Nowadays such a response is not restricted to armed conflict but also during the recovery phase, so, for example, through the

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[4] Gill T, 'Chivalry?: A Principle of the Law of Armed Conflict' in Matthee M, Toebes B and Brus M (eds), *Armed Conflict and International Law: In Search of the Human Face* (TMC Asser Press, The Hague 2013) Chapter 2.

[5] There are exciting and interesting developments in literature on this matter. See Bergsmo M and Tianying S (eds), *On the Proposed Crimes Against Humanity Convention* (Torkel Opsahl Academic EPublisher, Brussels 2014); Rodenhäuser T, 'Beyond State Crimes: Non-State Entities and Crimes Against Humanity (2014) 27(4) Leiden J of Int'l L 913; Chehtman A, 'Contemporary Approaches to the Philosophy of Crimes Against Humanity' (2014) 14(4-5) Int'l Criminal L Rev 813; Wemmers J-A, *Reparation for Victims of Crimes Against Humanity: The Healing Role of Reparation'* (Routledge, London 2014).

provision of healthcare or economic security.[6] These matters will be returned

to later in this chapter and in chapter five, which assesses the 'law in context'

and the current practice of the ICRC. The ICRC definition of humanity states

that 'its purpose is to protect life and health and to ensure respect for the

human being'.[7] If we take the mandate of the ICRC, for example, then its right

to visit prisoners of war or provide health care to wounded soldiers are clearly

linked to this part of the principle of humanity. This thesis addresses whether

'protection' and 'assistance' have had to adapt to new types of conflict and

broader humanitarian concerns. To this end, this thesis considers the current

interpretation of humanity by the ICRC.

b) The Concepts of Humanity and Neutrality

It is almost impossible to provide a concise and agreeable definition of

humanity. Perhaps it refers to human beings collectively, the state of being

human or the quality of being humane.[8] In which case, acts of 'inhumanity'

could be identified as 'massacres, persecution, forced displacement, arrests,

attacks on civilians, and excessive use of force by police and denial of freedom

or of self-determination'.[9] The most pragmatic way to think about humanity,

and for that matter, inhumanity, is 'you know it when you see it', but in terms

of legal analysis this is not particularly helpful. We see a legal definition of

'humanity' in international criminal law, which is considered later in the

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[6] 'Ensuring Economic Security' (ICRC) <www.icrc.org/eng/what-we-do/ensuring-economic-security/overview-economic-security.htm> accessed 15 July 2014.

[7] Statutes of the IRCRCM.

[8] Oxford Dictionary <http://www.oxforddictionaries.com/definition/english/humanity> accessed 8 March 2015.

[9] Coupland R, 'Humanity: What is it and How Does it Influence in International Law' (2001) 83 IRRC 969, 971.

chapter.[10] If you ask someone to define 'humanity' one would imagine the response would take some time to articulate. Ask an international lawyer, particularly one with a background in IHL, and perhaps they would cite the Martens Clause or Crimes against Humanity, as defined in the Rome Statute.[11] The principle of humanity is a corner stone of the IRCRCM.[12] This chapter seeks to understand and articulate what 'humanity' means today, in the international community and for the ICRC.

The principle of humanity theoretically fosters a reciprocal relationship between parties at war, as fighting ought to be based on notions of chivalry and civilised behaviour.[13] In fact, during the Thirty Years War, which began in 1618 and which Kunz referred to as the first 'total war', there were basic rules of humanity such as the distinction between civilians and combatants.[14] However the *jus ad bellum* affords the aggressor and the victims of the use of force unequal status before the law, whereas all people are afforded the protections of the *jus in bello*.[15] The *jus in bello* is purely humanitarian, it comprises a set of treaty-based and customary rules that govern belligerents' rights and duties in the conduct of hostilities, including on the legality of

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[10] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute).

[11] Hague Convention Concerning the Laws and Customs of War on Land, 18 October 1907, 36 Stat 2227 (Martens Clause); Rome Statute art 7.

[12] Statutes of the International Red Cross and Red Crescent Movement were adopted by consensus at the Twenty- fifth International Conference of the Red Cross, meeting in Geneva in October 1986 (Statutes of the IRCRCM).

[13] Droege C, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Israel L Rev 310, 313; See also Instructions for the Government of Armies of the United States in the Field (Lieber Code) 24 April 1863.

[14] Kunz JL, 'The Laws of War' (1956) 50(2) AJIL 313, 313.

[15] ibid 318.

methods and means of warfare and the safeguarding of protecting persons, notably those *hors de combat,* prisoners of war and civilians not taking part in hostilities. These rules are based on basic axioms of IHL, including military necessity, the principle of distinction and proportionality.[16] Turns argues that, 'the principle of humanity is, so to speak, the other side of the coin: it counterbalances military necessity by decreeing that the horrors of war must, to the extent possible, and without unduly hindering the attainment of lawful military objectives, be alleviated by considerations of humanitarianism, such as the protection of enemy soldiers who have surrendered. The balance between military necessity and humanity is not always easy to strike'.[17]

The Battle of Solferino 1859 stimulated international focus on the laws of war and lead to the creation of the first internationally agreed upon legal framework for the conduct of hostilities. The 'Convention for the Amelioration of the Condition of the Wounded in Armies in the Field' was adopted in Geneva on 22 August 1864.[18] Pictet stated that this treaty, and subsequent Geneva Conventions, 'are all founded on respect for the individual and for his dignity: they embody the principle of selfless relief, without discrimination, to all

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[16] Greenwood C, 'Historical Development and Legal Basis' and Oeter S, 'Methods and Means of Combat' in Fleck, D. *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 35ff, 126-36.

[17] Turns D, 'Targets' in White ND and Henderson C (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum* (Edward Elgar Publishing Lrd, Cheltenham 2013) 344.

[18] For a good outline of the laws of war prior to 1864 see Schindler D, 'The International Committee of the Red Cross and Human Rights' (1979) 208 IRRC 3, 3-5; See also Bossier, P. *History of the International Committee of the Red Cross: From Solferino to Tsushima* (Henri Dunant Institute, Geneva 1985).

human beings in distress whether they be wounded, prisoners of war or shipwrecked, and thus defenseless and no longer to be regarded as enemies'.[19]

It is fair to say therefore that the meaning of 'humanity' remains ambiguous, despite the 'laws of humanity' being evoked as early as 1868 in the St Petersburg Declaration which 'prohibited the use of bullets that would explode on impact with a soldiers body'. [20] The useless aggravation of suffering was seen as contrary to 'humanity' and the 'progress of civilization'. Despite almost 150 years to provide clarity to the meaning of 'humanity', the definition of such continues to remain open.

In 1899 Hague Peace Conference a Russian diplomat, Fryodor Fyodorovich Martens, successfully introduced a clause into the preamble of the Hague Convention (II) with Respect to the Laws and Customs of War on Land. It is also included in the Hague Convention (IV), developed at the Peace Conference of 1907. It states that:

> The inhabitants and the belligerents must remain under the protection and the rule of the basic principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity and the dictates of public conscience.[21]

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[19] Pictet JS, 'The New Geneva Conventions for the Protection of War Victims' (1951) 45(3) AJIL 462, 462.

[20] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868.

[21] Restated in Geneva Convention I art 63; Geneva Convention II art 62; Geneva Convention III art 142 and Geneva Convention IV art 158; Also present in Additional Protocol I art 1(2) but 'laws' was replaced by 'principles' and Additional Protocol II preamble para 4; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (10 October 1980) 1342 UNTS 137 Preamble para 5.

Eight years after the adoption of The Hague Convention (IV) there was a mass killing of Armenians in the Ottoman Empire. The terminology used to describe this event was that they were crimes against humanity and civilisation.[22] Such terminology continues to permeate international criminal law today. Technically 'the use of this specific term at Nuremberg was suggested by a leading scholar, Hersch Lauterpacht, to Robert Jackson, the US delegate to the London Conference, who was subsequently appointed chief US prosecutor at Nuremberg'.[23] These crimes were thus defined as:

> Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or connexion with any crimes within the jurisdiction of the Tribunal [i.e. either 'crimes against peace' or 'war crimes'], whether or not in violation of the domestic law of the country where perpetrated.

So, how does the ICRC fit into this international criminal law picture? Does its interpretation of humanity link into 'crimes against humanity' or is it broader? Nowadays, in fact, the nexus between crimes against humanity and armed conflict is no longer required. Crimes against humanity can be committed

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[22] Emphasis added. For the full text of the note, see the 'Dispatch of the US Ambassador in France, Sharp, to the US Secretary of State, Bryan, of 28 May 1915' in *Papers Relating to the Foreign Relations of the United States, 1915, Supplement* (US Government Printing Office, Washington 1928) 981.

[23] See on this point Koskenniemi M, 'Hersch Lauterpacht and the Development of International Criminal Law' (2004) 2 JICJ 811.

outside of armed conflict. 'Customary international law bans crimes against humanity whether they are committed in time of war or peace'.[24] In chapter three, the relationship between the laws of war and peace, and the ICRC, was explored, ultimately showing that there is significant convergence in law and practice between the two. To this end, it is argued that humanity, too, is a concept that permeates both war and peace, in the same way that the ICRC may refer to IHRL, the principle of humanity may; perhaps, overarch all functions of the ICRC.

Under the Statutes of the Movement the ICRC concept of humanity is defined as:

> 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 to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples.[25]

Chapters one and two explored the legal status of the Statutes of the IRCRCM and the mandate of the ICRC. What is the significance of the Fundamental Principles to the ICRC and the States parties to the Geneva Conventions I, II, III and IV 1949? Bugnion states that:

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[24] See on this point the dictum of the ICTY, *Prosecutor v Tadic* (Appeals Chamber Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-1995-IT-49-I-AR72 (2 October 1995) 141.

[25] Statutes of the IRCRCM.

Just like the Statutes, the Fundamental Principles form part of the constitutive rules of the Red Cross. At the regulatory level, they perform the same function as the Statutes do at the institutional level: they provide the cement without which the edifice of the Movement would fall apart. Even more than the statutory rules, the principles stand for belief in certain basic ideals which transcend not only national borders but also political, economic, religious, ideological and racial differences; they preserve the bond of solidarity without which the Movement would lose its meaning.[26]

Bugnion also argues that 'while the States themselves are not bound to adhere to the Fundamental Principles, they are obliged to allow Red Cross and Red Crescent organizations to do so'.[27] This conclusion is supported by Article 2 (4) Statutes of the IRCRCM, which states that 'the States shall at all times respect the adherence by all the components of the Movement to the Fundamental Principles'.

As a principle alone, however, 'humanity' is not helpful in assessing the work of the ICRC. It is argued that humanity must be interpreted in light of the situation on the ground. Humanity as an abstract concept is useless in terms of law. Indeed in 1956 Jean Pictet stated that 'humanity' is a 'further example of the poverty of language'.[28] To this end, humanitarianism is 'simply this attitude

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[26] Bugnion F, 'Red Cross Law' (1995) 308 IRRC 491, 507.

[27] ibid.

[28] Pictet J, *Red Cross Principles* (ICRC, Geneva 1956) 14-31.

of humanity laid down as a social doctrine and extended to mankind as a whole'.[29] It 'combines the elements of secular humanism and religious traditions, humanitarianism promotes an approach which places individual human beings at the forefront while at the same time putting emphasis on mercy, charity and compassion'.[30] For this author, the ICRC principle of humanity, if followed to the letter, fails to reflect the reality of inhumanity seen around the world today. If humanitarian action was restricted to the battlefield, as a key example, then the utility of humanitarianism would be ineffective for civilians affected by armed conflict and other situations of violence the world over. Fortunately, in the Statutes of the IRCRCM humanity also includes the 'prevention and alleviation of suffering wherever it may be found'.

There are key references to principles or laws of humanity in preambles to conventions[31] and General Assembly Resolutions.[32] An oft cited judicial reference to humanity is found in the *Corfu Channel* Case, in which the Court relied on certain 'general and well-recognized principles', including 'elementary considerations of humanity, even more exacting in peace than in

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[29] ibid.

[30] Bilkovà V, 'Ensuring Human Security in Armed Conflicts: The Role of Non-State Actors and it Reflection in Current International Humanitarian Law' in Ryngaert C and Noortman M, *Human Security and International Law: The Challenge of Non-State Actors* (Intersentia, Cambridge 2014) 36.

[31] See especially preamble to the Hague Convention Concerning the Laws and Customs of War on Land, 18 October 1907, 36 Stat 2227: 'Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'. This is known as the Martens clause.

[32] 'Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons' UNGA Res 1653(XVI) (24 November 1961).

war'.[33] Earlier, in the *Naulilaa Case*, the arbitral tribunal 'applied principles of humanity to limit the scope of permissible reprisals'.[34] The ICJ has also referred to provisions of the UN Charter concerning the protection of human rights and fundamental freedoms, as a basis for the legal status of considerations of humanity.[35] Interestingly, however, Judge Tanaka, in his dissenting opinion, stated that:

> As outstanding examples of the recognition of the legal interests of States in general humanitarian causes, the international efforts to suppress the slave trade, the minorities' treaties, the Genocide Convention and the Constitution of the International Labour Organisation are cited.

> We consider that in these treaties and organizations common and humanitarian interests are incorporated. By being given organizational form, these interests take the nature of 'legal interest' and require to be protected by specific procedural means.[36]

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[33] *Corfu Channel Case* (*UK v Albania*) (Merits) [1949] ICJ Rep 4, 22. The statement referred to Albania's duty to warn of the presence of mines in its waters. See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits) [1986] ICJ Rep 14, 112–14.

[34] 'Responsibilité de l'Allemagne à Raisons des Dommages Causés dans les Colonies Portuguaises du sud de 'Afrique, 2 RIAA 1013, 1026 (1928)' in Meron T, ' The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) 94(1) American JIL 78, 82.

[35] In *South West Africa* (Second Phase) ICJ Rep 1966 p 6, 34, the Court held that humanitarian considerations were not decisive.

[36] ibid 252–3, 270, 294–9.

One of the key cases that are often cited in reference to 'humanity' is the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*.[37] What was seen as an assault on the internal affairs of Nicaragua was defended, by the US, as provision of humanitarian assistance. However, the ICJ held that 'the aim of its assistance was not to prevent and alleviate human suffering. Moreover, it was provided in a discriminatory fashion, only to the Contras and their dependents. As such, it did not satisfy the criteria required to qualify as humanitarian assistance'.[38] What is important to this thesis is that the court explicitly recognised that the provision of strictly humanitarian assistance to persons or forces in another country could in no way be considered illicit, provided that such assistance conformed to the Fundamental Principles of the Red Cross, in particular those of humanity and impartiality:

> An essential feature of truly humanitarian aid is that it is given without discrimination' of any kind. In the view of the Court, if the provision of humanitarian assistance' is to escape condemnation as an intervention in the internal affairs of Nicarauga, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely to prevent and alleviate human suffering', and to protect life and health and to ensure respect for the human being'; it must also, and above all, be given without discrimination to all in need...[39]

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[37] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits) [1986] ICJ Rep 14.

[38] ibid.

[39] ibid 115.

The most recent articulation of crimes against humanity can be found in article 7 Rome Statue Crimes against Humanity. Article 7 (1) states that, '"crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The specifics of such actions are given further elaboration under Article 7(2) Rome Statute. It is argued that the Rome Statute goes some way to framing the

concept of humanity, as it identifies what humanity is not. It specifies which acts are 'against' humanity. The question remains, however, what does humanity look like? And as a 'humanitarian' actor what is the ICRC truly striving to achieve? It must be something beyond absence of the crimes described in the Rome Statute. For this Author the answer lies in a gradual 'creep' of human centric concepts and ideas that have gradually permeated international law and the international community over the past twenty-five years. Sovereignty as responsibility, human security and RtoP, taken together, provide key evidence that there is an increasing awareness and willingness to take the plight of civilians seriously and as central issues in decisions about intervention, protection and assistance. Of course, for the ICRC 'intervention' in any militaristic sense is not an option, but in terms of establishing its presence, through the consent of the government and a Headquarters agreement, intervention, is crucial to its utility as a humanitarian actor. The extent to which the ICRC has developed into roles akin to human security and RtoP will be considered in chapter five.

For Teitel, there are a myriad of cases that consider the definition and application of crimes against humanity, from the ICJ,[40] ICTY,[41] ECHR,[42] Inter-

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[40] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 679, para 24; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* (Advisory Opinion) [2004] ICJ Rep 136 para 86, 106; *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)*, Judgment, ICJ Reports 2005, 116; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43.

[41] *Prosecutor v Kordic and Cerkez* (Judgment/ Trial Chamber) ICTY IT-95-14/2 (26 February 2001) para 23; *Prosecutor v Tadic* (Appeals Chamber Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-1995-IT-49-I-AR72 (2 October 1995); See also *Prosecutor v Martić* (Review of the Indictment Pursuant to Rule 61) ICTY No IT-95-11-R61 (13 March 1996) para 13; See also the *Prosecutor v Furundžija* (Judgment) ICTY IT-95-17/1-T (10 December 1998) para 137.

[42] *Isayeva v Russia* App No 57950/00 (Judgment) (ECtHR 24 February 2005).

American Court of Human Rights[43] and domestic courts.[44] It is beyond the purpose of this thesis to consider the jurisprudence in depth, but what it shows is that the concept of humanity applies globally and is seemingly timeless; it is, in the words of Teitel, 'Humanity's Law'.[45] This thesis will however delve into the concept of humanity and its relationship with ICRC humanitarian assistance and protection.

In addition to the principle of humanity, neutrality is included in the Statutes of the IRCRCM. This section will consider how neutrality informs and guides the protection and assistance of the ICRC. Cassese argued that 'the attitude of neutrality adopted in 1804–15 by the USA towards the countries engaged in the Napoleonic wars and, subsequently, the stand of Britain and other European countries in relation to the American Civil War (1861–5) greatly contributed to the development of a set of rules striking a fairly felicitous compromise between conflicting interests'.[46] 'Neutrality is defined in international law as the status of a State which is not participating in an armed conflict between other States'.[47] Neff stated that, 'alongside the law of war—and in some ways in close partnership to it—was the full flowering of the law of neutrality, which, for the first time, emerged in the full light of juridical respectability as a sort of counterpart to the unrestricted right of States to resort

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[43] *Abella v Argentina*, Case 11.137, Rep No 5/97, IAmCtHR OEA/Ser. L/V/II.95 Doc. 7 Rev (13 April 1998).

[44] Al-Skeini v Secretary of State for Defence [2007] UKHL 26.

[45] See in particular Teitel R, *Humanity's Law* (OUP 2011) 40- 72.

[46] Cassese A, *International Law* (2nd edn, OUP 2004) 401-2.

[47] Fleck (n 16) para 1101- 1155; See also Haug H, *Humanity for All: The International Red Cross and Red Crescent Movement* (Henry Dunant Institute/Paul Haupt Publishers, Vienna 1993) 461-464.

to war on purely political grounds'.[48] The ICRC is given the status of a neutral State and, as such is governed by the elements of neutrality outlined below.[49] In the Geneva Convention 1864, neutrality is contained in a number of provisions. Under article 1' ambulances and military hospitals shall be recognized as neutral'; article 2 states that 'hospital and ambulance personnel, including the quarter-master's staff, the medical, administrative and transport services, and the chaplains, shall have the benefit of the same neutrality when on duty, and while there remain any wounded to be brought in or assisted' and article 5 states that 'inhabitants of the country who bring help to the wounded shall be respected and shall remain free. Generals of the belligerent Powers shall make it their duty to notify the inhabitants of the appeal made to their humanity, and of the neutrality which humane conduct will confer'. Under article 14 Hague Convention V, humanitarian assistance for the sick of wounded is not considered as being a violation of neutrality even if it benefits only the sick and wounded from one party to the conflict.[50] Cassese further argued that the 'institution of neutrality gradually fell into decline' following the Second World War.[51] Nevertheless, the Geneva Conventions of 1949 and Additional Protocol I of 1977 describe the ICRC as an impartial humanitarian body or organisation, specifically; they state that 'an impartial humanitarian body, such as the International Committee of the Red Cross' may carry out

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[48] Neff S, 'A Short History of International Law' in Evans M, *International Law* (4th edn, OUP 2014) 18.

[49] See also Rieffer-Flanagan BA,'Is Neutral Humanitarianism Dead? Red Cross Neutrality: Walking the Tightrope of Neutral Humanitarianism' (2009) 31 Human Rights Q 888; Plattner D, 'ICRC Neutrality and Neutrality in Humanitarian Assistance' (1996) 26(311) IRRC 161.

[50] Hague Convention V.

[51] Cassese (n 46) 403.

humanitarian activities.[52] Articles 5(2) (d) and (3) Statutes IRCRCM state that the ICRC is a 'neutral institution' and as a 'specifically neutral and independent' institution and intermediary.[53]

The ICRC must not, therefore, participate in hostilities. This includes helping or hindering either party. It must also 'keep out of political, racial, religious or ideological controversy in all circumstances'.[54] 'In other words, neutrality means standing apart from contending parties or ideologies, so that everyone will trust you. It is a means to an end, not an end in itself'.[55] The concept of neutrality is therefore of paramount importance to any developments of the ICRC mandate. Chapters one and two of the thesis showed that the ICRC takes its mandate from Conventions, Statutes IRCRCM and its right to 'humanitarian initiative', which enable it to act in a number of situations and contexts. Chapter three showed that the ICRC is no longer restricted to working in contexts where IHL applies, as there is a growing overlap between IHL and IHRL. This humanisation of international law has impacted the international community through the inception and development of human-centric norms including human security and RtoP. The key aspect of such developments for the ICRC is that it is inherently limited by the principle of neutrality. Whilst humanity, as a principle, can be developed, stretched and interpreted broadly, as will be argued in chapter five, the extent to which the ICRC can engage in

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[52] See Geneva Conventions I, II, III and IV 1949 Common art 3; Geneva Convention I, II, III and IV 1949 arts 9/9/9/10 and Additional Protocol I art 5(3).

[53] See Statutes IRCRCM arts 5 (2)(d) and 3.

[54] Harroff-Tavel M, 'Neutrality and Impartiality—The Importance of these Principles for the International Red Cross and Red Crescent Movement and the Difficulties Involved in Applying Them' (1989) 29(273) IRRC 536, 537.

[55] ibid.

such developments, and thus apply new humanity concepts to its mandate will always be restricted by its principle of neutrality.

Thus the initial concern was that the fighting parties would not attack medical personnel helping wounded soldiers. Fundamentally, medical personnel should not be viewed as combatants. Hence the ICRC tried to convince belligerents that humanitarian assistance to injured soldiers in its various forms is not to be thought of as interference or a violation of neutrality.[56] Akin to the principle of neutrality is that of non-discrimination, 'adverse distinction based on race, nationality, religious belief or political opinion is prohibited in the treatment of prisoners of war,[57] civilians[58] and persons *hors de combat.*[59] Parties to the conflict shall treat all protected persons with the same consideration, without distinction based on race, religion, sex or political opinion.[60] The key to its functioning is that the ICRC be seen as neutral, to enable it to reach those who need its protection and assistance. Its neutrality also allows it to 'negotiate rights for prisoners and captors alike, creating a human rights culture and ensuring compliance with fundamental rights and freedoms'.[61] In addition, when the ICRC believes that there has been a breach of IHL, it will make

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[56] Pictet J, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff Publishers, The Hague 1985).

[57] Geneva Convention III art 16.

[58] Geneva Convention IV art 13; Geneva Conventions I, II, III and IV 1949 Common art 3.

[59] Geneva Conventions I, II, III and IV 1949 Common art 3.

[60] Geneva Conventions I, II, III and IV 1949 Common art 3; Geneva Convention IV art 27; Additional Protocol I art 75.

[61] Smith R, *Textbook on International Human Rights Law* (6th edn, OUP 2013) 160.

representations to the requisite authority in confidence.[62] The ICRC must maintain neutrality to effectively carry out its humanitarian work. 'Only where there is general confidence, confidence of the authorities and the population, can the institutions of the Movement have unimpeded access to conflict and disaster victims and obtain the necessary support for their protection and assistance activities'.[63]

Smith stated that 'the Geneva Conventions are at the forefront of the work of the Red Cross in conflict situations but other rights such as food, shelter, and water also characterize their operations'.[64] This proposition that ICRC work is expanding beyond the strict delineation of roles proscribed in the Geneva Conventions I, II, III and IV 1949 forms much of the argument in this thesis. This concept of neutrality fed into the guiding principles of the movement and, ultimately the Statutes IRCRCM. It is argued that Jean Pictet, who stated that the ICRC should 'never take sides in hostilities or engage at any time in controversies of a political, racial, religious or doctrinal nature', offered the most concise conception of ICRC neutrality.[65] David Forsythe explained that 'the ICRC tries to avoid, or minimize, or balance if possible whatever impact its humanitarian protection may have on the power and status of states and the various factions engaged in power struggles'.[66] How then, does the ICRC

[62] Weissbrodt D, 'Humanitarian Law in Armed Conflict: The Role of International Nongovernmental Organizations' (1987) 24(3) J of Peace Research 297, 300.

[63] Haug H, 'Neutrality as a Fundamental Principle of the Red Cross' (1996) 36(315) IRRC 627, 628.

[64] Smith (n 61) 160.

[65] Moorehead C, *Dunant's Dream: War, Switzerland and the History of the Red Cross* (Carol and Graf Publishers, New York 1999) 561.

[66] See Forsythe DP, *The Humanitarians: The International Committee of the Red Cross* (CUP 2005) 173-74.

maintain its neutrality? 'The challenge for an organisation such as the ICRC is to carve out a neutral space where it can carry out its activities while limiting its impact as much as possible. Given the global environment, including the War on Terrorism, the ICRC must carefully calculate how its actions will impact others in the international community while maintaining its neutral image'.[67] The extent to which this is possible will be considered alongside analysis of its expanding humanitarian protection and assistance mandate.

c) Conclusion to Chapter Four

One purpose of the ICRC is to uphold humanity, but what does this mean? Is it that the ICRC must react to inhumanity, prevent inhumanity or create the circumstances for positive realisation of humanity? If it is the latter then what does humanity look like? Cornell stated that 'humanity must always retain its ideality; it can never be figured once and for all. We are responsible for an ideal that can never be realized and yet is always being configured and contested'.[68] For this Author, humanity is about something beyond IHL or human rights law. The humanity and inhumanity of humans extends beyond the direct recipients of aid or the victims of inhumanity and as such, responses to inhumanity must go beyond the judicial. Theoretical and legal concepts of humanity are impracticable to protect and assist those on the ground. To this end, the ICRC is the 'champion' of humanity, making real life changes on the ground to protect or bring humanity to those suffering the affects of armed conflict and other situations of violence.

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[67] Rieffer- Flanagan (n 49) 890.

[68] Cornell D, 'Facing Our Humanity' (2003) 18(1) Hypatia 170, 172.

It is argued that in 2015, it is insufficient to consider humanity simply as an IHL term, as a reference point for the banning of certain weapons or the maintenance of neutrality. Humanity must be understood in a more purposive sense and to this end, the extent to which the principle of humanity feeds into broader humanity, or human centric, ideas is considered in chapter five. For this Author, and others, humanity is the common denominator of IHL and IHRL. [69] The extent to which it permeates emerging concepts on the international stage, including sovereignty as responsibility, human security and RtoP is considered below.

What does its expanding mandate look like? In 1993, Harroff-Tavel published an article in the IRRC, which outlined the results of a 'comprehensive internal review' concerning the development of ICRC policy. The conclusion of the review is that the practice of the ICRC guides policy, as it must continually adapt to new forms of violence.[70] Through its dissemination of IHL, the ICRC ensures States and NSAs think about the interests of individual human beings. Beyond this, it is argued that the ICRC also engages directly in ensuring and promoting human security. The provisions of the Geneva Conventions I, II, III and IV 1949 enable it to bring humanitarian aid to victims of war, exchange messages between prisoners of war and their families, trace the fate of disappeared people and care for the wounded and sick. The ICRC has developed its activities from its traditional focus on the mere survival of victims of war, to a more comprehensive assistance and protection role, which not only seeks to protect victims of armed conflict, but also to provide for their

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[69] Teitel (n 45); Oberleitner (n 2).

[70] Harroff-Tavel M, 'Action Taken by the International Committee of the Red Cross in Situations of Internal Violence' (1993) 25 IRRC 195, 195ff.

basic needs. Bilkovà states that 'this approach corresponds to that held by the proponents of human security, in its broad definition'.[71] These developments are the focus of chapters five and six. The application of humanity and neutrality to the ICRC is considered throughout the next two chapters which consider whether the ICRC is able to work outside or beyond of its mandate. As stated at the beginning of this chapter, this chapter is a preface to analysis which draws on broader notions of humanity and actual practice of the ICRC; the latter being defended through the use of qualitative interviews with ICRC delegates.

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[71] Bilkovà (n 30) 38.

5) CHAPTER FIVE: NEW HUMANITARIAN HORIZONS FOR THE ICRC?

a) Introduction

Teitel stated that 'humanity law redefines security in a manner that transcends the traditional distinction between war and peace, conceptualizing conflict along a continuum of situations that require ongoing protection of those who are affected or threatened'.[1] It is argued that the existence of 'inhumanity' is an issue for individual people, for example prisoners of war deprived of food. Inhumanity could also refer to a lack of safe drinking water, caused by natural disaster or armed conflict, which the government refuses to remedy, for whatever reason. It could refer to sexual violence as a weapon of war, which is a recognised crime against humanity.[2] Whatever inhumanity might be the methods and means to establish 'humanity' are not cut-and-dry. This chapter examines the extent to which the humanisation of international law and new concepts of humanity inform, guide or are inspired by the work of the ICRC.

Since the end of the Cold War, new concepts have emerged on the international stage, which, at their heart, recognise and seek to remedy 'inhumanity' in its various guises mentioned above. This chapter takes sovereignty as responsibility, human security and RtoP as three key concepts that encompass the idea that humans ought to be front-and-centre when considering the behaviour of States, security and appropriate responses to armed conflict. Particularly armed conflicts that facilitate violations of the four

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[1] Teitel R, *Humanity's Law* (OUP 2011) 109.

[2] Rome Statute art 7(g).

core crimes, including war crimes, crimes against humanity, genocide and ethnic cleansing.

Whilst chapter four considered the 'narrow' or IHL understanding of humanity, this chapter shows unequivocally that 'humanity' is subject to wider interpretation in the international community than is provided for in the Statutes IRCRCM. These three concepts were chosen for examination because each developed in the international community, broadly speaking and, although they have links to the UN, their foundations are reflective of humanitarian concerns that permeate national, organisational and individual concerns.

Firstly therefore this chapter introduces the sovereignty as responsibility concept and describes how it links to the overall concept of human security. This includes outlining the expansion of 'threats' to security, from the traditional idea that the use of force against a sovereign States was the highest threat to security, to a concept of threats that includes threats to the day-to-day lives of individuals and communities. The Human Development Report (HDR) 1994 definition of human security has continued to be discussed at international forums and in the General Assembly, in fact, the current 'Common Understanding' of human security was agreed upon in the General Assembly in 2012.[3] It important, indeed necessary, to show that the Statutes IRCRCM definition of humanity is no longer reflective of the full corpus of human needs on the ground given the type of conflicts we see today and also it provides a reference point to argue that the ICRC work is reflective of a wider concept of humanity.

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[3] Report of the Secretary General, 'Follow-up to General Assembly Resolution 66/290 on Human Security' (23 December 2012) UN Doc A/68/685 para 4 (Common Understanding).

This chapter considers, utilising wider concepts of humanity, whether the ICRC is being pushed to act beyond its mandate by edging to the peripheries of humanity, as it is more widely understood. The argument, most simply put, is that the ICRC has adapted its practice on the ground to respond to broader humanitarian needs and that in doing so it may have expanded its definition of humanity, in line with key humanity concepts that have emerged over the past two decades, namely human security and RtoP. This is not to suggest that the ICRC is creating a new concept of humanity, rather that the definition of humanity, as provided for in the Statutes IRCRCM could be read very narrowly by the ICRC but the practice of the ICRC suggests that it is now defining 'humanity' more broadly.

In terms of its protection and assistance mandate, chapter six considers the reality on the ground for the ICRC. The thesis shows that in exercising its humanitarian mandate, the ICRC may be responding to the 'needs' of the people on the ground but it is walking a fine line in terms of its neutrality. It is this aspect of its mandate which is most likely to see consent revoked by States. The conclusions to chapter five will therefore draw on the principles discussed throughout the thesis, including the question of the usurpation of its mandate and whether there might be consequences for the ICRC, reflecting on analysis on chapter two.

b) Sovereignty as Responsibility

A consequence of the traditional State-centric paradigm of international law was that discourse on security focused on military defence of State sovereignty and territorial integrity. Despite the establishment of a number of intergovernmental organisations after the Second World War, international law

remained a 'system of legal norms, procedures and institutions of the States, for the States and by the States'.[4] Indeed State sovereignty is the principle that defines the modern State system.[5] There are a myriad of concepts of State sovereignty, but it is the European model, described in the Treaty of Westphalia 1648, which remains the dominant concept today.[6] Indeed, the Westphalian idea of sovereignty has rarely been challenged in principle.[7] In fact, since 1648 the international stage has been a place for sovereign States to come together as persons or subjects of international law.[8] However, there have been developments in what it means to be a sovereign State since 1648. While Westphalian sovereignty was traditionally dynastic, nowadays, popular rule is important in the recognition of a collective entity as a legitimate member of the

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[4] Noortman, 'Human Securities, International Laws and Non-state Actors: Bringing Complexity Back In' in Ryngaert and Noortman Ryngaert C and Noortman M, *Human Security and International Law: The Challenge of Non-State Actors* (Intersentia, Cambridge 2014) 16.

[5] Weber C, *Simulating Sovereignty: Intervention, the State and Symbolic Exchange* (CUP 1995) 4, 9; Thakur R, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (CUP 2006) 276; See Coicaud J-M, 'Deconstructing International Legitimacy' in Charlesworth H and Coicaud J-M (eds), *Fault Lines of International Legitimacy* (CUP 2010) 38; Melber H, 'In the Footsteps of Hammerskjöld: the United Nations and Interventions for Security and Development' (2012) <http://repository.up.ac.za/bitstream/handle/2263/20767/Melber_Footsteps(2012).pdf?sequenc e=1> accessed 24 June 2014.

[6] See Montevideo Convention on the Rights and Duties of States, 26 December 1933*,* (1934) 165 LNTS 19; See also Biersteker TJ and Weber C, *Sovereignty as a Social Construct* (CUP 1996).

[7] Krasner SD, 'Sharing Sovereignty: New Institutions for Collapsed and Failing States' (2004) 29(2) Intl Security 85, 85.

[8] Nussbaum A, *A Concise History of the Law of Nations* (Revised edn, MacMillan, New York 1954) 115; Reuter P, *International Institutions*, Translated by J.M. Chapman from the French *Institutions Internationales* published by Presses Universitaires de France 1955, (George Allen and Unwin, London 1958) 42-43; Visscher C de, *Theory and Reality in Public International Law* (Princeton UP, 1968) 3-18; Taylor P, *International Cooperation Today: The European and Universal Pattern* (Elek, London 1971) 28; Kennedy D, 'International Law and the Nineteenth Century: History of an Illusion', (1996) 65 Nordic J Intl L 385, 406-408; Brölmann C, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart, Oxford 2007) 37-38; Collins R, 'Modern-Positivism and the Problem of Institutional Autonomy in International Law', in Collins R and White ND, *International Organisations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge, London 2011) 22.

international community.[9] In fact, the requirements to be a 'legitimate' member of international society have continued to change over time. Years ago, for example, Christianity was required to be seen as a legitimate State. Nowadays it is democracy, liberal economic structures and capitalism.[10] Slaughter argues that 'membership of the UN is no longer validation of sovereign status and a shield against unwanted meddling in the internal affairs of the State... Membership recognises States as international actors that must work in concert and take action against threats to human security'.[11] During the twentieth-century totalitarian States committed themselves to secular ideology or religious radicalism, whilst liberal States saw sovereign power limited by social contracts and constitutions and finally the spread of democracy meant that more States became increasingly accountable to their citizens.[12]

In the Westphalian sovereignty paradigm, States have an external and internal identity.[13] External sovereignty concerns the relationship between States, as legal persons, whereas internal sovereignty concerns the State and its relationship with NSAs within its territory.[14] Non-intervention in the domestic affairs of other States is a structural and substantive component of external

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[9] See Allott P, *Eunomia: New Order for a New World* (OUP 1990) 306-309 which offers, according to Charlesworth and Coicaud (n 5), a critical interpretation of the phenomenon of popular rule.

[10] Charlesworth and Coicaud (n 5) 40.

[11] Slaughter A-M, 'Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform' (2005) 99(3) AJIL 619, 620.

[12] Jacobsen T, Sampford C and Thakur R (eds), *Re-envisioning Sovereignty: The End of Westphalia?* (Ashgate, Hampshire 2008) 2.

[13] Badescu CB, *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights* (Routledge, New York 2011) 38-39.

[14] Peters A, 'Humanity as the A and Ω of Sovereignty' (2009) 20(3) Eur J Intl L 513, 514, 515-16.

sovereignty.[15] The principle of non-intervention was codified or enshrined in Article 2(7) UN Charter. This article, and Article 2(4) which prohibits the use of force, reflect concerns within the international community following the Second World War that the aims of military intervention by States could include overthrowing the government, changing borders or disruption of the economic, political and social infrastructure of a State.[16] Internal sovereignty concerns the 'dignity, justice, worth and safety' of citizens.[17] The UN Secretary-General argued that these values that should be at the heart of any collective security system for the twenty-first century, but too often States have failed to respect and promote them.[18] Moreover the sovereign State must work with international organisations, NGOs and non-military government agencies towards development.[19] This chapter and chapter five consider to what extent the traditional Westphalian/ external concept of sovereignty has been usurped by ideas of responsibility for the people within States, that is, human-centric security.

During the twentieth century therefore, sovereignty came to symbolise and encompass, not only, a State-centric international legal order, as focus was

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[15] Fidler DP, 'Revolt Against or from Within the West? TWAIL, the Developing World, and the Future Direction of International Law' (2003) 2 Chinese J of Intl L 29, 34-36; See also Harding C and Lim CL, *Renegotiating Westphalia: Essays and Commentary on the European and Conceptual Foundations of Modern International Law* (Martinus Nijhoff Publishers, The Hague 1999) 5-6; Fidler DP, 'The Return of the Standard of Civilisation' (2001) 2 Chicago J of Intl L 140.

[16] UNGA, 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States' (9 December 1981) A/RES/36/103, 79.

[17] Report of the Secretary General's High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2 December 2004) UN Doc A/59/565, 22 (High-level Panel).

[18] High-level Panel (n 17) para 30.

[19] Larrinaga M De and Doucet MC, 'Sovereign Power and the Bio Politics of Human Security' (2008) 39(5) Security Dialogue 517, 525.

increasingly on happenings inside the borders of other States. In 1996, Deng argued that 'effective sovereignty implies a system of law and order that is responsive to the needs of the national population for justice and general welfare'.[20] A decade later, Chimni stated that, although the 'State is the principal subject of international law, the relationship between State and international law continually evolves, as each era sees the material and ideological reconstitution of the relationship between State sovereignty and international law'.[21] Falk argued that States must protect the welfare of their own people and fulfil its obligations to the wider international community.[22]

It was Kofi Annan, former Secretary-General of the UN, who arguably had the biggest impact on the sovereignty as responsibility paradigm. In 1999, Kofi Annan published a 'landmark' article entitled 'Two Concepts of Sovereignty' in *The Economist,* where he articulated that State sovereignty was being 'redefined', as 'States are now widely understood to be instruments at the service of their people's, and not vice versa'.[23] Annan argued that we should recognise that the aim of the UN Charter is to 'protect individual human beings, not to protect those who abuse them'.[24] This is a position repeated by Annan in subsequent UN reports, including 'We the Peoples: The Role of the United

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[20] Deng FM, Kimaro S, Lyons T, Rothchild D and Zartman W (eds), *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution, Washington DC 1996) 18.

[21] Chimni BS, 'Third World Approaches to International Law: A Manifesto' (2006) 8 Intl Community L Rev 3, 7.

[22] Falk R, 'Revisiting Westphalia, Discovering Post-Westphalia' (2002) 6(4) The J of Ethics 311, 327.

[23] Annan K, 'Two Concepts of Sovereignty' (*The Economist,* 18 September 1999) <www.economist.com/node/324795> accessed 24 June 2014; See also Bellamy AJ, *Global Politics and the Responsibility to Protect: From Words to Deeds* (Routledge, London 2011) 10.

[24] 'Two Concepts of Sovereignty' (n 23).

Nations in the Twenty-first Century' in 2000 (We the Peoples) and the Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility 2004' (High-level Panel Report 2004).[25] Kofi Annan reminded the international community that being a sovereign State is as much about responsibilities to the population within the territorial borders as it is about inter-State relations. When States sign the UN Charter, they 'not only benefit from the privileges of sovereignty but also accept its responsibilities'.[26] The 'High-level Panel Report 2004' was written by a panel of experts who had examined the major threats and challenges the world faces in the broad field of peace and security. The threats identified included economic and social issues insofar as they relate to peace and security. The panel made recommendations for the elements of a collective response. The report appealed for a 'new security consensus' and concluded that threats to security 'go far beyond States waging aggressive war', as threats are to people and not just States, including 'conflict between and within States'.[27] Slaughter stated that it considered the 'reconception of security, solidarity and even sovereignty'.[28]

The 4th Vienna Workshop on International Constitutional Law in 2008 (4th Vienna Workshop 2008) stated that 'sovereignty, or security, or for that matter, a state's existence, can only be a means to an end- the end being the protection

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[25] Report of the Secretary General, 'We the Peoples: The Role of the United Nations in the Twenty-first Century' (UN, New York 2000) (We the Peoples) 68; High-level Panel 2004 (n17) para 201.

[26] High-level Panel 2004 (n 17) para 21.

[27] High-level Panel 2004, (n 17) part 1.

[28] Slaughter (n 11) 619.

of the people, but never an end in and of itself'.[29] This juxtaposition on the international stage between the traditional Westphalian sovereignty paradigm and the sovereignty as responsibility concept raises an important issue: If individuals are to be the referent object or normative unit of security, where is human security situated within the traditional State-centric security paradigm?[30]

In terms of the ICRC, it is argued that sovereignty as responsibility reiterates a principle that has guided its actions on the ground since its inception in 1864, that is, humanity. For the ICRC, the State has always had responsibilities to civilians. Perhaps sovereignty as responsibility is a reconceptualisation of the Westphalian paradigm, but ultimately the international legal order will remain State-centric. Nevertheless, it is evidence of progress in understanding the detrimental impact that a 'closed' sovereign State can have for the people living within it.

The fact that responsibility for the lives of 'civilians' and the local population is with the State during peace and times of armed conflict shows the importance of 'humanity' to the international legal order and international law more broadly. The recognition of the responsibilities of the State to its citizens suggests that the ICRC approach, its principles of neutrality, impartiality and

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[29] The Workshop title was 'Constitutional Limits to Security' and was the 4th Workshop on International Constitutional Law on 16 – 17 May 2008 at Vienna University, Faculty of Law, the workshop objective was to 'develop criteria how to limit and/or balance security within the constitutional design' and was open to students, lawyers and practitioners. See 'ICL Workshop' (16-17 May 2008) <www.internationalconstitutionallaw.net/fourth_workshop> accessed 13 July 2014; Eberhard H, Lachmayer K, Ribarov G and Thallinger G (eds), *Constitutional Limits to Security: Proceedings of the 4th Vienna Workshop on International Constitutional Law* (Facultas Verlags, Bergasse 2009) 132, 140.

[30] We the Peoples (n 25) 7, in which human security is identified as 'complimentary' to state security; Banakar R (ed), *Rights in Context: Law and Justice in Late Modern Society* (Ashgate, Surrey 2010) 260.

humanity, in particular, are inherent to the wider international legal order. The extent to which the concept of sovereignty as responsibility has permeated international legal thinking in the last two decades is considered in this chapter and chapter five through analysis of human security and RtoP. The impact of these broader regimes on the ICRC, or alternatively, the influence of the ICRC beyond its own law and practice, is considered simultaneously.

c) Human Security

It is argued that the concept of human security is reflective of a normative shift on the international stage whereby States have recognised the central role that 'humanity' has during and after armed conflict. It is argued that the principle of humanity, once restricted to IHL and Red Cross work during armed conflicts, now permeates the international stage and is reflected in human security. It is argued that the threats to security contained in the concept of Human Security, as created by the HDR 1994 and now contained in General Assembly Resolution;[31] more aptly identify the corpus of humanitarian concerns facing individuals and communities nowadays, given the changed nature of conflict, which was considered in chapter three. The international community has moved on from the binary distinction between war and peace, institutionalized by the UN and ICRC at the end of the Second World War, to adopt a concept, which, at its centre, reflects the principle of humanity.

Human security is a human-centric reconceptualisation of traditional public international law principles, including state sovereignty and non-intervention. It is argued that its adoption at the General Assembly shows that the international community, at large, now recognises the importance of seeing

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[31] Common Understanding (n 3).

human beings as a central concern in decision-making about intervention and protection. Critically, for this thesis, it is argued that the ICRC is edging into the field of protection of and assistance in terms of the creation of human security. The ICRC works 'in other situations of violence'; it undertakes long-term projects beyond the cessation of hostilities, and it has clear links with Economic Security, the specifics of which will be addressed in chapter six.

The spirit of human security is a normative plea for people to be placed at the centre of decisions on security, rather than States. This chapter builds on the brief outline of the theory of human security outlined in the introduction to this thesis.[32] It showed that the 'HDR 1994' provided the first outline of what elements should be included under the umbrella of human security. Security can also refer to economic, food, health, environmental, personal, community and political security.[33] The 'HDR 1994' stated that security is 'a child who didn't die, a disease that did not spread, a job that wasn't cut, an ethnic tension that did not explode into violence, a dissident who was not silenced'.[34]

Bilková argues that the HDR was evidence of a 'broader normative shift leading to the strengthening of the position of individual human beings at the international scene'.[35] Indeed the 4th Vienna Workshop 2008 stated that 'States

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[32] Methodology, 14.

[33] UNDP, 'Human Development Report 1994' (UNDP, OUP 1994) (HDR 1994); See also Hampson FO, with Daudelin J, Hay J, Reid H and Martin T, *Madness in the Multitude: Human Security and World Disorder* (OUP, Canada 2001); Hubert D and McRae RG (eds), *Human Security and the New Diplomacy: Protecting People, Promoting Peace* (McGill UP, Canada 2001).

[34] HDR 1994 (n 33) 22; Eberhard (n 29) 112.

[35] Bilková in Ryngaert and Noortman (n 4) 30-31; See also Amouyel A, 'What is Human Security?' (2006) 1 Human Security J 10, 10-23.

can endanger both the international security and the security of their citizens'.[36]

The European definition of security, based on the Westphalian model, focused exclusively on a State's ability to counter external threats to its vital interests and core values.[37] Human security challenges this State-centric paradigm of security as it posits that decisions to intervene in a State could be human-centric.[38] Nevertheless the most recent 'Common Understanding' of human security, agreed upon at the General Assembly in December 2012, confirmed in paragraph 4(e) that 'human security does not replace State security'.[39]

On balance, therefore, human security can be seen as a 'post-Westphalian' framework, but it is not about the abolition of a statist system, rather the necessity to reformulate the concept of security to focus on individuals at the national and international level. It is about putting the vulnerabilities and needs of every person, everywhere as the focus of policy decisions on security.[40] The protection and assistance roles of the ICRC have always been human-centric and therefore this chapter shows that the expansion of its activities should be considered as contributing to the establishment of human security.

The concept of human security understands threats in two ways, the narrow and the broad definitions. The key threats, in the narrow 'camp', are the use of force, armed conflicts and perhaps mass violations of human rights. The means

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[36] Eberhard (n 29) 117.

[37] Upadhyaya P, 'Human Security, Humanitarian Intervention, and Third World Concerns' (2004-2005) 33 Denver J of Intl L and Policy 71, 72.

[38] Collins A (ed), *Contemporary Security Studies* (OUP 2007) 91-109.

[39] Common Understanding (n 3) para 4(e).

[40] Roberts D, *Global Governance and Bio Politics: Regulating Human Security* (Zed Books, London 2010) 15.

to protect individuals from these threats are primarily militaristic responses, as such, the security should be provided by the State or, if unable, the international community.[41] The broad concept of human security includes 'safety from chronic threats such as hunger, disease and repression', along with 'protection from sudden and hurtful disruption in the patterns of daily life'.[42] Krause strongly argues for the narrow conception, terming 'broad human security' as a 'shopping list', a 'loose synonym for "bad things that might happen", which means its 'utility to policy makers'.[43] For Krause, therefore, human security ought to be about 'controlling the institutions of organised violence and evacuating force from political, economic and social life' and 'struggle to establish legitimate and representative political institutions'.[44] In fact, the narrow conception of human security looks rather like the RtoP, which is considered later in this chapter. For this Author, if human security is reduced to its narrow conception, it adds little to existing international law and policy. It is imperative that human security continues to be viewed in its broadest sense, as, for the people on the ground; military threats are only one of a broad swathe of threats that limit security in their day-to-day lives.

Human security therefore joins together freedom from fear, freedom from want and freedom to live in dignity through people-centred, comprehensive, context specific and preventive strategies of security.[45] The recognition of threats,

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[41] Paris R, 'Human Security: Paradigm Shift or Hot Air?' (2001) 26(2) Intl Security 93, 95.

[42] HDR 1994 (n 33) 23.

[43] Krause K, 'The Key to a Powerful Agenda, If Properly Delimited' (2004) 35 Security Dialogue 367, 367-68.

[44] ibid.

[45] Report of the Secretary General, 'Human Security' (8 March 2010) UN Doc A/64/701 para 69 (General Assembly Human Security Report 2010); See also Report of the Secretary General,

beyond threats to national security, as relevant to the conceptualisation of human security did not automatically create a workable definition of human security. The realisation by the international community that a State can be a threat to its population, that the environment can be a threat or that food and healthcare are as important as a military to the security of the population was key to the international community developing an expanded understanding of security.

In terms of threats to human security, broadly defined, it is recognised that 'poverty, conflict and societal grievances can feed on one another in a vicious cycle',[46] as atrocities perpetuate poverty and set back development.[47] Unlike national security paradigms however, human security does not rely upon the use of force to establish or maintain peace and security; rather it focuses on fostering government and local capacity to react to threats.[48] It is argued that the assistance and protection roles of the ICRC have an inherent human-centric underpinning and can act in response to threats to human security. To this end, this thesis shows that the ICRC's work can potentially contribute to the establishment of human security.

'An Agenda for Development' (6 May 1994) UN Doc A/48/938 paras 16-20; Kofi Annan, 'Secretary-General Salutes International Workshop on Human Securty in Mongolia', Two-day Session in Ulaanbaatar, Press Release, (8-10 May 2000) UN Doc SG/SM/7382; Report of the Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (21 March 2005) UN Doc A/59/2005 (In Larger Freedom) para 14.

[46] General Assembly Human Security Report 2010 (n 45) para 10.

[47] In Larger Freedom (n 45) para 16.

[48] General Assembly Human Security Report 2010 (n 45) para 23.

i) The Process of Defining Human Security

It is argued that the potential for a human security agenda was always present in the UN Charter, but it was not until the 'HDR 1994' that the UN embraced it. The UN Charter was created in a world where the greatest threat imagined to a State was external aggression by one State against another, but in recent decades far more people have been killed in NIACs, ethnic cleansing and acts of genocide, than inter-state armed conflicts.[49] Not only must humans become the referent objects of security but also while threats were once considered from an external sovereignty perspective, they are increasingly recognised that for people living in a given territory, the gravest threats may actually be from the State. During the Cold War, the Security Council defined threats to international peace and security as 'disputes between States that might or had become militarised, conflicts involving the great powers, and general menaces to global stability'.[50] It wasn't until the Cold War ended that the UN recognised that internal armed conflicts were putting entire populations at risk, creating mass flight and destabilising entire regions.[51]

In the meantime, the Brandt Commission 1981 [52] and 1983; [53] Palme

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[49] We the Peoples (n 25) 11.

[50] White ND, *Keeping the Peace* (Manchester UP 1993) 34-38.

[51] Barnett M and Weiss TG, *Humanitarianism Contested: Where Angels Fear to Tread* (Routledge, London 2011) 74.

[52] Institute of Development Studies Bulletin, 'The Brandt Commission Report 1981' (April 1981, Her Majesty's Stationery Office). This memorandum was prepared by the Foreign and Commonwealth Office for the Overseas Development Sub-Committee of the Foreign Affairs Committee.

[53] The Brandt Commission 1983, 'Common Crisis-North-South: Co-operation for World Recovery (1st Draft from Scanned Book, 14 March 2002) <http://files.globalmarshallplan.org/inhalt/coc_2.pdf> acessed 13 July 2014. For a discussion on Food Security see pages 100ff.

Commission 1982 'Common Security'[54] and the Stockholm Initiative on Global Security and Governance 1991[55] sought to broaden the definition of security threats to include HIV/ AIDS, terrorism, environmental degradation and to deepen security considerations to include the security of individuals and groups. The Brandt Commission stated that 'world hunger, mass misery and alarming disparities between living conditions of rich and poor' were threats to human security.[56] The Palme Commission said that security must rest on a commitment to joint survival rather than a threat of mutual destruction.[57] It argued that the real security concerns of the world were whether the political, social and economic needs of all people were being met. Finally the Stockholm Initiative stated that threats from 'failures in development, environmental degradation, excessive population growth and movement, and a lack of progress towards democracy' should be taken into account.[58]

In 1992, the Security Council Summit Statement declared that the 'non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security'.[59] The Security Council began to define a threat based on the 'the magnitude of human

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[54] Swedish Prime Minister Olof Palme, 'Report of the Independent Commission on Disarmament and Security Issues-Common Security: A Blueprint for Survival' (1982). This is known as the Palme Commission; Galtung J, 'The Palme Commission Report on Disarmament and Security: A Critical Comment' (1983) 14(2) Bulletin of Peace Proposals 147, 147-51.

[55] 'Common Responsibility in the 1990s: The Stockholm Initiative on Global Security and Governance' (22 April 1991, Prime Ministers Office, London).

[56] Brandt Commission in Banakar (n 30) 254.

[57] Palme Commission in Banakar (n 30) 254.

[58] Stockholm Initiative in Banakar (n 30) 254.

[59] Security Council, 'Summit Statement Concerning the Councils Responsibility in the Maintenance of International Peace and Security' (31 January 1992) S/23500.

tragedy',[60] deteriorating civil war situations[61], genocide[62] and humanitarian crises.[63] As Slaughter later argued:

> We need not be guaranteed prosperity but at least the health and education necessary to strive for it. We cannot be guaranteed long lives, but at least that our government will not try to murder us and will do its upmost to prevent our fellow citizens from doing so.[64]

The Security Council also recognised that the 'trans boundary affects' of human rights violations, such as the plight of refugees, allowed it to side step the legal commitment to non-intervention.[65] The Security Council continues to recognise that violations and abuses of human rights and IHL amount to a threat to the peace, for example in Syria.[66] The Security Council has also determined that complex humanitarian emergencies, which are a 'conflict related humanitarian disaster involving a high degree of breakdown and social dislocation and, reflecting this condition, a system wide aid response from the

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[60] UNSC Res 794 (3 December 1992) Somalia, preamble.

[61] UNSC Res 788 (19 November 1992) Liberia.

[62] UNSC Res 955 (8 November 1994) Rwanda.

[63] UNSC Res 841 (16 June 1993) Haiti.

[64] Slaughter (n 11) 619.

[65] Note by the President of the Security Council (26 February 1993) S/25344; Odello M and Cavandoli S (eds), *Emerging Areas of Human Rights in the Twenty-first Century: The Role of the Universal Declaration on Human Rights* (Routledge, London 2011) 28.

[66] UNSC Res 2139 (22 February 2014) Syria: Humanitarian Assistance.

international community' amount to a threat to international peace and security.[67]

The nature of threats to security outlined in the 'HDR 1994' definition recognises matters that the ICRC is already dealing with, under its mandates in the Geneva Conventions I, II, III and IV 1949 and Statutes of the ICRC, in particular, the importance of reconnecting families, delivering humanitarian aid, providing healthcare and so on are pertinent to definitions of human security and to the work of the ICRC. The importance, for this Author, of the ICRC's potential contribution to human security for people's day-to-day lives is in its quiet determination to provide protection and assistance to people. Its principles, particularly confidentiality, neutrality and impartiality, give it favour within States and for the people on the ground.

Over a decade after the publication of the 'HDR 1994', in 2005, the World Summit was held from 14 to 16 September at UN Headquarters in New York. It considered development, security, human rights and reform of the UN. In March 2005, former Secretary-General Kofi Annan had set out proposals in this regard in his report, 'In Larger Freedom'.[68] The World Summit provided an opportunity to truly define and begin to implement human security. The 'Outcome Document 2005' was adopted following negotiations between States and organisations over the course of four days in September 2005.[69] It sought to enhance the system of collective security, following 'We the Peoples', by reviewing its progress and by making recommendations in areas of

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[67] Barnett and Weiss (n 51) 76.

[68] In Larger Freedom (n 45) part V.

[69] UNGA, '2005 World Summit Outcome' (15 September 2005) A/60/L.1 (Outcome Document).

development, peace and security, human rights and institutional reform. The States at the World Summit welcomed 'In Larger Freedom' and it appeared that consensus would be reached on the definition and implementation of human security.[70] However, at its conclusion, meagre progress had been made. States had merely agreed to continue to work towards a new security consensus.[71] In part, the World Summit highlighted many of the inequalities between States and between States and their citizens.

The broad security rhetoric and optimism of the 'HDR 1994', 'We the Peoples', 'High-level Panel Report 2004' and 'In Larger Freedom' struggled to survive in the face of staunch criticism from many States when it came to actually adopting the ideas in some concrete form. Many States felt backed into a corner by States with political power and better financial resources.[72] The 'Outcome Document 2005' was therefore criticised for failing to address the broad issues initially anticipated. It was also criticised for failing to provide specific, implementable action to actually achieve the Millennium Development Goals, disarmament, facilitating State struggles against terrorism and for failing to actually outline how all of the promises could be lived up to

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[70] UNGA, 'Preparation for and Organization of the High-level Plenary Meeting of the General Assembly' (25 April 2005) Res 59/291 para 2.

[71] Outcome Document (n 69) para 143 states: 'We stress the right of people to live in freedom and dignity, free from poverty and despair. We recognise that all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential. To this end, we commit ourselves to discussing and defining the notion of human security in the General Assembly'.

[72] 'Revised Draft Outcome Document of the High-level Plenary Meeting of the General Assembly of September 2005 Submitted by the President of the General Assembly paragraph 120' (10 August 2005) UN Doc A/59/HLPM/CRP.1/Rev.2; 'Draft Resolution: 2005 World Summit Outcome' (*Cuba Video,* 16 September 2005) <www.un.org/webcast/summit2005/statements.html> accessed 23 June 2014; 'Draft Resolution: 2005 World Summit Outcome' (*Venezuela video,* 16 September 2005) <www.un.org/webcast/summit2005/statements.html> accessed 23 June 2014.

logistically and financially. Cuba stated, for example, that the failure to clearly address issues of the environment, trade and disarmament, amongst other issues, was an 'unforgiveable regression' and one which the US and its closest allies had created.[73] Cuba also criticised the seven hundred amendments to the 'Outcome Document 2005' that 'diluted, distorted and jeopardised the unity which is essential to save the millions and millions of lives that suffer from hunger, ill health'.[74] Nevertheless, during the World Summit, the General Assembly committed itself to discuss and define the notion of human security and on 22 May 2008 it held a daylong thematic debate on the concept.[75] This ensured that human security remained on the policy agenda and entered the 'common international discourse'.[76]

The General Assembly 'Human Security Report 2010' takes account of the global financial and economic crisis; food prices and food insecurity; infectious diseases and other health threats; climate change; and the prevention of violent conflicts.[77] Roberts argued that these are mass threats that kill or maim millions every year, but are quite preventable.[78] It is recognised that the threats included in broad human security discourse can potentially embrace any threat to human safety and therefore scholars find it difficult to prioritise

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[73] Cuba Video (n 72).

[74] Cuba Video (n 72).

[75] Outcome Document (n 69) para 143; HRH Prince El Hassan Bin Talal (General Assembly) 'Thematic Debate on Human Security' (22 May 2008).

[76] Krause K, 'Is Human Security More Than Just a Good Idea?' in Rzoska M and Croll PJ (eds), *Promoting Security: But How and For Whom?* (Bonn International Center for Conversion, Bonn 2004) 43.

[77] General Assembly Human Security Report 2010 (n 45).

[78] Roberts (n 40) 16.

different types of threats.[79] Within broad human security rhetoric, for example, Owen argued that 'any conceptualization of human security must have a response to genocide, the necessary consequence of which is a rethinking of sovereignty'.[80] Scholarly debates on human security in 2011 suggested that the theoretical and conceptual discussions on human security needed to end. It was questioned whether the idea of human security has any 'constructive impact on the behaviour or policies of States'?[81] The focus should be on how to increase the 'institutionalisation and operationalisation of the concept'.[82] However, the 'final' say on the definition of human security was in 2012.

The UN General Assembly has adopted a 'Common Understanding' of human security.[83] It echoes the 'freedom from' sentiments of earlier drafts.[84] It also 'calls for people-centred, comprehensive, context-specific and prevention-oriented responses that strengthen the protection and empowerment of all people and all communities' which supports this Author's repeated contention that security must be human-centric. The 'Common Understanding Resolution' states that 'human security recognises the interlinkages between peace,

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[79] Newman E, 'Critical Human Security Studies' (2010) 36 Rev of Intl Studies 77, 82.

[80] Owen T, 'Human Security-Conflict, Critique and Consensus: Colloquium Remarks and a Proposal for a Threshold-Based Definition' (2004) 35(3) Security Dialogue 373, 378.

[81] Mgbeoji I, 'The Civilised Self and the Barbaric Other: Imperial Delusions of Order and the Challenges of Human Security' (2006) 27(5) Third World Q 855, 860.

[82] Benedek W, Ketteman MC and Möstl M (eds), *Mainstreaming Human Security in Peace Operations and Crisis Management: Policies, Problems, Potential* (Routledge, London 2011) preface.

[83] Common Understanding (n 39): This report builds on General Assembly Human Security Report 2010 (n 45); Report of the Secretary General, 'Follow up to General Assembly Resolution 64/291 on Human Security' (5 April 2012) UN Doc A/66/763; UNGA, 'Follow-up to paragraph 143 on Human Security of the 2005 World Summit Outcome' (25 October 2012) Res 66/290; See also Martin M and Owen T, 'The Second Generation of Human Security: Lessons from the UN and EU Experience' (2010) 86 Intl Affairs 211.

[84] Common Understanding (n 39) para 4(a).

development and human rights, and equally considers civil, political, economic, social and cultural rights'.[85] This reflects the sovereignty as responsibility concept and signifies the inherent human-centric normative underpinnings of the international community. It is not, however, a binding law.

The participation, commitment and determination of community members and civil society are considered a fundamental component of the progression of human security. Hampson points out that 'vulnerability is both broad in nature and structurally dependent, and that if we are to mitigate human insecurity, we must address not only the threats, but also society's ability to counter them'.[86] The role of civil society is more important today than ever before in advancing the goals of human security. Partnerships amongst civil society, the UN and the wider international community are a central component to promoting comprehensive policies and lasting solutions that can strengthen the triangle of development, freedom and peace.[87] The importance of local ownership of human security advancing projects and initiatives is therefore considered in chapter five and the case study.

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[85] Common Understanding (n 39) para 4 (c).

[86] Hampson FO and Hay J, 'Human Security: A Review of Scholarly Literature' (2002), paper presented to the annual meeting of the Canadian Consortium on Human Security, Ottawa, April in Owen (n 80) 376.

[87] OCHA (Human Security Unit), 'Human Security at the United Nations' (*Newsletter (Issue 1)*, Fall 2007) < https://docs.unocha.org/sites/dms/HSU/Publications%20and%20Products/Newsletters/Issue%201%20-%20Fall%202007%20Human%20Security%20Towards%20an%20Integrated%20Approach.pdf> accessed 24 June 2014.

d) The Relationship between Human Security, International Human Rights Law and International Humanitarian Law

It is argued that human security, IHRL and the assistance and protection mandate of the ICRC share common purposes.[88] This section builds on the analysis in chapter three, which recognised the complementarity between IHRL and IHL. This section considers whether the protection and assistance activities of the ICRC could provide an additional 'layer' to the pursuit of human security. When IHRL and IHL laws are violated, can assistance and protection activities provide more security on the ground for the local population than existing legal and practical frameworks?

This section considers whether the 'minimum core' of Economic, Social and Cultural Rights has inherent links to the objectives of the establishment of human security. It postulates that should States be unwilling or unable to realise this standard, then ICRC assistance and protection work, which can reach individuals and communities at the local, rather than State level, is able to bring substance to human security for the people on the ground. It is argued that some aspects of human security are uncontroversial for the ICRC, in particular food and health security. It is argued however that economic security is a contentious area for the ICRC to be working in, as it potentially conflicts with its fundamental principles and could damage its reputation should it be perceived as a partial or politically motivated organisation.

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[88] Former UN Under-Secretary General for Legal Affairs (Hans Corell), 'Banquet Speech' from 'Proceedings of the Annual Conference of the Canadian Council on International Law, "From Territorial Integrity to Human Security"' (Kluwer, The Hague 2001) <www.un.org/law/counsel/ottawa.htm> accessed 22 June 2014.

Noortman argued that international law could be viewed as a regulatory instrument to achieve human security's goals of providing multi-dimensional security to all human beings.[89] This section tests whether IHRL or the protection and assistance activities of the ICRC can help to achieve human security. ICCPR and ICESCR, taken together constitute an International Bill of Human Rights. They are international treaties and are binding on State Parties under international law. Indeed the Vienna Declaration (1993) recognised civil and political rights and economic, social and cultural rights as 'indivisible, interdependent and interrelated'.[90] The reasoning is that both sets of rights are necessary to establish the integrity and dignity of the person. To this end, the principles of respect, protect and fulfil permeate documents on IHRL.[91] 'Common Understanding Resolution' paragraph 4(c) states that 'human security recognises the interlinkages between peace, development and human rights, and equally considers civil, political, economic, social and cultural rights'. They are legal frameworks that protect people in peacetime, during and after armed conflict, by limiting State action.

Noortman argues that 'a holistic approach to human security leaves little room for differentiating between political and civil rights, social, cultural and economic rights, and collective rights'.[92] In addition to the UN Charter and IHRL, there are a number of treaty laws that have been identified as examples

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[89] Noortman (n 4) 5.

[90] Office of the High Commissioner for Human Rights, 'Vienna Declaration and Programme of Action-Adopted by the World Conference on Human Rights in Vienna on 25 June 1993'.

[91] CESCR, 'General Comment 12: The Right to Adequate Food' (12 May 1999) UN Doc E/C.12/1999/5 para 15; CESCR, 'General Comment 14 on the Right to the Highest Attainable Standard of Health (art. 12)' (11 August 2000) UN Doc E/C.12/2000/4 paras 33-37.

[92] Noortman (n 4) 20.

of the 'intrinsic normative effects' of human security, including the 1997

Ottawa Treaty,[93] 2008 Convention on Cluster Munitions,[94] 1998 Rome Statute

of the ICC,[95] the 2000 Protocols to the Convention on the Rights of the Child,[96]

2000 Convention against Transnational Organized Crime and its Protocols[97]

and the 2002 Protocol to the Convention against Torture.[98] There is also

evidence that the Security Council has been systematically developing the

human security agenda without calling it by that name, for example, with

resolutions on protection of civilians, women and children.[99]

In order to reflect on the complementarity between IHRL, IHL and human

security it is pertinent to restate the types of security included in the 'HDR

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[93] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211.

[94] Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) 2688 UNTS.

[95] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

[96] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227.

[97] UN (Office on Drugs and Crime), 'United Nations Convention Against Transnational Organized Crime and the Protocols thereto' (UN, New York 2004) www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf accessed 2 August 2014.

[98] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237; See also Oberleitner G, 'Human Security: A Challenge to International Law?' (2005) 11 Global Governance 185, 195; Eberhard (n 29) 127; Benedek (n 82) 16.

[99] Protection of Civilians in Armed Conflict UNSC Res 1265 (17 September 1999); UNSC Res 1296 (19 April 2000); UNSC Res 1674 (28 April 2006); UNSC Res 1738 (23 December 2006) and UNSC Res 1894 (11 November 2009); 'Report of the Secretary General to the Security Council on the Protection of Civilians in Armed Conflict' (8 September 1999) S/1999/957 para 61; Protection of Children in Armed Conflict UNSC Res 1261 (30 August 1999); UNSC Res 1314 (11 August 2000); UNSC Res 1882 (4 August 2009); UNSC Res 1998 (12 July 2011); Women and Peace and Security UNSC Res 1325 (31 October 2000); UNSC Res 1820 (19 June 2008); UNSC Res 1960 (16 December 2010); UNSC Res 1888 (30 September 2009) Violence against Women and Children in Armed Conflict; UNSC Res 1706 (31 August 2006) Situation in the Sudan.

1994'. They include economic, food, health, environmental, personal, community and political security. This section therefore considers each aspect of human security and its correlative IHRL provisions and the protection and assistance roles of the ICRC. It argues that there are two key limitations to economic, social and cultural rights; firstly that the obligation on States is 'progressive realisation' and that such obligations are limited to realisation of a 'minimum core'. This is evidenced most clearly in Reports of the Committee on Economic, Social and Cultural Rights (CESCR), which will be relied on throughout this section to provide more information on UN expectations of States in terms of their ICESCR obligations.

Under Article 2(1) ICESCR governments are required to 'take steps, to the *maximum of available resources*, with a view to achieving *progressively* the full realisation of the rights recognised in the present Covenant by all appropriate means'.[100] Minkler states that 'economic and social rights enable each and every individual to claim sufficient resources to live a dignified life no matter what a country's average income or distribution might be'.[101] Moreover, Article 2(2) provides that States are also required to 'guarantee that the rights will be exercised without discrimination of any kind and, finally, Article 3 provides that States must 'ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights'.

CESCR General Comment 3 (1990) stated that the 'minimum essential levels' of each of the rights is incumbent on every State party.[102] It provides that 'a

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[100] Emphasis added.

[101] Minkler L (ed), *The State of Economic and Social Rights: A Global Overview* (CUP 2013) 2.

[102] CESCR, 'General Comment 3 on the Nature of States Parties' Obligations (art.2 para.1 of the Covenant)' (14 December 1990) UN Doc E/1991/23/ E/C.12/1990/8 para 10.

State party in which any number of individuals is deprived of essential foodstuffs, of essential primary healthcare, of basic shelter or housing, or of the most basic form of education is, *prima facie*, failing to discharge its obligations under the Covenant'.[103] The 'minimum core' therefore provides a base line for the realisation of economic, social and cultural rights; failure to meet this is unacceptable, even in post-conflict situations.[104] If States fail to meet these requirements they must 'demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.[105]

e) Responsibility to Protect

After the human catastrophe in Somalia (1991),[106] the genocide in Rwanda (1994[107]) and the ethnic cleansing in Srebrenica (1995)[108] and Kosovo (1999)[109] the international community was forced to acknowledge and react to situations where citizen's human rights were grossly and systematically violated. In each case the State was committing atrocities against its population. The foundation of both human security and RtoP is that every State has an obligation to protect the human beings in its care, that is, they both stem from the concept of sovereignty as responsibility. It is argued that human security

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[103] ibid.

[104] Chapman A and Russell S (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, Oxford 2002) 8-10.

[105] General Comment 3 (n 102) para 10.

[106] UNSC Res 794 (3 December1992) Somalia.

[107] UNSC Res 929 (22 June 1994) Rwanda.

[108] SC Res 770 (13 August 1992) Bosnia-Herzegovina.

[109] Evans M, *International Law* (4th edn, OUP 2014) 514-5.

and RtoP reflect changing priorities of nation States and international community to put humans first. This is reflective of the Statutes IRCRCM concept of humanity. In April 2014 the UN Special Advisor on the RtoP, Jennifer Welsh, stated that there is a 'simple imperative to us all that there is a collective responsibility to all of us to protect populations'.[110]

The changes in the idea of security and the introduction of the sovereignty as responsibility paradigm not only link to human security but also to RtoP. This chapter shows that the identification of threats that exist within States led to the formulation by ICISS in 2001 of the RtoP doctrine. This has undergone numerous reinventions and nowadays it alludes to military intervention by the UN to protect civilians from the committal of the four core crimes of genocide, ethnic cleaning, crimes against humanity and war crimes. Significantly however it has proved essentially useless for the protection of the population of many States, including in the DRC and most recently Syria. This analysis considers, therefore, whether there is a place for the ICRC in the implementation of RtoP and whether denial of access by the ICRC could amount to a crime against humanity, sufficient for the Security Council to authorise intervention.

Zyberi stated that:

> The ICRC is a very important actor with regard to RtoP, because it has
>
> been granted certain competences under the Geneva Conventions I, II,

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[110] 'Interview with Jennifer Welsh, UN Special Adviser on the Responsibility to Protect (20th Commemoration of the Rwanda Genocide)' (Published on 16 April 2014) <www.un.org/en/preventgenocide/adviser/responsibility.shtml> accessed 17 July 2014.

III and IV 1949 and the 1977 Additional Protocols to protect victims of armed conflicts and to provide humanitarian assistance.[111]

This statement appears to miss the corpus of evidence to the contrary, that is, that there is a very limited place for the ICRC within the RtoP legal and practical implementation. This chapter shows that whilst RtoP remains an alternative approach to the expansion of 'humanity' as a guiding principle in international law, that for the ICRC, as a neutral and impartial actor, it is not part of its assistance and protection duties. RtoP is left open for the UN, North Atlantic Treaty Organization (NATO) and other international organisations to embrace as a means to protect the civilian population of States from the threats posed by those in power. In fact, it is shown unequivocally that the ICRC cannot become part of the RtoP implementation machinery. Nevertheless, it remains to be seen whether, if States refuse humanitarian assistance, does the international community have a responsibility to intervene to provide such? Similarly, could intervention be ordered for violations of humanitarian assistance? For example, if States fail to allow delivery of food or purposefully disrupt such distribution, causing the population to starve. This matter is considered later in the chapter.

i) The Origins of RtoP

Sovereignty today 'clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider

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[111] Zyberi G, 'The Role of Non-State Actors in Implementing the Responsibility to Protect' in Ryngaert and Noortman (n 4) 54.

international community'.[112] RtoP is about the positive and affirmative duty of States to protect their citizens but also perhaps, and primarily, it is about individuals and their place in the international order.[113] Kofi Annan initiated work on a response to grave human rights violations; a project taken up by the Canadian led International Commission on Intervention and State Sovereignty 2001 (ICISS). Gareth Evans, former Australian foreign minister and UN Secretary-General Special Advisor Mohamed Sahnoun, chaired ICISS.[114] This commission, made up of people from various cultures and areas of law, developed the RtoP concept following demand to reconcile humanitarian intervention with the limitations of State sovereignty. ICISS has been described as the 'most sophisticated attempt to establish a moral guideline for international action in the face of humanitarian emergency'.[115] ICISS aimed to introduce a 'new set of international norms on intervention that would guide and restrict the conduct of the State and the international community in "extreme and exceptional circumstances"'.[116] RtoP narrowed threats down to 'violent threats to individuals',[117] such as 'mass murder and rape, ethnic

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[112] Report of the Secretary General's High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2 December 2004) UN Doc A/59/565, 65 (High-level Panel 2004) paras 21-22.

[113] '"Responsibility to Protect-UN Torino Retreat 2008" (Address by Patricia O'Brien, Under-Secretary-General for Legal Affairs, The Legal Counsel)' (2008) 20(4) Intl J of Refugee L 710, 711.

[114] Weiss TG and Hubert D, *The Responsibility to Protect: Research, Bibliography, and Background* (International Development Research Centre, Ottawa 2001) v-vi.

[115] Day G and Freeman C, 'Operationalising the R2P-the Police-keeping Approach' (2005) 11 Global Governance 139, 139.

[116] Report of the International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (International Development Research Centre, Canada) (ICISS 2001) 31.

[117] Human Security Centre, *Human Security Report 2005: War and Peace in the Twenty-first Century* (OUP 2005) viii.

cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease'.[118] Failed States may also be considered a threat.[119]

RtoP is 'consistent with existing obligations under international human rights, humanitarian and refugee law'.[120] RtoP encompasses a military response to four core crimes when committed within sovereign States, including genocide, war crimes, crimes against humanity and ethnic cleansing. The 'Common Understanding Resolution' specifically states that 'the notion of human security is distinct from the responsibility to protect and its implementation' and 'human security does not entail the threat or the use of force or coercive measures. Human security does not replace State security'.[121] This thesis has established that the ICRC can contribute to the establishment of human security, but the 'ICRC has not taken a clear stance on RtoP'.[122] This chapter therefore considers whether there is scope for the ICRC protection and assistance roles to contribute to RtoP, or whether, ultimately, its principles of impartiality, independence and neutrality preclude any such involvement.

It is argued that the minimal operationalisation of RtoP is evidence of the inherent weaknesses in relying on States to agree to action for the protection of people. Political will, resources and agreement on which situations warrant, or are worthy of, interventions continually change. This section identifies the

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[118] High-level Panel 2004 (n 112).

[119] Badescu CB, *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights* (Routledge, New York 2011) 36-37.

[120] Report of the Secretary-General, 'Responsibility to Protect: State Responsibility and Protection' (9 July 2013) UN Doc A/67/929-S/2013/399 para 6.

[121] Report of the Secretary-General, 'Follow-up to General Assembly Resolution 66/290 on Human Security' (23 December 2013) UN Doc A/68/685 paras (d) and (e).

[122] Schweizer B, 'Responsibility to Protect: The Perspective of the ICRC' Horizons and Débats (2008)' in Zyberi G. *An Institutional Approach to the Responsibility to Protect* (CUP 2013) 50.

innate limitations of RtoP and, although on the face of it, it mirrors the 'values' underpinning the human security model, its usefulness is questionable. To this end, it is argued that RtoP, although a component of the sovereignty as responsibility and the humanity-based paradigm of the international legal order, more often than not fails to reach people on the ground. It is for this thesis to examine whether alternative models, in particular the work of the ICRC, provide better security for people on the ground.

(1) Collective Security and Humanitarian Intervention

Collective security is premised on the notion that peace is universal and indivisible. It is defined as the 'combined usage of the coercive capacity of the international community to combat illegal uses of armed force and situations that threaten international peace'.[123] In theory the system created prevents unilateral intervention, as a range of States must be convinced of the reality of the threat and the utility of forceful intervention.[124] States renounced some of their freedom of action by vesting the Security Council with competence to decide on collective action on their behalf and are legally bound by the decision the Security Council has made.[125] Bowett argues that the Security Council provides an indispensable forum for the mutual engagement of States, as it was specifically designed to operate at the intersection of law and

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[123] White ND, 'The Legality of Bombing in the Name of Humanity' (2000) 5(1) J of Conflict and Security L 27, 29.

[124] Brunée J and Toope SJ, 'The Use of Force: International Law After Iraq' (2004) 53 ICLQ 785, 797.

[125] Koskenniemi M, 'The Place of Law in Collective Security' (1996) Michigan J of Intl L 455, 456-57.

politics.[126] It enjoys a normative authority that builds coalitions and musters public support.[127] However, Higgins cautions that:

> The key peacekeeping function should remain the security of the peace on the ground. Only then should ancillary functions be added. Humanitarian assistance, electoral observation, human rights monitoring should be additional to the securing of peace, and not in lieu of it.[128]

An additional caveat, for the UN, is that collective security actions taken outside the ambit of the Security Council are usually deficient both in terms of legitimacy and legality.[129] States with similar values and interests can act collectively against unilateral action and, as such, collective security is a response to the unlawful use of force by one State against another, which would threaten international peace and security. Thus collective security may not provide a useful mechanism for action when a State uses force against its own population.

Another mechanism developed by States for intervention in another State is humanitarian intervention.[130] Humanitarian intervention usually arises in a

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[126] DW Bowett, *The Law of International Institutions* (4th edn, Stevens and Sons, London 1982) 24, 26, 33-42.

[127] Wedgwood R, 'NATOs Campaign in Yugoslavia' (1999) 93 AJIL 828, 832.

[128] Higgins R, 'Peace and Security Achievements and Failures' (1995) 6 Eur J Intl L 445, 460.

[129] Roberts A and Kingsbury B, 'The UN's Role in International Society' in Roberts A and Kingsbury B, *United Nations, Divided World* (OUP 1993) 57.

[130] See Teitel (n 1) 36.

situation where a government has turned the machinery of the State against its own people or where the State has collapsed into lawlessness.[131] The idea behind humanitarian intervention has been linked to Grotius and Lauterpacht.[132] Nowadays humanitarian intervention is understood as seeking to legitimise the use of force by a State or group of States in the case of flagrant and large scale violations of fundamental human rights, without the consent of the government of the State on whose territory the intervention takes place and without the authorisation of the Security Council, with the purpose of halting the violations.[133] In theory, humanitarian intervention protects the right to life of anyone residing in the territory of another state, but in reality people can be killed as a result of the intervention, whether directly or indirectly. The legality, morality and prudence of humanitarian intervention arises from the rudimentary values at stake when human rights abuses occur on a large scale, when they are persistent, and when they shock the conscience of humanity.[134] It reveals a gap between what is lawful and what is morally justified, between strict legality and legitimacy.[135] Indeed, during the Cold War,

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[131] Wheeler NJ, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000) 27.

[132] Edwards C, 'The Law of War in the Thoughts of Hugo Grotius' (1970) J of Public L 371, 396-97; Lauterpacht H, 'The Grotius Tradition in International Law' (1946) 23 British YB Intl L 46 in Meron T, *War Crimes Law Comes of Age: Essays* (Clarendon Press, Oxford 1998) 122; Katayanagi M, *Human Rights Functions of United Nations Peacekeeping Operations* (Martinus Nijhoff Publishers, Netherlands 2002) 239.

[133] Blokker N and Schriver N (eds), *The Security Council and the Use of Force: Theory and Reality A Need for Change? (*Martinus Nijhoff Publishers, Leiden 2005) 38.

[134] Murphy SD, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Pennsylvania Press, Pennsylvania 1996) 17.

[135] Franck T, 'Interpretation and Change in the Law of Humanitarian Intervention' in Holzgrefe JL and Keohane RO (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (CUP 2003) 216.

individual States, such as the US and UK, and the General Assembly condemned claims that violations of human rights justified the use of force. [136]

When used, therefore, there was a fear that humanitarian intervention would evoke counter-intervention, usually through support of insurgencies and as such there should remain mutual respect for sovereignty and territorial integrity.[137] There was also a fear that allowing humanitarian intervention would pave the way for States to intervene in order to promote Western ideals of liberal democracy, or would only be put forward as an *ex post facto* justification of the intervention.[138] In fact, during the Cold War the best case that could be made in support of humanitarian intervention was that it could not be said to be unambiguously illegal.[139] Indeed, there was disagreement when humanitarian intervention was used as a justification for intervention in Kosovo, but those who faced the loss of millions of lives wanted to know- under what theoretical model can we respond to such atrocities as humanitarian intervention is clearly not up to it?[140] For Hehir, the 'solution to the problem of what to do when a crisis erupts within an uncooperative or incapable State

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[136] Franck TM and Rodley NS, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force' (1973) 67 AJIL 275, 299-302; See, for example, UNGA, '1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty' (21 December 1965) Res 2131 (XX).

[137] Clark JF, 'Realism, Neo-Realism and Africa's international Relations in the Post-Cold War Era' in Dunn K and Shaw T, *Africa's Challenge to International Relations Theory* (Palgrave, Basingstoke 2001) 97.

[138] Téson F, 'The Liberal Case for Humanitarian Intervention' in Holzgrefe and Keohane (n 135) 93.

[139] Gray C, *International Law and the Use of Force* (2nd edn, OUP 2004) 32.

[140] Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000).

should be sought via international law, rather than nebulous and ineffective moral aspirations'.[141]

It is argued that RtoP is an attempt to reconcile the inherent tension between humanitarian intervention and the persistent reality of State sovereignty, as 'by specifying that sovereignty is based on the people, the international community can penetrate nation-States' borders to protect the rights of citizens'.[142] RtoP was intended to answer the question; 'if humanitarian intervention is an unacceptable assault on State sovereignty then how should we respond to Rwanda and Srebrenica?'[143]

ii) Defining RtoP: International Commission on Intervention and State Sovereignty 2001 to the Outcome Document 2005

Peters argues that the 'endorsement of RtoP... definitely ousted the principle of sovereignty from its position as a first principle of international law'.[144] The ICRC supported the change in terminology from humanitarian intervention to RtoP, as it avoids the potential confusion between military and humanitarian activities.[145] Axworthy stated that RtoP:

> Pays homage to the human security approach in a number of
> fundamental ways. It focuses international attention and calls for

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[141] Hehir A, *Humanitarian Intervention after Kosovo: Iraq, Darfur and the Record of Global Civil Society* (Palgrave MacMillan, Hampshire 2008) 122ff.

[142] Soros G, 'The People's Sovereignty' (2004) 140 Foreign Policy 66, 66-68.

[143] Report of the Secretary General, 'We the Peoples: The Role of the United Nations in the Twenty-first Century' (UN, New York 2000) 48.

[144] Peters A, 'Humanity as the A and Ω of Sovereignty' (2009) 20(3) Eur J Intl L 513, 514.

[145] Schweizer in Zyberi (n 122) 50.

action fashioned around where it is most needed – on the victim. It focuses on the responsibilities of sovereignty versus its privileges. Under the principle of R2P, it is no longer permissible for states to harm their populations with impunity. And finally, if for some reason a state is unwilling or incapable to protect its citizens, the responsibility then falls on the international community to do so.[146]

There are three pillars to ICISS's formulation of the RtoP, including the responsibility to prevent, responsibility to react and the responsibility to rebuild.[147] The responsibility to prevent was premised on the notion that deadly conflict and other man-made catastrophes put populations at risk.[148] The Security Council could justify or mandate political action to prevent such disasters.[149] The scope of the responsibility to prevent was narrowed in the 'Outcome Document 2005' and the 2009 Secretary-General's Report on Implementing the RtoP (Implementing RtoP Report 2009) to include only prevention of genocide, war crimes, ethnic cleansing and crimes against humanity. This includes prevention of their incitement.[150] Bellamy suggests a number of ways to implement the responsibility to prevent including use of the

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[146] Axworthy L, 'Human Security in the R2P Era' in Martin M and Owen T, *Routledge Handbook of Human Security* (Routledge, Oxford 2014) 153.

[147] ICISS 2001 (n 116).

[148] ICISS 2001 (n 116) 3.2; See also Banakar R (ed), *Rights in Context: Law and Justice in Late Modern Society* (Ashgate, Surrey 2010) 266.

[149] Peters (n 144) 522 (emphasis added).

[150] UNGA, '2005 World Summit Outcome' (15 September 2005) A/60/L.1 para 138 (Outcome Document); Report of the Secretary General 'Follow-up to the Outcome of the Millennium Summit: Implementing the Responsibility to Protect' (12 January 2009) UN Doc A/63/667 para 11(a) (Implementing RtoP Report 2009).

Human Rights Council, ratification by all States of IHRL treaties, IHL, Refugee Conventions and the Rome Statute.[151] In addition, Bellamy suggests we should localise RtoP to specific cultures or societies so they are locally owned rather than being viewed as external impositions.[152]

The responsibility to react refers to large-scale killings, with genocide intent or not, and ethnic cleansing. There remains a just cause threshold of large-scale loss of life or large scale ethnic cleansing to trigger a reaction from the international community.[153] The international community can use diplomatic, humanitarian and other methods to help protect the human rights and well being of civilian populations.[154] Once again, the international community's 'duty' to protect is only enacted when a State proves unwilling or unable to discharge the duty, but States should use peaceful measures such as development assistance or economic sanctions first.[155] Under ICISS there were four precautionary principles to strictly limit coercive military force including right intention, reasonable prospects of success, force as a last resort and proportional means.[156] Security Council Resolution 1674 of 2006 reaffirmed

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[151] Bellamy AJ, *Global Politics and the Responsibility to Protect: From Words to Deeds* (Routledge, London 2011) 37.

[152] ibid.

[153] ICISS 2001 (n 116) 4.19.

[154] Report of the Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (21 March 2005) UN Doc A/59/2005 para 135 (In Larger Freedom).

[155] Focarelli C, 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine' (2008) 13(2) J of Conflict and Security L 191, 196.

[156] ICISS 2001 (n 116) 'The Precautionary Principles' XII.

RtoP, as defined in the 'Outcome Document 2005', but it does not include the four precautionary principles.[157]

The third pillar of the ICISS formulation of RtoP is the responsibility to rebuild. It refers to creating lasting peace and the political and institutional structure within a State. The theory behind this pillar is that the civilian population needs its State to be rebuilt following armed conflict or a disaster, especially when violations were committed by the State itself, but the responsibility to rebuild is completely absent from later reports on RtoP. For Barnett and Weiss RtoP concerns 'identifying situations that are capable of deteriorating into mass atrocities and bringing to bear diplomatic, legal, economic and military pressure in a prudent fashion to prevent or end the suffering and death resulting from mass atrocities'.[158] Weiss and Hubert stated that 'paper rights are meaningless for victims of atrocities, without ways to impose compliance'.[159]

ICISS recognised that the ICRC would be suitable to help in the 'early warning' objective of the ICISS conception of RtoP.[160] If RtoP was to be used, there needed to be a 'threshold criteria' or a 'just cause', as:

> Military intervention for human protection purposes must be regarded
> as an exceptional and extraordinary measure, and for it to be warranted,

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[157] UNSC Res 1674 (28 April 2006) Protection of Civilians in Armed Conflict para 4; See also Odello M and Cavandoli S (eds), *Emerging Areas of Human Rights in the Twenty-first Century: The Role of the Universal Declaration on Human Rights* (Routledge, London 2011) 35.

[158] Barnett M and Weiss TG, *Humanitarianism Contested: Where Angels Fear to Tread* (Routledge, London 2011) 83.

[159] Weiss and Hubert (n 114) 146.

[160] ICISS 2001 (n 116) 3.12.

there must be serious and irreparable harm occurring to human beings, or imminently likely to occur.[161]

ICISS suggested that 'ideally there would be a report as to the gravity of the situation', for which the ICRC was 'an obvious candidate for this role… but for understandable reasons- based on the necessity for it to remain, and be seen to remain, absolutely removed from political decision making, and able to operate anywhere on the ground- it is absolutely unwilling to take on any such role'.[162]

The change from the ICISS 2001 conception of RtoP to the version contained in the 'Outcome Document 2005' is that it 'resulted in a distinct legalization of RtoP'.[163] This analysis shows the accomplishments and difficulties of the World Summit 2005 and considers the final version of RtoP. The now infamous 'Outcome Document 2005' paragraph 138 states that:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help

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[161] ICISS 2001 (n 116) 4.18.

[162] ICISS 2001 (n 116) 4.29.

[163] Hoffman J and Nolkaemper A, 'Concluding Observations' in Hoffman J and Nolkaemper A, *Responsibility to Protect: From Principle to Practice* (Amsterdam UP, 2012) 359.

States to exercise this responsibility and support the United Nations in establishing an early warning capability.[164]

Although General Assembly resolutions are recommendations only, the 'Outcome Document 2005' is considered to have 'particularly high political and moral significance since its commitments were undertaken by the world leaders.[165] For this Author, RtoP reaches to the most fundamental concerns for 'humanity'. The definition agreed at the World Summit is a 'boiled down' version of human security. If sovereignty as responsibility created a spectrum of rights and duties on the international stage, human security would be at the opposite end to RtoP.

During the World Summit, former Secretary-General Kofi Annan stated 'you will be pledged to act if another Rwanda looms'.[166] Despite what appears to be an acceptance of RtoP by the international community in the 'Outcome Document 2005', it States only that the international community should be

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[164] Outcome Document (n 150) para 139: 'The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out'.

[165] Gierycz G, 'The Responsibility to Protect: A Legal and Rights-based Perspective' (2010) 2 Global Responsibility to Protect 250, 258.

[166] Annan K (Secretary-General), 'Address to the 2005 World Summit' (14 September 2005) <www.un.org/sg/statements/?nid=1669> accessed 17 July 2014.

prepared, and the State in question must *manifestly fail* to protect citizens from four specific crimes before intervention can take place.[167] This is far narrower than the RtoP envisaged by ICISS. Indeed, Kofi Annan stated that the 'Outcome Document 2005' was a 'glass half full'.[168] The differences between the subject matter contained in ICISS 2001 and the World Summit were confounded in the 'Implementing RtoP Report 2009',[169] which is considered in more depth later in this chapter. On the other hand, that is, on a positive note, the 'protection responsibilities of the State have come to include the whole population under its jurisdiction and not only to its citizens'.[170]

During the World Summit, the concept of RtoP was supported by: States that had 'suffered terrible atrocities' such as Bosnia, East Timor, Guatemala, Rwanda and Sierra Leone; some States from the global South, such as Chile and South Korea; and the entire West.[171] However China, Russia, India and a host of developing countries were reluctant to embrace the RtoP whole-heartedly.[172] In fact, Cuba, Nicaragua, Sudan and Venezuela sought to roll back their earlier consensus on RtoP.[173]

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[167] Outcome Document (n 150) para 139.

[168] In Larger Freedom (n 154) para 135; Annan K, 'A Glass at Least Half Full' (*Wall Street Journal*, 19 September 2005) <http://online.wsj.com/news/articles/SB112708454142944392> accessed 16 July 2014.

[169] Implementing RtoP Report 2009 (n 150).

[170] Zyberi (n 122) 513.

[171] Barnett and Weiss (n 158) 86.

[172] Hehir A, Kuhrt N and Mumford A (eds), *International Law, Security and Ethics: Policy Challenges in the Post 9/11 World* (Routledge, London 2011) 106.

[173] Barnett and Weiss (n 158) 86.

Venezuela outright rejected the 'Outcome Document 2005', in part, because it had specific concerns and questions about the practical limitations of RtoP, especially as regards its implementation. The representative stated:

> In accordance with the terms of the document, who is in a position to 'protect'? Who is in a position to send troops, thousands and thousands of miles away? Who has the financial resources? Who has the weapons and the logistics to conduct actions to 'protect' especially when this concept is related to the Human Rights Council? Would it be the case that the countries that have not ratified the international conventions regarding human rights not be part of the council? Would that mean that they are also not subject to intervention?[174]

These concerns reflect broader concerns within the international community on the inequality of sovereign States. It also suggests that we do not know which agent has the responsibility to undertake action against a State failing to protect its citizens. To this end, it is essential to consider the implementation of RtoP. What does it mean in practice?

iii) Ten Years of RtoP (2005- 2015): From 'Word to Deed'?

A common feature of the 'High-level Panel Report 2004', 'In Larger Freedom' and the 'Outcome Document 2005' is that they all presume a priority, indeed an exclusive competence, of the Security Council in determining when a

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[174] -, 'Draft Resolution: 2005 World Summit Outcome' (*Venezuela video,* 16 September 2005) <www.un.org/webcast/summit2005/statements.html> accessed 23 June 2014.

situation engages RtoP.[175] Some States including China, Russia, Algeria, the Philippines and Brazil thought that the General Assembly had only committed to deliberate on RtoP and that the Security Council would be premature to seize the matter.[176] Nevertheless, there is an operational challenge; how can the international community stop a government from killing its own civilians? It is argued that RtoP rules and language in diplomatic circles is not enough, as 'what matters most is to get the necessary political commitment right, in order to implement the RtoP guidelines'.[177] Moreover, implementation of RtoP requires considerable military deployment capacity.[178]

Since 2006 there has been a growing emphasis on the transition of RtoP from 'word to deed'.[179] Indeed, at the UN Torino Retreat 2008, RtoP was described as being in the early days of transition from theory to practice.[180] Nevertheless, despite the World Summit and the 'Implementing RtoP Report 2009', 'there is still no international consensus, not even among supporters of RtoP, on how to operationalize it'.[181] In fact, it took the Security Council six months after World Summit to endorse RtoP; Security Council Resolution 1674 of 2006 on

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[175] Stahn C, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 AJIL 99, 99-120.

[176] See also Security Council, 'Protection of Civilians in Armed Conflict' (9 December 2005) S/PV.5319, 10 and 19.

[177] Badescu (n 119) 45.

[178] High-level Panel 2004 (n 112) para 36.

[179] UN Secretary General, 'Remarks at a Stanley Foundation Conference on "Implementing Responsibility to Protect"' (*International Coalition for the Responsibility to Protect*, 15 January 2010) <www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/2712-ban-ki-moons-remarks-at-stanley-foundation-conference-on-implementing-the-responsibility-to-protect-stanley-foundation> accessed 25 June 2014.

[180] Address by Patricia O'Brien (n 113).

[181] Badescu (n 119) 146.

the protection of civilians in armed conflict endorses the RtoP populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[182] Despite previous inaction, however, Security Council Resolution 1706 of 2006 on the situation in Darfur also reaffirmed to the application of the RtoP, although it did so in the non-operative preamble.[183] China abstained to vote because Sudanese consent had not been secured.[184] It is argued, therefore, that despite the 'Outcome Document 2005', there remained inherent tensions within the traditional State-centric security paradigm and between Article 2(4) and 2(7) UN Charter. Nevertheless it was the first resolution to link RtoP to a particular conflict. The ICJ has also since endorsed RtoP.[185] There is also evidence that States are in favour of interlinking the concepts of human security and RtoP.[186] However, the Secretary-General is keen to maintain the distinction between the concept of RtoP and the protection of civilians.[187]

On 21 February 2008, Secretary General Ban Ki-moon appointed Edward Luck as a special advisor tasked with promoting RtoP. In the 'Implementing RtoP Report 2009' the Secretary-General proposed a three-pillar approach to RtoP:

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[182] UNSC Res 1674 (28 April 2006) Protection of Civilians in Armed Conflict para 4; See also UNSC Res 1894 (11 November 2009) Protection of Civilians in Armed Conflict.

[183] UNSC Res 1706 (31 August 2006) Situation in the Sudan, preamble.

[184] Bellamy (n 151) 28 ff.

[185] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 paras 425-50.

[186] Mr. Jandroković (Croatia): 'The concept of the responsibility to protect, as reflected in the 2005 World Summit Outcome Document (General Assembly resolution 60/1), represents an integral part of the protection of civilians agenda' (UN Doc S.PV.6216, 11); See also Ireland (UN Doc S/PV.6216, 18); Netherlands (UN Doc S/PV.6531 (Resumption 1), 23-25.

[187] Report of the Secretary General, 'Protection of Civilians in Armed Conflict' (22 May 2012) UN Doc S/2012/376 para 21; Report of the Secretary General, 'Responsibility to Protect: Timely and Decisive Response' (25 July 2012) UN Doc A/66/874-S/2012/578 para 16.

pillar one focus on the protection responsibilities of the State, pillar two on international assistance and capacity building and pillar three on a timely and decisive response by the international community.[188] This is to be substituted for the three-pillar structure contained in ICISS 2001. The 'Implementing RtoP Report 2009' leaves galvanisation of political will and creation of institutional structures to facilitate RtoP oriented policy making, to the General Assembly. The report also identifies a number of possible mechanisms that are available for the implementation of the RtoP. For example, international community assistance for capacity building and mediation, in situations where express consent is given and action will be consistent with the states sovereign right to make bilateral and multilateral agreements.[189] Moreover, the 'Implementing RtoP Report 2009' called for research into *why* States plunge into mass violence and called for State-to-State and region-to-region learning.[190] There have since been four 'informal interactive General Assembly dialogues' on different aspects of RtoP, followed up with Reports of the Secretary-General.[191]

The 'Responsibility to Protect: Timely and Decisive Response' explored pillar two in more depth. It states that 'the commitment to help States build capacity to protect their populations and to assist those which are under stress, before

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[188] Implementing RtoP 2009 (n 150) para 11.

[189] Mr. Valero Briceño (Bolivarian Republic of Venezuela) (14 September 2009) UN Doc A/63/PV.105, 3; UNGA, 'The Responsibility to Protect' (7 October 2009) Res 63/308 para 2.

[190] Implementing RtoP Report 2009 (n 150) para 15; On 7 October 2009, the General Assembly adopted a resolution to continue consideration of RtoP-A/Res/63/308 (n 189).

[191] Report of the Secretary General, 'Early Warning, Assessment and the Responsibility to Protect' (14 July 2010) UN Doc A/64/864; Report of the Secretary General, 'The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect' (27 June 2011) UN Doc A/65/877-S/2011/393; UN Doc A/66/874-S/2012/578 (n 187); A/67/929-S/2013/399 (n 120).

crises and conflicts break out- can also comprise elements of prevention and response, sometimes even at the same time'.[192] The Secretary-General was keen to emphasise the benefits of 'early engagement with the society and the Government under stress'.[193] In 'Early Warning, Assessment and the Responsibility to Protect' it was stated that 'getting the right assessment- both the situation on the ground and of the policy options available to the United Nations and to regional and sub regional partners- is essential for the effective, credible and sustainable implementation of the responsibility to protect'.[194] It is argued that, taken together, these statements could lead to the appointment of the ICRC in such roles. However, it is precluded from such by virtue of its fundamental principle, in particular, neutrality. Nevertheless, it is argued that RtoP is not completely distinct from the protection and assistance roles of the ICRC, perhaps, for the people on the ground; the work of the ICRC has a greater benefit in terms of prevention of conflicts.

What can and should the Security Council do in practice under RtoP? The Stanley Foundation, which opened with a speech from Secretary-General Ban Ki-Moon, suggested that the UN could establish an institutional home for RtoP so that the Secretary-General could develop and strengthen the implementation agenda by providing capacity to generate specific proposals related to implementation and the normalisation of RtoP throughout the UN system.[195] The 'Responsibility to Protect: Timely and Decisive Response' identifies the

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[192] A/66/874-S/2012/578 (n 187) para 12.

[193] ibid para 19.

[194] A/64/864 (n 191) para 19.

[195] Stanley Foundation, 'Implementing the Responsibility to Protect' (Conference Report, New York 15-17 January 2010) 22.

tools available for implementation, including mediation and preventive diplomacy, public advocacy, fact-finding missions and commissions of enquiry, monitoring and observer missions deployed under Chapter VI, a role for the ICC and universal, public reporting.[196] Not surprisingly, in this report, the ICRC is not identified as a 'partner' in the implementation of RtoP.[197]

In practice, therefore, what action has been undertaken under the guise of RtoP? The Secretary-General recognised that atrocity crimes, 'that are the direct consequence of the failure of States to take preventive action', exist in Côte d'Ivoire, the DRC, Kenya, Sri Lanka, the Sudan and the Syrian Arab Republic. [198] Moreover, 'the unacceptable suffering in the Syrian Arab Republic is a tragic reminder of the consequences when, in the first instance, the State, and subsequently, the international community, fail to fulfil their responsibilities in that regard'.[199]

The Libya conflict is the most recent and most high profile consideration of RtoP. Security Council Resolution 1970[200] and 1973[201] express grave concern on the use of violence and force against civilians, gross and systematic human rights violations and the plight of refugees. Both preambles reiterate the responsibility of the Libyan authorities to protect the Libyan population. On face value therefore, it appears that RtoP is part of the Security Council

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[196] A/RES/874-S/2012/578 (n 187) paras 22-30.

[197] ibid Section IV.

[198] ibid para 72.

[199] A/67/929-S/2013/399 (n 120) para 73.

[200] UNSC Res 1970 (26 February 2011) Peace and Security in Africa.

[201] UNSC Res 1973 (17 March 2011) The Situation in Libya.

reaction to situations of armed conflict. However, we know that Resolution 1973 was only adopted on that day, by ten votes to four, because Gadaffi was moving towards Benghazi threatening to kill civilians. Indeed, under paragraph four of Security Council Resolution 1973 force may be used to prevent attacks on towns and cities, whether those attacks are directed at civilians or even at what would be legitimate military targets. Akande stated that the resolution was really about stopping Gaddafi's forces from winning the civil war in Libya. To this end, the resolution goes beyond the intention of the RtoP doctrine. It is 'not just about stopping international crimes, it is about the restoration of peace, something closer to the original design of the Council (except that it is an internal conflict, which was not in the original design)'.[202] Situations following Libya saw the UN utilise 'protection of civilian' rhetoric and mandates.[203] Nevertheless RtoP language is still visible in Security Council resolutions, for example, in July 2014 the Security Council reaffirmed the 'primary responsibility of the Syrian authorities to protect the population in Syria'.[204]

It is pertinent to touch on the Brazilian proposal that RtoP should be considered as 'Responsibility while Protecting'. On 21 September 2011, Brazil's president Dilma Rousseff declared in a speech to the UN General Assembly: 'Much is said about the responsibility to protect; yet we hear little about the

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[202] Akande D, 'What Does UN Security Council Resolution 1973 Permit?' (*Eur J Intl L: Talk! Blog of the Eur J Intl L*, 23 March 2011) <www.ejiltalk.org/what-does-un-security-council-resolution-1973-permit/> accessed 23 June 2014.

[203] UNSC Res 2162 (25 June 2014) Côte d'Ivoire para 19(a); UNSC Res 1996 (8 July 2011) Reports of the Secretary-General on the Sudan para 15; UNSC Res 2155 (27 May 2014) Reports of the Secretary-General on the Sudan and South Sudan para 4(a).

[204] UNSC Res 2165 (14 July 2014) Syria.

responsibility in protecting. These are concepts that we must develop together'.[205] 'It seeks to strengthen the commitment to seek peaceful means of addressing grave threats to populations, and to enhance the accountability of those who use force, as a last resort, in the name of the United Nations'. However, this idea appears to have disappeared from the Brazilian and therefore international agenda.[206]

iv) Denial of ICRC Humanitarian Assistance: Cause for RtoP?

During the humanitarian crisis in Myanmar in 2007/8 humanitarian agencies wanted to send aid but the government wanted to distribute it itself so the humanitarian agencies stopped the aid.[207] The French Foreign Minister suggested that the Security Council should apply RtoP to this situation. Three ICISS members took part in the Security Council debate: one denied application of RtoP; one agreed this was an exact situation for RtoP and a third said that the situation was not yet serious enough for RtoP.[208] It is apparent therefore that the definition was not clear, even to the people who drafted ICISS 2001.

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[205] UNGA, 'Statement by HE Dilma Rousseff, President of the Federative Republic of Brazil, at the Opening of the General Debate of the 66th Session of the UN General Assembly' (21 September 2011); See also 'Annex to the Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, 'Responsibility while Protecting: Elements for the Development and Promotion of a Concept' (11 November 2011) UN Doc A/66/551-S/2011/701 para 11.

[206] Welsh J, Quinton-Brown P and MacDiarmid V, 'Brazil's "Responsibility While Protecting" Proposal: A Canadian Perspective' (12 July 2013) Canadian Centre for the Responsibility to Protect.

[207] International Coalition for the Responsibility to Protect, 'The Crisis in Burma' < http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-burma> accessed 9 March 2015.

[208] Kedzia D (United Nations High Commissioner for Refugees) 'Lecture 2' (19 July 2011) Hague Academy for Public International Law Summer Course.

In 'Responsibility to Protect: State Responsibility and Prevention' the promotion and protection of human rights is identified as a prevention mechanism to preclude the committal of 'atrocity crimes', that is, genocide, war crimes, ethnic cleansing and crimes against humanity.[209] The report identifies 'humanitarian institutions dedicated to the protection, inclusion and empowerment of vulnerable or excluded groups' as part of the infrastructure to promote and protect human rights.[210] It is argued that although the ICRC has a mandate to work with vulnerable groups, particularly the wounded, sick and civilians, it does so in order to protect and assist those people. It would be a stretch to argue that in these direct acts, it was able to prevent the committal of mass atrocity crimes, in particular, in its traditional roles, which only start once armed conflict begins. Nevertheless, it is proposed that in its more recently developed work in the area of economic security, it could, in fact, assist in the prevention of hostilities, or the recurrence of such. This proposition is given more careful consideration in chapter six.

In the final part of 'Responsibility to Protect: State Responsibility and Prevention', the Secretary-General states that the way forward includes identifying and forming partnerships with 'Member States, regional and sub-regional arrangements or civil society for technical assistance and capacity-building purposes, exchange of lessons learned and mobilization of resources'.[211] Perhaps, given its observer status at the General Assembly, it is

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[209] A/67/929-S/2013/399 (n 120).

[210] ibid para 49.

[211] ibid para 71(f).

possible that the ICRC be part of such partnerships, without, of course, compromising its fundamental principles.

It is argued that given the remote likelihood of RtoP being authorised by the Security Council, it is incredibly unlikely that denial of access of humanitarian assistance from the ICRC would be sufficient to inspire authorisation of military intervention to support such. Although, on paper, RtoP appears to be quintessentially grounded in the humanisation of international law and the expansion of a humanity-based concept of the international legal order, it remains flouted by political interests of States. This is evidence of the utility of the ICRC's principle of neutrality and its ability, as a humanitarian organisation, to continue to work in States where other organisations cannot. It is argued that there is evidence of a wider concept of humanity in international law, including human security and RtoP, the former of which will be explored chapter six and the case study, but ultimately the ICRC will remain outside of militaristic approaches to protection and assistance. Perhaps, if RtoP gains traction in the UN and the veto of resolutions authorising its use, for example in Syria, are put to bed, then denial of access of the ICRC might become a cause for RtoP, but currently the concept is not advanced enough for such developments.[212]

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[212] UNSC Res 612 (4 October 2011) Syria; UNSC 'Bahrain, Colombia, Egypt, France, Germany, Jordan, Kuwait, Libya, Morocco, Oman, Portugal, Qatar, Saudi Arabia, Togo, Tunisia, Turkey, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: Draft Resolution' (4 February 2012) UN Doc S/2012/77; Security Council Report, 'France, Germany, Portugal, United Kingdom of Great Britain and Northern Ireland and United States of America: Draft Resolution' (19 July 2012) UN Doc S/2012/538.

f) Conclusion to Chapter Five

This chapter has shown that the concept of security has changed. Whilst State sovereignty, that is the Westphalian model of the international legal order, remains relevant, the type of threats to these States and the people living within them has expanded. Security discourse nowadays includes recognition that a government is a potential threat to its people. As such, the sovereignty as responsibility concept provided a turning point in the progressive inclusion of humanitarian concerns in a historically State-centric international legal order. It showed that States have a responsibility to their own people.

The ICRC has always recognised the centrality of human beings and has built upon its historical experiences with soldiers, prisoners of war and the shipwrecked. It has been necessary for the ICRC to increase its protection and assistance activities in light of the protracted nature of conflicts, particularly NIACs. These types of conflicts create situations whereby the needs of the civilian population are ongoing and the threats to security include those to food, health and the economy. There are also threats to personal, community, and political and environmental security. To this end, ICRC protection and assistance roles have expanded to include economic security.

The UNDP concept of human security, published twenty years ago in 1994, has undergone various studies and formulations. Human security itself does not have a legal framework, but it does now have an agreed definition. The 'Common Understanding Resolution' provided an opportunity to make human security an underlying principle of international law. General Assembly consensus arguably made it a soft law, or perhaps evidence of *opinio juris* and State practice. However 'Common Understanding Resolution' paragraph 4(h)

shows State sovereignty remains a limiting factor in the pursuit of human security. It is argued therefore that, for now, the publication and agreement on the 'Common Understanding' of human security marks the end of the progressive realisation of human security as law.

Fortunately human security has links, in a human-centric sense, to existing legal frameworks including IHRL and IHL. Moreover it has links to development, as threats to security are recognised as needing more long terms solutions, in particular, economic growth. If human security is to have any real meaning for people on the ground, we have to look past State sovereignty and territorial integrity. We cannot do so in a legal vacuum otherwise human security is reduced to rhetoric only. To this end, it was shown that economic, social and cultural rights are increasingly relevant to analysis of the real life impact of human security. By drawing analogies between the different legal frameworks this part of the thesis has shown that the ICRC has the potential to be a legitimate actor in the establishment of human security, as its humanitarian protection and assistance activities overlap with human rights. Although, in terms of law, it might be beyond its mandate, which is the issue to be considered in chapter six and the case study.

6) CHAPTER SIX: QUALITATIVE ANALYSIS APPRAISING THE ICRC'S ADHERENCE TO ITS MANDATE AND 'HUMANITY'

a) Introduction

This thesis has shown that there is progression within the international legal order to a human-centric concept of security, that is inward looking, which allows international organisations to reach out to people within sovereign States. Whilst the ICRC has always had such an outlook, its changing role, beyond or overreaching strict interpretation of its protection and assistance mandate, is entering unchartered territory. This thesis introduced the economic security roles of the ICRC in chapter four and now turns to consider these newer roles of the ICRC in practical terms. What is the ICRC doing on the ground nowadays? Will States or NSAs with whom the ICRC has built a dialogue revoke their consent? This part of the thesis will use academic literature and interviews, with ICRC delegates in its Geneva based headquarters, to consider the protection and assistance roles of the ICRC and to what extent they depart from the Geneva Conventions I, II, III and IV 1949 and the Statutes of the ICRC.

In an interview at the ICRC in Geneva this Author was told that the ICRC tries to avoid the perception that it is an organisation 'stuck in a certain mandate' because its ultimate focus is to tend to 'people facing challenges in their daily lives'.[1] To this end, the interviewee stated, the ICRC will work to address this need, even if people say 'this is not your mandate'.[2] The same interviewee admitted that it is necessary, 'not to try to put every action of every

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[1] INTERVIEW 001.

[2] INTERVIEW 001.

organisation in a certain box because people who are living on the ground, they don't care about the box, they care about the problems and the way they will be able to feed their families'.[3] The ICRC cannot turn away from victims and say, 'I'm sorry but you're not in the legal frame.'[4] These statements are evidence that for ICRC delegates, human-centricity, perhaps even human security, is at the heart of their protection and assistance roles. For this Author, they are also evidence, or suggestions, that the ICRC has lost sight of its core functions, as discussed in chapter one.

This chapter argues that as conflicts and situations of violence have changed, so too has the role of the ICRC. Human insecurity permeates societies emerging from conflict, resulting in lack of resources and threats to physical and economic security. It also considers whether it compromises its neutrality and independence to the extent that its value as a humanitarian actor is challenged. Can it benefit the people on the ground? Who is really advancing local populations security and sustainable peace?

b) Assessing the Current Roles of the ICRC against its Mandate

This chapter focuses on the protection and assistance activities of the ICRC, in particular, respect for the law; humanitarian diplomacy; the provision of food, health care, shelter and water; economic security and the prevention of armed conflicts. These topics are the focus of this qualitative analysis because they are the areas that interviewees talked about most and provide the most controversial and interesting areas of work. There is existing literature on the

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[3] INTERVIEW 001.

[4] INTERVIEW 001.

more traditional roles of the ICRC, such as visiting prisoners of war and medical assistance on the battlefield.

The methodology of the interviews was provided in the introduction. In summary, to contextualise this chapter, five interviews were undertaken with ICRC delegates based in Geneva, Switzerland. The recruitment of interviewees employed a snowball sampling technique, which allowed this Author to use one or two contacts to reach other interviewees. The sample size is small but the interviews provided sufficient information on the protection and assistance roles of the ICRC today. In addition, access to five delegates with experience in the field and a willingness to be interviewed for thesis research was a positive outcome.

i) *Building Respect for the Law and Humanitarian Diplomacy*

The ICRC 'offers its expertise and practical experience of conflicts to help governments meet their responsibilities by passing legislation, training the armed forces and the police and promoting international humanitarian law at universities and among young people'.[5] It undertakes this role through its Advisory Service. The ICRC's humanitarian diplomacy:

> Comprises developing a network of close bilateral or multilateral, official or informal relations with the protagonists of armed conflicts and disturbances, and with any other State, non-State actor or influential agent, in order to foster heightened awareness of the plight

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[5] ICRC, 'Building Respect for the Law' (1 May 2011) <https://www.icrc.org/eng/what-we-do/building-respect-ihl/overview-building-respect-ihl.htm> accessed 9 March 2015.

of victims of armed conflicts, support for the ICRC's humanitarian action and respect for humanitarian law. The ICRC's humanitarian diplomacy consists chiefly in making the voices of the victims of armed conflicts and disturbances heard, in negotiating humanitarian agreements with international or national players, in acting as a neutral intermediary between them and in helping to prepare and ensure respect for humanitarian law.[6]

Another key role of the ICRC is to establish a dialogue with local people who were present in the State before and after the conflict. They know the root causes of the conflict and can see whether tensions still run high. They also know what actions could stop a conflict recurring. Security concerns differ from conflict to conflict and therefore local people can identify specific actions that will bring security and identify whether the focus should be on freedom from fear or freedom from want. This chapter shows that the significant benefit of ICRC involvement is that it is able to successfully reach individuals and local communities. It is argued that within wider literature on access to vulnerable populations the concept of local ownership lends itself to consideration of the protection and assistance work of the ICRC.

Local ownership can be defined as a process where the solutions to a particular society's needs are developed in concert with the people who are going to live

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[6] Harrof-Tavel M, 'The Humanitarian Diplomacy of the International Committee of the Red Cross' < https://www.icrc.org/eng/assets/files/other/humanitarian-diplomacy-icrc.pdf> accessed 9 March 2015. The original of this article was published in French in (2005) 121 Relations Internationales 72-89.

with, and uphold, these solutions in the long run.[7] Accordingly, peace must be built simultaneously from the top-down, bottom-up and middle out.[8] In situations following armed conflicts, local people develop their 'own strategies to cope with the debilitating circumstances of post-war spaces; living life at the level of the "everyday", local people have shaped peace through cooperative activity and enterprising endeavours involving significant degrees of agency often overlooked by external peace builders'.[9] Moreover, Pouligny argues that:

> Whatever is done, on the ground, locally, on the streets and in the apartment blocks and villages, some form of regularised social interaction will begin to emerge, whether imposed or not. This is community, not as utopian or communitarian goal, but community in reality.[10]

It is argued that 'bottom-up approaches', which engage in dialogue and engagement with individual community members, understand 'identity, ideas, [and] knowledge' and can therefore deliver genuine human security.[11] Local ownership can and should be context-specific, that is, 'determined by and

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[7] Hansen A and Wiharta S, 'The Transition to a Just Order: Establishing Local Ownership After Conflict, A Policy Report' (Folke Bernadotte Academy, 2007) x.

[8] Lederach, JP, 'Civil Society and Reconciliation' in Crocker CA, Hampson FO and Aall P, *Turbulent Peace*, *The Challenges of Managing International Conflict* (Institute of Peace, Washington DC 2001) 843.

[9] Richmond O, 'Resistance and Post-liberal Peace' (2010) 38 Millennium J of Intl Studies 665, 665-92.

[10] Pouligny B, 'Local Ownership' in Chetail V (ed), *Post-conflict Peace Building: A Lexicon* (OUP 2009) 179-180.

[11] Conteh-Morgan E, 'Peace Building and Human Security: A Constructivist Perspective' (2005) 10(1) Intl J of Peace Studies 69, 72.

tailored to the diversity of political, social, and economic factors'.[12] Oxfam reported, for example, that in Afghanistan 'land and water cause disputes. As do family and tribal affiliations and with arms widely available the disagreements can easily escalate and flare into violence'.[13] Indeed, the issue of the availability of arms in post-conflict situations is regularly referred to as an issue perpetuating local insecurity.[14] It is these context specific dilemmas that require local knowledge from international organisation and NGOs, in addition to local ownership to create sustainable peace.

The local community incorporates Civil Society Organisations, such as trade unions; business associations; faith-based organisations; issue specific advocacy coalitions; and, other organisational forms and domestic actors. All of which are essential for the establishment of sustainable peace. The idea of 'local' has many definitions, for Anderson and Olsen there is a distinction between insiders and outsiders. They define insiders as:

> Those vulnerable to the conflict, because they are from the area and living there, or people who in some other way must experience the conflict and live with its consequences personally, [… Outsiders are

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[12] Boyce W, Koros M and Hodgson J, ' Community Based Rehabilitation: A Strategy for Peace-building' (2002) BMC Intl Health and Human Rights 216 in Pouligny in Chetail (n 10) 181.

[13] Oxfam, 'Local Peace Building Urgently Needed to Reduce Insecurity in Afghanistan' (27 February 2008).

[14] McEvoy C and Murray R, 'Gauging Fear and Insecurity: Perspectives on Armed Violence in Eastern Equatoria and Turkana North' (Small Arms Survey, Graduate Institute of International and Development Studies, Geneva 2008) 22-28; Rolandsen OH, 'Land, Security and Peace Building in the Southern Sudan' (PRIO Paper, International Peace Research Institute, Oslo, December 2009) 2 and 13; See also Waldman M, 'Community Peace Building in Afghanistan: The Case for a National Strategy' (Oxfam International Research Report, February 2008).

those] who choose to become involved in a conflict [and who] have personally little to lose'.[15]

Lederach argued that local people must not automatically be seen as the problem and the outsider as the answer.[16] These distinctions are important when analysing the work of the ICRC, as it is important to note whether it engages with local people or civil society organisations. Is the ICRC able to facilitate local ownership?

Before an intervention, therefore, all the international players, including the ICRC, need to ask themselves the following questions: In what way and to what extent the intervention help to achieve the objectives of peace and security? In what way will the conflict impact on the intervention? In what way will the intervention influence the conflict dynamics? Can external actors ever really understand the conflict and what it will take to build sustainable peace in that specific context? These questions are posed to recognise the dynamics between international actors and the local population.

It is possible that on initial intervention outsiders could actually exacerbate local insecurity. When international actors enter States, often in their hundreds and thousands, they occupy space no longer available to local actors. They may also often have a detrimental effect on local economies, as they create, 'large increases in salaries, prices in the stores, and house rents- impeding local

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[15] Anderson M and Olsen L, *Confronting War: Critical Lessons for Peace Practitioners* (The Collaborative for Development Action Inc, Cambridge 2003) 32.

[16] Lederach JP, *Preparing for Peace: Conflict Transformation Across Cultures* (Syracuse UP, New York 1995) 212.

organizations from functioning properly'.[17] The international actors work away from their 'normal' life and enter into an environment, rife with prejudices and insecurity. In these circumstances international actors may fail to ascertain, let alone address, grievances and problems and therefore long-term security remains elusive.[18] Can the ICRC overcome such limits to truly protect and assist local people?

This is not to say that local ownership is a catchall solution, which would bring sustainable peace to every situation. The problem is that in some conflicts, for example Afghanistan, local actors, in this case the Taliban, have increasingly filled the void left by bureaucratic, duplicated and inefficient international efforts to build police, courts and institutions at the State level.[19] The Taliban came in at the grassroots level and took over the functions of security, mediation, dispute resolution and community policing.[20] Whilst doing so, they also brought the poppy to the Afghan farmer which fuels a narcotics trafficking infrastructure, which, in turn, dilapidates the security and economic progress of local Afghans.[21]

It is argued that the emphasis should be on international actors to make themselves aware of and work with people on the ground, including political,

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[17] Pouligny in Chetail (n 10) 182.

[18] Truger A, 'Operationalisation through Training: Human Security Training and Education for Peace Building' in Benedek W, Ketteman MC and Möstl M (eds), *Mainstreaming Human Security in Peace Operations and Crisis Management: Policies, Problems, Potential* (Routledge, London 2011) 126.

[19] Kilcullen DJ, 'Deiokes and the Taliban: Local Governance, Bottom-up State Formation and the Rule of Law in Counterinsurgency' in Mason W, *The Rule of Law in Afghanistan: Missing in Inaction* (CUP 2011) 44-45.

[20] ibid.

[21] ibid.

military, economic actors and members of the indigenous 'civil society'.[22] However it is recognised that grass root stakeholders are often excluded from efforts to recover from conflict, as they are 'consulted only as a predetermined template for reform, often mere observers of the process'.[23] This may be, in part, because of a lack of understanding of the situation by outsiders and an assumption that international intervention, in particular for the purposes of democratisation and the establishment of the rule of law, will ensure post-conflict peace and security. The concern is that outsiders, in particular the UN, only reflect their own principles, interests, and priorities.[24] The priorities of the local community are different from international actors. Pouligny argues that in rural villages and city neighbourhoods, Disarmament, Demobilisation and Reintegration, reintegration of former combatants into civil society and return and reintegration of displaced people and refugees are generally the top priorities in which local communities ask for empowerment but so far, with very few exceptions, this has not been put into practice.[25] Furthermore, because they intervene in an unknown, often still highly insecure environment, outsiders tend to actually collaborate with other outsiders, in a largely closed

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[22] Report of the Secretary General, 'No Exit without Strategy: Security Council Decision-making and the Closure or Transition of United Nations Peacekeeping Operations' (20 April 2001) UN Doc S/2001/ 394 (No Exit Without Strategy) para 10-12; Orr R, 'Governing When Chaos Rules: Enhancing Governance and Participation' (2002) 25(4) The Washington Q 140, 140; Keating T and Knight A (eds), *Building Sustainable Peace* (UN UP, 2004) xxxi; Lemay-Hebert N, 'The "Empty-Shell" Approach: The Setup Process of International Administrations in Timor-Leste and Kosovo, Its Consequences and Lessons' (2011) 12 Intl Studies Perspectives 190, 190-211.

[23] Cubitt C, *Local and Global Dynamics of Peace Building: Post-conflict Reconstruction in Sierra Leone* (Routledge, Oxon 2011) 58; Pouligny in Chetail (n 10) 176.

[24] Pouligny in Chetail (n 10) 177; See also Curtis D, 'The International Peace building Paradox: Power Sharing and Post-Conflict Governance in Burundi' (2012) African Affairs 72, 72-91.

[25] Pouligny in Chetail (n 10) 177.

circle, partially isolated from the 'real world'.[26] Autesserre notes that international agencies tend to recruit staff on the basis of their technical expertise. There are many situations therefore when 'newly hired staff members benefit, at best, from a few days briefing on the country. Most interveners therefore lack reliable information on current events'.[27] With these tensions between international organisations and local actors in mind, it is argued again that a middle ground needs to be established.

In light of this analysis, the chapter now turns to consider the interview data collected, as regards local ownership established by ICRC involvement. When asked about the issue of lack of local knowledge, the interviewees were keen to convey that ICRC delegates are well prepared before they are deployed to conflict areas. When pushed on this matter, however, it was admitted that, because the ICRC has been present for many years in some conflicts, in particular the DRC, then the training is rather brief as the assumption is that the ICRC delegate will understand the situation on the ground.[28] It seems therefore, that the continuing presence of the ICRC on the ground is important to local people. However, the people working for the ICRC are not automatically experienced in the specific conflict to which they have been deployed. It is argued that this impacts on the ability of delegates to bring the best protection and assistance to people on the ground from their first day.[29]

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[26] Pouligny B, 'Civil Society and Post-Conflict Peace Building: Ambiguities of International Programmes Aimed at Building 'New Societies'' (2005) 36(4) Security Dialogue 495, 501.

[27] Autesserre S, 'Dangerous Tales: Dominant Narratives on the Congo and their Unintended Consequences' (2012) 111/443 African Affairs 202, 208.

[28] INTERVIEW 002.

[29] INTERVIEW 002.

If we return briefly to the analysis in chapter one, it is argued that the ICRC benefits from its relationship with other components of the IRCRCM. It is argued, in particular, that National Societies greatly benefit the local impact of ICRC protection and assistance work, due to their proximity to armed conflict and issues pertaining to human insecurity. The ICRC works with National Societies when re-establishing family links of people displaced during military operations. This can include 'repatriation, family reunification, and sometimes cross border family reunification'.[30] Interviewees frequently referred to the relationship between the ICRC and the National Societies, creating the impression formed that the National Societies are relied upon, or perhaps used, more frequently than ICRC website information suggests.[31] One interviewee stated that the National Societies 'network and number of volunteers scattered throughout the country is huge and allows to reach out a lot of families... when it comes to cross border issues [the ICRC] will engage the national societies on both sides'.[32] It also became apparent in an interview at the ICRC that the UN also engages with the National Societies of the Red Cross.[33] The ICRC therefore interacts and works with communities and individuals on the ground to try and bring protection and assistance to those in need.

The analysis so far brings us to the question of to what extent the ICRC approach to protection and assistance nowadays can actually contribute to human security. Interviewees at the ICRC recognised the potential for the

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[30] INTERVIEW 001.

[31] INTERVIEW 002; INTERVIEW 003; INTERVIEW 004.

[32] INTERVIEW 001.

[33] INTERVIEW 002.

ICRC to contribute to human security.[34] Specific examples included food security and physical security, as some of the protection activities can help to prevent people being attacked. The ICRC is 'trying to build an environment that is safer for the people. In that sense maybe it's something that's at the junction of the concepts'.[35] The first thing the ICRC does when it arrives in an area is to 'have a discussion with the community to understand what is their perception of the problem is'.[36] This is to ensure that projects are not wholly designed elsewhere, which is a mistake that the ICRC and others have made in the past.[37] If an organisation is offering to help a community in an area suffering conflict or in the post-conflict stage then the community will say 'yes' to everything.[38] The ICRC has to think about the long-term sustainability of projects, for example, if it agrees with a community to restart agriculture in a volatile environment then you can be sure that the farmers will flee when fighting restarts.[39]

The ICRC therefore has to engage with local people, but maintain perspective of the bigger picture. In some cases, for example, the local community will ask the ICRC to prioritise healthcare. This will require thinking about not only the building to provide primary healthcare but also the recruitment and salary of doctors and healthcare professionals, this requires a Ministry of Health and the

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[34] INTERVIEW 001; INTERVIEW 002; INTERVIEW 003; INTERVIEW 004; INTERVIEW 005.

[35] INTERVIEW 002.

[36] INTERVIEW 001.

[37] INTERVIEW 001.

[38] INTERVIEW 001.

[39] INTERVIEW 001.

provision of healthcare plans for entire communities.[40] This analysis leads to the question of whether the ICRC is demand led. From analysis of the interviews it is argued that the ICRC protection and assistance mandate is very much tied into the 'needs' of local communities, not just strict interpretation of the activities included in the Geneva Conventions I, II, III and IV 1949 and Statutes of the ICRC. The ICRC will develop projects in light of the specific situations on the ground. This Author argues that for traditional roles of the ICRC, such as visiting detainees and provision of medical assistance, and so on, the ICRC will embark on such activities by virtue of provisions contained in the Geneva Conventions I, II, III and IV 1949 and Statutes of the ICRC. It is argued that for more recent developments in its roles, such as economic security, the ICRC delegates are more flexible in their responses to the situation on the ground. Perhaps this is because the ICRC is embarking on a relatively new area of work, or perhaps this is because the ICRC recognises that local ownership is essential for projects to gain traction on the ground in fragile communities. The ICRC also engages with local communities to determine the needs within it.

One interviewee was keen to emphasise the importance of including local populations in the economic security projects on the ground.[41] The interviewee argued that a wholly top down approach includes so many stakeholders that the average people on the ground rarely feel the benefits; in some cases they don't even understand what is happening. The interviewee stated that 'if there is not a sense of ownership within the community, then it is doomed to fail. I am

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[40] INTERVIEW 001.

[41] INTERVIEW 001.

pretty sure about that'.[42] However, another interviewee explained that the EcoSec Unit is more of an aid to the assistance department more broadly and that its work is the first to scale down and withdraw from a situation.[43] Nevertheless, it is important, in this period of time, to help people to get their heads above the waterline, which is already good for the population.[44] The intention of the ICRC is 'to be as close as possible to the field… to get its own understanding of what is going on'.[45] This is only possible if it retains the capacity, logistics and dialogue with all actors on the ground. These are essential to discover where needs are going unmet, in part, because other actors are unable to intervene. These issues affect where the ICRC work; it has purposely chosen, for example, not to be involved in Internally Displaced Person (IDP) camps because as soon as there are settlements close to urban settings there are a huge number of organisations willing to work there.[46] Moreover, it is pertinent to retain contact with groups in need as if the ICRC reaches a community and decides to engage in programmes then there are essential follow-up activities.[47] Once again, therefore, it must be questioned whether the ICRC is demand led.

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[42] INTERVIEW 001.

[43] INTERVIEW 005.

[44] INTERVIEW 001.

[45] INTERVIEW 001.

[46] INTERVIEW 001.

[47] INTERVIEW 001.

ii) *Food, Health, Shelter and Water*[48]

Under Article 25 (1) UDHR 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food'. This is reasserted in Article 11(1) ICESCR which states that States 'will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent'. Article 18(2) Additional Protocol II states that:

> If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

Sivakumaran states that the 'customary norm has been framed along different lines', namely that '[t] he parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction to their right of control'.[49]

The 'HDR 1994' stated that:

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[48] For key information on current ICRC budgets and expenditure in these areas see the ICRC Annual Reports. The most recent report is 2013- correct at 9 March 2015.

[49] Sivakumaran S, *The Law of Non-International Armed Conflict* (OUP 2012) 330.

Food security means that all people at all times have both physical and economic access to basic food. This requires not just enough food to go around, it requires that people have ready access to food- that they have an "entitlement" to food, by growing it for themselves, by buying it or by taking advantage of a public food distribution system.[50]

The CESCR recognises that in the case of the right to food, the obligation is to 'take the necessary action to mitigate and alleviate hunger … even in times of natural or other disasters.'[51] To this end, the minimum core that must be reached is that States must ensure their citizens are 'free from hunger, aiming to prevent starvation'.[52] The right to water provides that priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.[53]

Barber states that violations of the minimum core obligations as regards the right to food include 'hijacking of food convoys, demands for extortion, the holding up in customs of food intended for distribution to the civilian population, or any other form of harassment or restriction imposed on

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[50] HDR (n 33) 27.

[51] CESCR, 'General Comment 12: The Right to Adequate Food' (12 May 1999) UN Doc E/C.12/1999/5 para 15.

[52] CESCR, 'General Comment 3 on the Nature of States Parties' Obligations (art.2 para.1 of the Covenant)' (14 December 1990) UN Doc E/1991/23/ E/C.12/1990/8 para 10.

[53] CESCR, 'General Comment 15: The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' (20 January 2003) UN Doc E/C.12/2002/11 para 6; See also World Summit on Sustainable Development, 'Plan of Implementation 2002' (4 September 2002) A/CONF.199/20 para 25 (c).

international agencies engaged in food or nutrition programmes'.[54] For the ICRC, 'food security has to be considered primarily at the individual and household levels, since conflicts affect individuals and households before adversely affecting the whole country'.[55] In situations of food shortages, people will channel their resources into obtaining food and other essential items, including medicines, clothes and shelter. The ICRC provides support for these coping mechanisms. It continues to be involved in distribution of food and non-food relief, establishing public kitchens and setting up emergency water and environmental health facilities. These roles have expanded to include activities such as agricultural, veterinary and fishery programmes; general food distribution as a back up until the next harvest; small-scale credit programmes and 'food-and-cash-for-work programmes'.[56] These activities will be explored further in chapter six and the case study, which examine the expanding roles of the ICRC, to include assistance projects that facilitate farming and other ongoing food projects. In Central African Republic, for example, 'thanks to ICRC-provided disease-resistant cassava cuttings and financial support, 24 farming groups (1982 people/ 389 households) in Birao and Zemio grew healthy cassava plants and supplied other farmers with disease-resistant cuttings'.[57] Moreover in the DRC, 'some 4200 farming households grew disease- resistant cassava and distributed the cuttings or provided seed to 7835

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[54] Barber R, 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law' (2009) 91 IRRC 371, 394.

[55] 'World Food Summit: Food Security in Armed Conflicts-The ICRC's Approach and Experience' <www.icrc.org/eng/resources/documents/misc/57jncy.htm> accessed 14 July 2014.

[56] ibid.

[57] ICRC, 'Annual Report 2013' < https://www.icrc.org/eng/assets/files/annual-report/icrc-annual-report-2013.pdf> accessed 9 March 2015.

other households, thus varying their diet and at least doubling their productivity'.[58]

Chapter one of this thesis briefly recalled the experiences of Henry Dunant in the aftermath of the Battle of Solferino, his experiences of the wounded soldiers inspired the establishment of the ICRC. Nowadays, provisions in the Geneva Conventions I, II, III and IV 1949 provide the mandate for the ICRC to be involved in the provision of health care to those in need.[59] Health security is also recognised in the 'HDR 1994'. Threats to health security include infectious diseases arising resulting from poor nutrition and an unsafe environment. These pose a greater risk to the poor, women and children. It is argued that Article 25 UDHR, as above, seeks to protect the right to health. It is also included in Article 12 ICESCR.[60] A lack of available national healthcare facilities, especially primary care and mental health services is an issue for many post-conflict States.[61] The ICRC is currently embarked upon a 'Health Care in Danger' project, which 'is an ICRC-led project of the Red Cross and

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[58] ibid.

[59] Geneva Convention IV arts 14-22; Additional Protocol I arts 8 and 12-15; Additional Protocol II art 7, 8 and 11(1).

[60] CESCR, 'General Comment 14 on the Right to the Highest Attainable Standard of Health (art. 12)' (11 August 2000) UN Doc E/C.12/2000/4 explored the core obligations as regards the right to health. They include-a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups; b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone; c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs; and finally, e) To ensure equitable distribution of all health facilities, goods and services.

[61] Concluding Obervations of the Committee on Economic, Social and Cultural Rights: Croatia (5 December 2001) UN Doc E/C.12/1/Add.73 para 34; Serbia and Montenegro (23 June 2005) UN Doc E/C.12/1/Add.108 paras 33-36, 60-63; Cambodia (12 June 2009) UN Doc E/C.12/KHM/CO/1 paras 32-33; Democratic Republic of Congo (16 December 2009) UN Doc E/C.12/COD/CO/4 para 34; Afghanistan (7 June 2010) UN Doc E/C.12/AFG/CO/2-4 paras 40-42; CESCR, 'Concluding Observations on the Second to Fourth Periodic Report of Rwanda, adopted by the Committee at its Fiftieth Session (29 April-17 May 2013)' (10 June 2013) UN Doc E/C.12/RWA/CO/2-4 para 25.

Red Crescent Movement scheduled to run from 2012 to 2015 and aimed at improving the efficiency and delivery of effective and impartial health care in armed conflict and other emergencies'.[62]

iii) Economic Security

The ICRC defines economic security programmes as 'designed to ensure that households and communities have access to the services and resources required to meet their essential economic needs, as defined by their physical condition and social and cultural environment'.[63] In practice, this translates into three different types of intervention, relief, production and structural. Relief interventions are designed to protect lives and livelihoods by providing people in need with the goods and/or services essential for their survival when they can no longer obtain them through their own means. This includes access to food, such as ensuring adequacy and stability of access, availability of food, economic activities, household assets, market, food aid, cultural standards, nutritional status; access to essential household items, including the availability of essential household items, household assets and economic activities, material aid, climate, shelter conditions, clothing, living conditions, hygiene, water storage, cooking capacity and access to means of production, for example, seed, tools, availability of land, land tenure, job market, land cultivated, yield.

Production interventions aim to protect or enhance a household or community's asset base – its means of production – so that it can maintain or

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[62] ICRC, 'Health Care in Danger' <www.icrc.org/eng/what-we-do/safeguarding-health-care/solution/2013-04-26-hcid-health-care-in-danger-project.htm> accessed 15 July 2014.

[63] ICRC Annual Report 2013 (n 57).

recover its livelihood. This could mean increasing food production capacity, for example, by increasing the availability of land, access to means of production such as land, seed, tools or animals, seasons, harvest, animal health, livestock management, training, market and consumption of own product. It may also entail the ICRC improving processes and institutional capacity. This may include looking at the existence of services, type of service, quality of services, appropriateness of services, deployment capacity, political will and security. Finally, structural support, aims to improve processes and institutions that have a direct influence on a target population's lives and livelihoods, such as agricultural or livestock services.[64]

Economic security refers to an assured basic income, threats to which include unemployment, temporary work, precarious employment, self-employment, low and insecure income.[65] The CESCR is concerned with unemployment levels in many 'post-conflict' States, including Croatia, Serbia and Montenegro, Cambodia and Rwanda.[66] The inability to ensure economic security can also be linked to the need for education[67] and 'the right to live somewhere in security,

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[64] ibid 29.

[65] This is echoed in UDHR art 17 (right to property), 23 (right to work), 24 (right to leisure), 26 (right to education); ICESCR art 6 (right to work), 7 (just work conditions), 8 (right to form trade unions, strike), 9 (right to social security), 10 (protection of the family), 13-14 (right to education); See also CESCR, 'General Comment 13: The Right to Education' (8 December 1999) UN Doc E/C.12/1999/10 para 57.

[66] Croatia Report (n 61) paras 12, 23 and 32; Serbia and Montenegro Report (n 61) paras 16-17; DRC Report (n 61) para 21; Cambodia Report (n 61) paras 21 and 39; Rwanda Report (n 61) para 12.

[67] Under ICESCR art 13(2)(a) compulsory primary education shall be free of charge for all. See also CESCR, 'General Comment 11: Plans of Action for Primary Education' (10 May 1999) UN Doc E/C.12/1999/4 para; General Comment 13 (n 65) para 57; DRC Report (n 61) para 35; Cambodia Report (n 61) para 34; Afghanistan Report (n 61) para 43.

peace and dignity'.[68] Economic insecurity is therefore recognised as a threat to people. It is argued that sovereignty as responsibility and human rights guarantees, even 'minimum core' obligations, cannot ensure economic security. It is important therefore to look elsewhere to guarantee the human security of people on the ground, for example, to the ICRC.

It is important to highlight the links between economic security and development, not least because each is beyond the scope of a strict interpretation of the ICRC mandate. The 1994 HDR crucially linked human security with development and stated that progress in one-area leads to progress in the other. This section does not delve into grandiose development or economic theories, but it provides an analysis of the 'triangle' of security, development and human rights. It is argued that economic security facilitates constructive relationships between people and can feed into other aspects of human security. The human rights described in relation to economic security have inherent links to development. The extent to which the ICRC can help to establish economic security is considered below. The analysis reflects upon the mandate of the ICRC in the Geneva Conventions I, II, III and IV 1949 and the Statutes of the ICRC and the potential conflicts in undertaking such activities could have with its fundamental principles.

Human development is a process of widening the range of choices people have about the way they live their lives and the opportunities afforded to them. To this end, the Commission on Human Security argues that human security and

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[68] CESCR, 'General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)' (13 December 1991) UN Doc E/1992/23 para 7.

human development 'look out on shared goals but with different scope'.[69] However a 'more secure world' is only possible if poor countries are given a real chance to develop. The 'High-level Panel Report 2004' recognised that extreme poverty and infectious diseases, for example, threaten many people directly, but they also provide a fertile breeding-ground for other threats, including civil conflict.[70] In the days following the publication of 'In Larger Freedom', Kofi-Annan published an article in the *Financial Times* identifying what he saw as the crucial focus of the time as regards security, human rights and development. Annan argued that the UN founders knew that development could only occur within freedom and that political freedom is only available once people have a fair chance of reaching decent living standards. He also argued that the illustrious 'larger freedom' embraces freedom from war and violence and the realisation of your fundamental rights and dignity in law.[71] To this end, human security recognises the conditions that preclude survival, the continuation of daily life and the dignity of human beings.[72]

The traditional understanding of development was that economic growth, that is, increases in Gross National Product, was sufficient to benefit a population. Over time this assessment came to include socio-economic indicators, such as employment. The Organisation for Economic Co-operation and Development (OECD) recognised that a myriad of deficiencies preclude socio-economic

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[69] Commission on Human Security, *Human Security Now* (UN Publications, New York 2003) 10.

[70] High Level Panel 2004 (n 17) viii.

[71] Annan K, 'An Aspiration to a Larger Freedom' *(Op ed, Financial Times, London,* 21 March 2005*)* <www.ft.com/cms/s/1/b5922726-996e-11d9-ae69-00000e2511c8.html#axzz35abROfzw> accessed 24 June 2014.

[72] Human Security Now (n 69) 10.

development including weak governance, bad policies, human rights abuses, conflicts, natural disasters and other external shocks. A number of factors compound socio-economic deficiencies, including the spread of HIV/ AIDS, the failure to address inequalities in income, education and access to healthcare, the inequalities between men and women and finally poverty all compound socio-economic deficiencies.[73]

The progression to 'human development' means that individuals are viewed as subjects, not just objects. Likewise, human security places 'people's well-being as the ultimate end goal and proposed that development was not for increasing capital but for advancing peoples choices, to give them freedom'.[74] Development is about more than income; it's about greater access to knowledge, better nutrition and health services, more secure livelihoods, security against crime and physical violence, satisfying leisure hours, political and cultural freedoms, the sense of participation in community activities, and ultimately, self-respect and dignity. All of which echoes the sentiments of human security, IHRL and IHL. For the UN, therefore, 'the real test, to a growing global population demanding a life of dignity, is the degree to which they are able to enjoy freedom from fear and want, without discrimination'.[75]

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[73] OECD Development Assistance Committee, 'Shaping the Twenty-first Century: The Contribution of Development Co-operation' (May 1996) <www.oecd.org/dac/2508761.pdf> accessed 22 June 2014; See also UN, IMF, OECD/ Development Assistance Committee and World Bank Group, 'A Better World for All: Progress Towards the International Development Goals' (2000) <www.imf.org/external/pubs/ft/jointpub/world/2000/eng/bwae.pdf> accessed 25 June 2014; UNGA, '1986 Declaration on the Right to Development' (4 December 1986) Res 41/128.

[74] Tadjbakhsh S and Chenoy AM, *Human Security: Concepts and Implications* (Routledge, London 2007) 104.

[75] Report to the Secretary General, 'UN Development Agenda, 'Realizing the Future We Want for All: Report of the UN System Task Team on the Post: 2015 UN Development Agenda' (New York, June 2012) 3.

To this end, 'development includes consideration of decent work, health care, adequate housing, a voice in public decisions, fair institutions of justice, and a sense of personal security'.[76]

Since 1949 the ICRC has developed its specific mandate to include action to ensure economic security, health, water and habitat, mine action, diplomacy and communication and puts them under the term 'Early Recovery'.[77] The official justification for these developments in its scope of action is 'to meet the needs of people affected by armed conflict and other situations of violence'.[78] The 'official line' from the ICRC is that its work to 'promote economic security aims to ensure that households and communities affected by conflict or armed violence can meet essential needs and maintain or restore sustainable livelihoods'.[79] It relies on its 'statutory right of initiative and on its assessment of the level of organization of the armed groups involved, the scale of humanitarian impact, the support it can provide to National Societies and its own added value'.[80]

A decade ago the ICRC Director of Operations, Pierre Krähenbühl, recognised the need for the ICRC to work in the 'full spectrum of conflict situations' and that it needed the 'capacity to sustain longer term commitments in chronic crises, early transitional phases or situations of violence which attract little or

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[76] ibid 4.

[77] ICRC, 'ICRC Strategy 2011-14: Achieving Significant Results for People in Need' (ICRC, Geneva 2010) 5.

[78] ibid.

[79] 'Overview of the ICRC's work to promote economic security' (ICRC, 29 October 2010) <www.icrc.org/eng/what-we-do/ensuring-economic-security/overview-economic-security.htm> accessed 24 June 2014.

[80] ICRC, 'Overview of Operations 2012' (ICRC, Geneva November 2011) 9.

no attention' or are out of the spotlight.[81] In this role:

> Its activities range from emergency distributions of food and essential household items to programmes for sustainable food production and micro-economic initiatives. Needs covered include food, shelter, access to health care and education. Economic security activities are closely linked to health, water and habitat programmes. All these activities come within the ICRC's global mission to protect victims of conflict.[82]

The developing practice of the ICRC within economic security is explored in greater depth in chapter six and the case study. They utilise data gathered during interviews with ICRC delegates at the Geneva headquarters in Geneva. The interviews provide greater detail on the practical activities of the ICRC in such areas.

The local impact of ICRC protection and assistance roles is discussed later in this chapter. The interviewee went on to state that 'sometimes… the scarcity of resources will bring instability, and, of course, if you bring, at some point, food security, you will help building peace, I would say, as a secondary effect'.[83]

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[81] Krähenbühl P, ICRC Director of Operations, 'Challenges for Humanitarian Action in Situations of Armed Conflict and Internal Violence: Statement Council of Delegates of the International Red Cross and Red Crescent Movement, Seoul, Republic of Korea, 16-18 November 2005' <www.icrc.org/eng/resources/documents/statement/council-of-delegates-2005-statement-161105.htm> accessed 13 July 2014.

[82] 'Ensuring Economic Security' (ICRC) <www.icrc.org/eng/what-we-do/ensuring-economic-security/overview-economic-security.htm> accessed 15 July 2014.

[83] INTERVIEW 001.

Another interviewee gave the example of ICRC work in Columbia:

> When the ICRC works with gang leaders, which are responsible for some neighbourhoods, the ICRC tries to get them to be more careful with their own inhabitants and the ICRC can have a dialogue on their responsibility as the local authority there. Sometimes the situation improves for the people and [the ICRC] priority remains to be there.[84]

In answering the question, therefore, of to what extent the expansion of assistance into long-term projects has allowed the ICRC to contribute to the establishment of peace or human security, the interviewees framed their answers in the negative. Nevertheless, interviewees recognised that 'probably all activities allowing more stability will in one way or another have an effect on the peace process… but the aim of the ICRC is not to be involved in the peace process. We are working much more on the consequences of the conflict and their resolutions'.[85] Sometimes, for example, ICRC activities can have an impact on the reconciliation between communities, which can, in turn, stabilise the situation, in particular when there are insufficient means to live.[86]

After an armed conflict, local communities are directly affected by loss of livelihoods and employment, as well as other socio-economic factors. As the Secretary-General noted in 'We the Peoples', 'every step taken towards reducing poverty and achieving broad-based economic growth is a step toward

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[84] INTERVIEW 002.

[85] INTERVIEW 003.

[86] INTERVIEW 004.

conflict prevention'.[87] Development requires the creation of an environment in which people can engage in ordinary activity, safely and professionally. If we look, for example, at recent conflicts, it is likely that schools were either used militarily or that children were unable or unwilling to attend school.[88] This not only prevents children from advancing their education but also limits their learning of valuable life skills. In addition to the disruption of children's education, mass displacement is also a consequence of many armed conflicts. It can also lead to the marginalisation of entire communities but also impacts on post-conflict reconstruction as hundreds and thousands of people are displaced and most likely living in poverty. Unfortunately, all of these difficulties facing individuals, families and communities are compounded by the impact of conflicts on the environment, land, natural resources and access to safe and nutritious food and water.

Human security is a key component in the vocabulary, thinking, and practice of international development; in fact, poverty, socio-economic inequality and violent conflict are closely linked.[89] Indeed, 'lack of economic growth and therefore economic opportunity is often one of the underlying causes of

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[87] Report of the Secretary General, 'We the Peoples: The Role of the United Nations in the Twenty-first Century' (UN, New York 2000) 45.

[88] 'UNWRA Strongly Condemns Israeli Shelling of its School in Gaza as a Serious Violation of International Law' (30 July 2014) <www.unrwa.org/newsroom/official-statements/unrwa-strongly-condemns-israeli-shelling-its-school-gaza-serious> accessed 4 August 2014.

[89] Hampson FO, with Daudelin J, Hay J, Reid H and Martin T, *Madness in the Multitude: Human Security and World Disorder* (OUP, Canada 2001) 150.

conflict'.[90] Finally, 'the economic impact of civil wars is massive and it has been borne disproportionately by the poorest countries'.[91]

It is argued that insecurity can be resolved by socio-economic activities.[92] In its most obvious sense this entails employment generation and livelihoods for youth and demobilised former combatants. Socio-economic development can also include the development of social services (health, education, water and sanitation); rehabilitation of basic infrastructure; improving transportation, reconstruction of roads, bridges and railways; promoting environmental awareness; return and reintegration of displaced persons and refugees and transitional justice.[93] In addition, it is important that communities reconcile. To this end, it is imperative that community dialogue is re-established or developed. Finally, it is necessary to provide psychological trauma counselling for war-affected groups.[94] The latter is significant as people feel war long after it ends and 'peace' has arrived. Socio-economic development should be placed within broader political contexts.[95]

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[90] Gerstle T and Meissner L, 'Peace Building Essentials for Economic Development Practitioners: Practice Note 1: Market Development in Conflict-affected Contexts' (International Alert, 2009-2010) 3.

[91] Hampson et al (n 89) 151.

[92] Report of the Secretary General, 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping' (17 June 1992) UN Doc A/47/277 -S/24111 paras 56-59 (An Agenda for Peace).

[93] Department of Peacekeeping Operations and Department of Field Support, 'United Nations Peacekeeping Operations: Principles and Guidelines' (18 January 2008) 25; Report of the Secretary General, 'Peace Building in the Immediate Aftermath of Conflict' (11 June 2009) UN Doc A/63/881–S/2009/304 paras 17 and 54; See also Lewarne S and Snelbecker D, 'Economic Governance in War-torn Economies: Lessons Learned from the Marshall Plan to the Reconstruction of Iraq: Long Report' (2004) prepared for US AID Bureau for Policy and Program Coordination (US AID, Washington DC 2004) 5.

[94] No Exit Without Strategy (n 22) para 21.

[95] Wennmann A, 'Conflict Economies' in Chetail (n 10) 84-85.

Economic development can alleviate ethnic tensions, black markets for illicit products, and elite capture of natural resources, bringing warring groups together for trade; training ex-combatants for jobs so they're less likely to instigate conflicts or promote economic alternatives to the production of coca or opium.[96] Economic development can therefore be used to build relationships and trust between people, thus addressing the root causes of conflict.

Once basic economic stabilisation has occurred and the focus should move onto the creation the conditions for sustained economic growth. The UNDP has a mandate to promote 'sustainable human development' primarily through measures aimed at eradicating poverty.[97] The idea of an integrated approach to peace building, whereby economic bodies like the World Bank and the International Monetary Fund (IMF) are included in the process, has pushed peace operations beyond militaristic peace operations.[98] However, despite the possibilities for socio-economic recovery initiatives to build local security, peace building often forces peace builders to concentrate on the context of the conflict rather than on the issues, which divide the parties.[99] Socio-economic development is therefore often limited to States embarking on mutually

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[96] Banfield J, Gündüz C and Killick N (eds), *Local Business, Local Peace: The Peace building Potential of the Domestic Private Sector* (International Alert, London 2006) in Gerstle and Meissner (n 90) 4.

[97] 'UNDP Mission Statement' <www.undp.org/content/undp/en/home/operations/about_us/> accessed 22 June 2014.

[98] Soto A de and Castillo G del, 'Obstacles to Peace building' (1994) Foreign Policy 69, 70; See also Collier P, Hoeffler A and Soderbom M, 'Post-conflict Risks' (2008) 45(4) J of Peace Research 461, 469-70.

[99] Bush K, 'Fitting the Pieces Together: Canadian Contributions to the Challenge of Rebuilding Wartorn Societies' (Paper presented to the International Development Research Centre) (Ottawa, July 1995).

beneficial economic and social development projects [100] or to reaching 'entrenched macroeconomic benchmarks for social progress at the global level that have been utilised since the founding of the UN'.[101] It is argued that such grandiose visions for socio-economic development need not be the only efforts to establish socio-economic development. It is important for communities recovering from armed conflict to see real progress in the socio-economic development of their daily lives.

In light of the foregoing discussion on the importance of socio-economic development, this section now turns to consider the contribution to such by the ICRC. In addition, in terms of socio-economic development, the ICRC affirms the importance of 'early recovery'.[102] This is the topic to which this chapter now turns. The phase known as 'early recovery' describes the 'grey area' between war and peace, before development activities fully begin and whilst the situation on the ground remains fragile. Early recovery sits on the conflict to post-conflict continuum or between emergency relief and development and it 'encompasses the restoration of basic services, livelihoods, shelter, governance, security and rule of law, environment and social dimensions, including the reintegration of displaced populations'.[103] The UNDP stated that 'early recovery is the term used to describe the application of development

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[100] Agenda for Peace (n 92) para 56.

[101] Moore J, *Humanitarian Law in Action within Africa* (OUP 2012) 77; See also UNGA, 'United Nations Millennium Declaration' (8 September 2000) Res 55/2 (A/55/L.2) para 19.

[102] ICRC, 'ICRC Strategy 2011-14: Achieving Significant Results for People in Need' (ICRC, Geneva 2010) 6.

[103] CWGER (in cooperation with the UNDG-ECHA Working Group on Transition), 'Guidance Note on Early Recovery' (April 2008) 6.

principles to humanitarian situations'.[104] To what extent, therefore, has ICRC protection and assistance progressed into early recovery?

The 'Cluster Working Group on Early Recovery' describes early recovery as:

> Humanitarian and development agencies working together on recovery as early as possible within the humanitarian phase - assessing, planning, mobilizing resources, implementing and monitoring activities; supporting spontaneous recovery initiatives of affected populations; supporting capacity of national actors to manage and implement the recovery process; influencing the way humanitarian assistance is provided to avoid dependencies; capitalizing on opportunities to reduce risk; and establishing strong foundations for recovery and sustainable development.[105]

Collier argued that stagnant economies are likely to rely on primary commodities and post-conflict countries are likely to return to conflict within a year, the question therefore is whether economic recovery should come after relief operations or whether this just creates a culture of dependency.[106] When the ICRC actively engages in a country, which has seen 'populations largely affected with loss of livelihoods'; it will deploy its EcoSec Unit, which comes

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[104] UNDP (Bureau for Crisis Prevention and Recovery), 'UNDP Policy on Early Recovery' (February 2008) 5.

[105] CWGER, 'Implementing Early Recovery' (July 2006) 1.

[106] Collier P and Hoeffler A, 'On Economic Causes of Civil War' (1998) 50(4) Oxford Economic Papers 563, 563-73; See also Collier P, *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It* (OUP 2008).

under the 'assistance' umbrella of ICRC activities.[107] One interviewee stated that 'once the political situation stabilises a bit then [the ICRC] might think of other types of activities… usually EcoSec is the first department to withdraw'.[108] To this end, it is argued that the ICRC early recovery operations are not intended to create a culture of dependency.

For the ICRC, during the period termed 'early recovery', the 'aim is to promote the resilience and self-sufficiency of affected people or communities, and to protect their dignity in a way that food or other emergency relief alone cannot'.[109] Significantly the 'ICRC 2011-14 Strategy' shows that the heart of the ICRC mission remains the same, that is, protection and assistance of those in need.[110] However, the ICRC acknowledges its encroachment into the early recovery phase, which includes 'medical, economic security, and water and habitat'. It will 'prepare to withdraw once the entry strategies of development organizations have been clearly set out and followed by concrete actions'.[111] It is argued that each of these aspects of ICRC action extend the activities provided for it in the Geneva Conventions I, II, III 1949 and the Statutes of the ICRC. In addition, it should be recalled that under Article 81(1) Additional Protocol I, the ICRC may also 'carry out *any other humanitarian activities* in favour of these victims, subject to the consent of the Parties to the conflict

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[107] INTERVIEW 005.

[108] INTERVIEW 005.

[109] Jakob Kellenberger, 'Overview of the ICRC's Operations in 2012: Message from the President, Jakob Kellenberger' (8 December 2011) <www.icrc.org/eng/resources/documents/report/appeals-2012-message-president-2011-12-08.htm> accessed 22 July 2014.

[110] ICRC Strategy 2011-14 (n 102).

[111] ibid 6.

concerned'. Can economic security and early recovery be considered out '*any other humanitarian activity'* or do they go beyond humanitarianism into new activities entirely?

The interview data shows that 'it was not only a question of hit and run operations, even in situations of conflict [the ICRC] began to think about the long-term consequences, especially in situations where [it was] present for years and decades'.[112] There was a need to 'inject more sustainability' and so:

> Sometimes [the ICRC] goes towards more development activities but it's at the borderline. [The ICRC] also continue to have some activities in post-conflict situations and when [it has] activities in non-conflict situations, like "other situations of violence", sometimes, yes, it's at the borderline of development. [The ICRC has] these reflections regularly on where to draw the line. What are [its] limits in terms of competence?[113]

It is argued, therefore, that the changing nature of armed conflicts, in particular their protracted nature, has pushed the ICRC to work for extended periods of time in States and to develop its protection and assistance roles to include more long-term activities. It cannot be known, for sure, to what extent the ICRC truly 'reflects' on where to draw the line. It appears that the humanitarian needs usurp the need to reconcile action with the activities contained in the

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[112] INTERVIEW 001.

[113] INTERVIEW 001.

Geneva Conventions I, II, III and IV 1949 and Statutes of the ICRC. It was recognised by interviewees that this development of ICRC activities was enough to raise questions about its competences, but for the delegates of the ICRC, they are humanitarians.[114] The situations in which their roles take place are therefore not strictly limited to armed conflict. Early recovery should help the population get back on its feet. Practical initiatives include 'increasing the availability of resources or distribution of seeds directly to the community, in order they can restart farming when they come back from displacement'[115] and 'working with associations including basic help such as printing manuals to try and restart associations. Sometimes [the ICRC] organise fairs in very remote areas, where [it] brings sellers from different parts to increase the level of available goods in the community. [It is] now starting to think of other forms of support, more linked to emergencies, they can be vouchers/ cash transfers. Different ways of bringing, or trying to help communities cope, with the immediate effects of the conflict'.[116] The last examples are part of longer-term strategies and show the expansion of ICRC activities into early recovery.

During the interviews this Author asked the interviewees whether they considered the changes in the roles of the ICRC to be 'progression' within the organisation, or rather, a move away from the armed conflict specific activities of the ICRC, as identified in the Geneva Conventions I, II, III and IV 1949 and Statutes of the ICRC. It was asked whether such changes are risky for the sustainability of the principles of the ICRC. The interviewees considered that

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[114] INTERVIEW 001; INTERVIEW 002; INTERVIEW 003; INTERVIEW 004; INTERVIEW 005.

[115] INTERVIEW 001.

[116] INTERVIEW 001.

'needs' were the relevant consideration to an assessment of appropriate action: one interviewee stated that 'I don't see that there's a risk as long as you target the right needs and then as long as you have identified the needs, the whole issue is how you address these needs and do you address the needs with a short term or long term solution'.[117]

The interviewees provided examples ongoing ICRC projects, which, unlike past protection and assistance activities, require more long-term thinking. The nature of armed conflict is constantly changing. Battlefields, soldiers and weapons have been replaced by cyber warfare, NIACs, non-state armed groups, sexual violence used as a weapon, and so on. Unlike in the traditional armed conflict paradigm, the ICRC cannot identify an immediate need, 'fix it' and leave. Nowadays, conflicts are a long cycle of violence that can have times of armed conflict and times of near peace. In any situation, the consequences for the population are still extremely important, as they will face the same lack of services, usually associated with armed conflicts, and periods where the system collapses completely.

Recovery from conflict takes a very long time. In some instances, protracted armed conflict can go on for years and decades. The ICRC is being forced to adapt its preparations to these needs and be as flexible as possible to address particular issues. In some areas, again, this will only be by feeding people, bringing medicine, operating on the wounded but in others, where the ICRC can engage with the local authorities, for example on primary healthcare, then it will develop a more long term strategy. For one interviewee, these kinds of developments by the ICRC are 'probably quite close to what the UN is doing

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[117] INTERVIEW 001.

[in peace building], I don't see that as incompatible. When you are working in conflict-affected areas, in countries like the DRC, the needs are so huge that there is space for all to work'.[118] This response to questions about the more long-term projects, including economic projects, was par for the course during the interviews. It appears therefore that the humanitarian needs trump any real analysis of the legitimacy of action or whether it buys into broader concepts of peace and security.

In conclusion, by engaging with economic security projects, the ICRC work bridges the nexus between security, development and human rights. To this end, the ICRC may increasingly step over the line, established in the Geneva Conventions I, II, III and IV 1949 and the Statutes of the ICRC, which keeps it as a neutral and independent actor. If the ICRC continues to develop its economic security activities, perhaps attracting funding from development donors rather than humanitarian donors, will it push States to deny access?[119]

iv) *Prevention of Conflict*

'Owing to the constraints imposed by the principle of neutrality, the ICRC cannot play a role in political negotiations aimed at averting an imminent armed conflict, but it can on occasion make a significant contribution through preventive humanitarian diplomacy, its good offices and creative use of its role as a neutral intermediary'.[120] Moreover, the ICRC can 'play an important part in the prevention of renewed conflict, for by helping to establish conditions

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[118] INTERVIEW 001.

[119] A list of donors, both individuals and companies, can be found in the Annual Report 2013.

[120] International Red Cross Red Crescent 'Preventive action: understanding the concept and defining the ICRC's role in preventing armed conflicts: Guidelines' (2002) 84(846) IRRC 463, 465.

conducive to reconciliation and social reconstruction it helps to consolidate peace' and 'carry out vital work on a long-term basis'.[121] It is argued that, in terms of human security, the prevention of future hostilities is closely linked to both Freedoms from Fear and Want.[122] If armed conflict can be prevented it precludes people from suffering during and after conflict. Pragmatically it also saves the international community money and resources as it need not launch military intervention, provide emergency humanitarian relief or facilitate reconstruction after the conflict.[123] Those who favour focusing on the underlying causes of conflicts argue that such crisis-related efforts often prove either too little or too late. Attempted earlier, however, diplomatic initiatives may be rebuffed by a government that does not see or will not acknowledge a looming problem, or that may itself be part of the problem. Thus, long-term preventive strategies are a necessary complement to short-term initiatives.[124]

Prevention requires broad human security concerns to be dealt with. To this end, prevention requires relationship building, prejudice reduction, power sharing, socio-economic equality, and education. Preventive diplomacy including communication, negotiation and mediation, which is, establishing person-to-person interactions that focus on increasing understanding and functional cooperation between groups or States embroiled in destructive conflict.[125] Prevention may be crisis oriented and endeavour to strengthen

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[121] ibid 466.

[122] Human Security 169; The Process of Defining Human Security 172.

[123] Brahimi Report 2000 (n 22) para 29.

[124] ibid para 16.

[125] Fisher RJ, 'The Potential for Peacebuilding: Forging a Bridge from Peacekeeping to Peacemaking' (1993) 18 Peace and Change 247, 252.

political settlements and to address the cause of conflict. In order to prevent the violent escalation of crisis as early as possible and in order to achieve sustainable results, it has to cover all stages of the conflict cycle: crisis prevention, crisis intervention and post-conflict rehabilitation.[126] Indeed the 'stabilization' imperative of peace building is to prevent relapse into violence and de-escalation, protection of civilians and promotion of political processes.[127] It is argued that if local people are to recover from violence, even structural violence that has not yet led to massive civil unrest, then it is necessary to create a secure environment where resort to violence and destruction does not occur.[128] The possibility of conflict must therefore be detected early. Truger suggests that detection could be undertaken using a 'standardised assessment matrix', which would classify crisis situations and determine when to take preventative measures or intervene.[129] However, it is argued that in order to prove effective, such a mechanism would need to take into account the specific circumstances and conditions.[130]

In light of this analysis, does the ICRC contribute to the prevention of the recurrence of hostilities? The ICRC recognises that megatrends, such as climate change, natural disasters, environmental degradation, migration, pandemics, and rampant urbanisation, have lead to 'more and new

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[126] Truger in Benedek (n 18) 127.

[127] Neubert D, 'The "Peacemakers" Dilemma: The Role of NGOs in Processes of Peace-building in Decentralised Conflicts' in Foblets M-C and Trotha T von, *Healing the Wounds: Essays on the Reconstruction of Societies after War* (Hart, Oxford 2004) 54; Francis DJ, (ed), *When War Ends: Building Peace in Divided Communities* (Ashgate, Surrey 2012) 4.

[128] Jeong H-W, *Peace Building in Post conflict Societies: Strategy and Process* (Lynne Rienner Publishers, Boulder 2005) 4.

[129] Truger in Benedek (n 18) 124.

[130] ibid.

manifestations of organized armed violence, many of which will lie below the threshold at which IHL starts to apply'.[131] They include for example State repression or inter-community violence.[132] 'Organised armed violence' can include transnational organised crime, sudden onset crisis and State repression that may not amount to armed conflict.[133] There has been 'widespread proliferation of weapons by mass migration from rural to urban settings, resulting in sprawling urban centre's in many developing countries'.[134] There is consequently a blurred distinction between political violence and criminality. Nevertheless, it is argued that the ICRC's voyage into such protection and assistance roles, that is, before IHL starts to apply, show its ability to venture into the realm of preventing the recurrence of hostilities. Its ability and willingness to engage in the prevention of hostilities is explored further in the next section, as it is argued that the advantage of ICRC protection and assistance activities overall is their ability to successfully reach individuals and local communities on the ground.

It is argued that prevention of armed conflicts is inextricably linked to addressing the root causes of those conflicts. Broadly speaking, economic factors such as poverty and frustration of human needs; access to political and economic participation; resource and other environmental issues, such as food insecurity, can be causes of conflict. Human rights violations can also create

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[131] ICRC Strategy 2011-14 (n 102) 4.

[132] ibid 6.

[133] ICRC, 'Overview of Operations 2006' (ICRC, Geneva 2006) 2.

[134] ibid.

conflict, in particular, denial of cultural and religious expression.[135] Peck argues that these matters are best precluded and resolved in States that 'provide the greatest human security to their populations'.[136] In addition, local people require social and structural transformation during and after conflict to establish security. Social transformation looks at psychological, spiritual, social, economic, political and military changes. It is more than post-accord reconstruction.[137] Lederach argues that 'a sustainable transformative approach suggests that the key lies in the relationship of the involved parties, with all that term encompasses at the psychological, spiritual, social, economic, political and military levels'.[138] Human security is important in addressing the root causes of conflicts.

This brief overview of the links between the root causes of conflict and human insecurity is expanded upon in the description of the ongoing conflict in the DRC, which forms the case study to this thesis.[139] It is difficult to expand meaningfully on the root causes of conflict in the abstract. Later in this chapter, the interview data will also show that the ICRC can work to overcome the root causes of conflict by working alongside individuals and local communities.

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[135] Brahimi Report 2000 (n 22) para 24.

[136] Peck C, *Sustainable Peace: The Role of the United Nations and Regional Organizations in Preventing Conflict* (Rowman and Little Publishers Inc, Oxford 1998) ch 2.

[137] Lederach JP, 'Conflict Transformation in Protracted Internal Conflicts: The Case for a Comprehensive Framework' in Rupesinghe K (ed), *Conflict Transformation* (Macmillan, New York 1995) 201-22.

[138] Lederach JP, *Building Peace: Sustainable Reconciliation in Divided Societies* (US Institute of Peace Press, Washington DC 1997) 75.

[139] The Congo Wars in Brief: 1994-2014 265.

c) Conclusion to Chapter Six

The mandated activities of the ICRC are contained in the Geneva Conventions I, II, III and IV 1949 and Statutes of the ICRC but it has been shown that it has developed its role to other situations of violence and nowadays more long-term assistance roles. The ICRC has traditionally interpreted its role under the Common Article 3 and Articles 9, 9, 9 and 10 Geneva Conventions I, II, III and IV 1949 to include visiting detainees, administering the tracing and messaging service and providing healthcare to the wounded and sick soldiers during armed conflict. This thesis has questioned whether its incursion into human security type activities can also be considered lawful. This chapter has shown the connections between the current activities of the ICRC and human security. It is argued that, as these activities are not specifically identified in the articles listed above, the ICRC may be able to justify its activities under Article 81(1) Additional Protocol I 1977, which states that it may undertake '*any other humanitarian activities* in favour of these victims, subject to the consent of the Parties to the conflict concerned'. It is the latter part of this provision, which keeps this Author wondering about the sustainability of economic security activities. Even if economic security can be subsumed under '*any other humanitarian activities*', surely consent will be revoked or denied if States see the ICRC as buying into politicised models of socio-economic development.

These changes show recognition by the ICRC of the changing needs of the local people, in particular civilians, and the relevance of a broader understanding of humanity to its role. Firstly, the ICRC engages in practices, which can support or encourage peace, in particular economic security. Secondly, its local presence and ongoing work with National Societies and

local people can better facilitate human security than traditional top-down approaches, such as, State building activities assumed by the UN, which have been alluded to earlier in this chapter through consideration of peace building.

This chapter considered the Cluster Working Group on Early Recovery definition of 'early recovery' and it was stated that it would be returned to in the conclusion. In summary, the definition includes 'assessing, planning, mobilizing resources, implementing and monitoring activities; supporting spontaneous recovery initiatives of affected populations; supporting capacity of national actors to manage and implement the recovery process; influencing the way humanitarian assistance is provided to avoid dependencies; capitalizing on opportunities to reduce risk; and establishing strong foundations for recovery and sustainable development'.[140] It is argued that the ICRC responds to these elements by entering into a dialogue with National Societies and local communities when it is establishing projects for protection, assistance and economic security. It can also establish 'spontaneous recovery initiatives' when it is led by demand on the ground. It supports national actors through its relationships with National Societies. It also works to avoid dependency by creating ongoing economic projects, which will be discussed in greater depth in the case study on the DRC. There are additional elements to socio-economic development, for example, development of social services (health, education, water and sanitation), which will also be discussed in the case study.

In terms of the ICRC ability to facilitate local ownership, the results showed that the ICRC, overall, is more concerned with reaching the needs of victims of conflict and other situations of violence than strictly sticking to the Geneva

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[140] 'Implementing Early Recovery' (n 105) 1.

Conventions I, II, III and IV 1949 and Statutes of the ICRC description of their rights and duties. It is necessary to work with local people to determine which needs should be addressed and take priority. The first job for the ICRC on the ground is to meet with local communities and design with, not for, the needs of those people. The ICRC therefore recognises the advantages of a 'bottom-up approach', that is, local people understand the conflict, recognise escalating tensions and human insecurities and provide context to the situations. The interviews showed that the ICRC works alongside National Societies, which supports their local knowledge and continued presence. However, it was acknowledged that, for long-term projects, the support of the authorities in each area that the ICRC works is also essential. The success, or otherwise, of ICRC activities will be considered in the Case Study.

CASE STUDY: ACCOUNTS OF ICRC DELEGATES ON THE DEMOCRATIC REPUBLIC OF CONGO

For decades, the people of the Congo have been tormented by the chaos of wars, conflicts and corruption. And whilst Congolese soil is exceptionally fertile and rich in raw materials such as copper, cobalt, gold, diamonds, coltan and oil, its people do not really reap the benefits. Indeed the vast majority live in abject poverty. In the east of the country, one of Africa's bloodiest conflicts has claimed the lives of millions and the region remains in turmoil to this day. With looting, rape and murder commonplace, people have no option but to escape. As for the human rights situation, it is quite simply catastrophic.[1]

a) Introduction

The ICRC has been present in the DRC since 1978 and has continued to adapt its protection and assistance roles through phases of war, peace and everything in between. In terms of its mandate the DRC is a microcosm of the ICRC mandate from the Geneva Conventions I, II, III and IV 1949 and the Statutes IRCRCM. That is, the DRC is, in some parts, an example of shifting trends in ICRC practice generally, for example towards more long-term humanitarian projects, such as Health Care in Danger. On the other hand, the ICRC has adapted its mandate in the DRC to respond to the specific case of sexual violence and provide projects on the ground for victims of such. These projects will be considered in this chapter. In addition, the interviews were used to gain

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[1] 'Between Frontlines: ICRC Delegates at Work' (ICRC, DRC) <http://icrc.srf.ch/en/kongo#/introduction> accessed 22 July 2014.

qualitative data on the mandate and work of the ICRC in the DRC. This case study therefore provides a unique insight into the practice of the ICRC and its interpretation of its humanitarian mandate. The case study also, critically, considers the extent to which the work of the ICRC can be said to reflect a human security approach to humanity, as considered in chapter five. The case study also provides insight into a complicated situation, which provides an innumerable amount of humanitarian needs and protection issues. The case study builds on analysis in chapter six and is therefore heavily reliant on the interview data. It uses personal accounts of how the ICRC mandate is interpreted on the ground and what the mandate is from the Geneva Conventions I, II, III and IV 1949 and Statutes IRCRCM. It also highlights how ICRC activities might support broader understandings of humanity, such as the establishment of human security. It reflects the key themes that were identified in chapter six.

In the DRC, the ICRC works to meet the emergency needs of those affected by armed conflict. The ICRC Annual Report 2013 identifies its role as:

> It meets the emergency needs of conflict- affected IDPs and residents, assists them in becoming self- sufficient and helps ensure that the wounded and sick receive adequate medical/surgical care, including psychological support. It visits detainees, helps restore contact between separated relatives, reunites children with their families and supports the Red Cross Society of the Democratic Republic of the Congo's

development. It also promotes knowledge of and respect for IHL and international human rights law among the authorities.[2]

In 2009 the ICRC undertook research in eight countries, including the DRC, to 'develop a better understanding of people's needs and expectations, to gather views and opinions, and to give a voice to those who had been adversely affected by armed conflict and other situations of armed conflict'.[3] The research identified two 'priority actions' that the respondents in the DRC wanted to communicate to the rest of the world:

> The international community should use its power to force the local and neighboring governments to find a peaceful settlement and despite the fact that the armed conflict has continued for so long, civilians still need the most basic assistance to help them survive and rebuild their lives.[4]

This case study will examine, therefore, whether the humanitarian mission of the ICRC is having positive effects in communities and areas of the DRC, bringing stabilisation and human security to pockets of a country overwhelmed by conflict and insecurity. This case study focuses on the experiences of the

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[2] ICRC, 'Annual Report 2013' < https://www.icrc.org/eng/assets/files/annual-report/icrc-annual-report-2013.pdf> accessed 9 March 2015, 135-141. The 2013 Annual Report is the latest available at the time of writing.

[3] ICRC, 'Democratic Republic of the Congo: Opinion Survey and In-depth Research, 2009' (Geneva, December 2009) 1.

[4] ibid 10.

people on the ground throughout these intrepid times by building on conclusions drawn in the preceding chapters of this thesis. To this end, this case study will test whether the role of the ICRC, in practice, goes beyond the roles prescribed in the Geneva Conventions I, II, III and IV 1949 and Statutes of the ICRC and whether there is evidence of the ICRC undertaking human security activities. The case study continues the analysis of interviews undertaken at the ICRC Headquarters, in Geneva, April 2014.

b) The Congo Wars in Brief: 1994-2014

This brief outline provides a timeline of major events in the DRC over the last twenty years. Its purpose is simply to provide context to the analysis the protection and assistance work of the ICRC in the region. There are excellent texts by Stearns and Autesserre that provide a more comprehensive overview of the conflicts.[5]

The situation in the DRC is the 'largest conflict Africa has seen since independence'.[6] The First Congo War took place during the aftermath of the Rwandan genocide and ended with toppling of President Mobutu in May 1997.[7] Mobutu had seized power from Lumumba in 1965; just five years after the Congo became an independent State.[8] In fact, Mobutu had been Chief-of-

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[5] Stearns JK, *Dancing in the Glory of Monsters: The Collapse of the Congo and the Great War of Africa* (PublicAffairs, New York 2011); Autesserre S, *The Trouble with the Congo: Local Violence and the Failure of International Peacebuilding* (Cambridge Studies in International Relations, Cambridge 2010).

[6] Carayannis T, 'The Democratic Republic of the Congo, 1996-2012' in Boulden J (ed), *Responding to Conflict in Africa: The United Nations and Regional Organisations* (Palgrave Macmillan, Basingstoke 2013) 177.

[7] Stearns (n 5) 153-62.

[8] Kreijen G, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonisation of Sub-Saharan Africa (Developments in International Law)* (Martinus Nijhoff Publishers, Leiden 2004) 74; Stearns (n 5) 61-64.

Staff to Prime Minister Lumumba. Mobutu's rule lasted for thirty-two years, 'during which time the Republic of Congo's economic infrastructure was completely dismantled- at times literally being sold for scrap- gaining it an infamous repute for excessive corruption'.[9] Chapter five of the thesis considered the concept of sovereignty of responsibility and its connection to human security and RtoP. In the context of the DRC, the idea that leaders of States can no longer shun the outside world and use the territory for their own gains or use sovereignty as a shield against the acts committed against the people is critically important. The independence of the DRC in the 1960's did not protect the people from acts of brutality against them, which had been the situation under Belgian rule.[10]

When the Tutsi-led Rwandan Patriotic Front (RPF), led by Paul Kagame, seized power in Rwanda in 1994, two million Hutu's fled to the North and South Kivu's, which are situated to the east of the DRC.[11] The Congolese of Rwandan decent allied with the new Rwandan government.[12] The groups of people who are indigenous to the DRC allied themselves into militias called Mai-Mai, eventually supporting defeated Rwandan Hutu rebels and the Congolese government.[13] The decline and collapse of the Zairian/ Congolese State permitted the Hutu to continue their struggle against the RPF from Congo. During the Rwandan genocide and the period afterwards, the ICRC was

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[9] Kreijen (n 8).

[10] Hochschild A, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (Houghton Mifflin Harcourt, Boston 1999).

[11] Arimatsu L, 'The Democratic Republic of the Congo 1993-2010' in Wilmshurst E (ed), *International Law and the Classification of Conflicts* (OUP 2012) 148-50.

[12] Autesserre (n 5) 7.

[13] ibid 161-68.

helping protect and assist displaced people and providing food aid. The ICRC also supported health facilities.[14] The RPF responded to such attacks.[15] The result of the violence in the region was that, in 1996, a regional coalition led by Angola, Uganda and Rwanda formed to overthrow Mobutu.[16] In April 1997, the DRC saw the fall of Lubumbashi and Kikwit, and by May of the same year, Kinshasa fell.[17] Following a failed attempt at peace talks, Laurent Kabila was sworn in as president on 16 May 1997 and, very quickly, Mobutu fled into exile.[18]

Unfortunately for the Congolese people, the new president, Laurent Kabila, fell out with his Rwandan and Ugandan allies, which sparked the Second Congo War.[19] The DRC, Angola, Namibia, Zimbabwe, Sudan and Chad fought against, Rwanda, Uganda and Burundi. There were also around thirty local militias involved in the war.[20] This second conflict lasted until the 'Final Act of the Inter-Congolese Dialogue on 2 April 2003'.[21] The process leading up to this Act was rather complex and is therefore discussed below.

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[14] ICRC, *ICRC Activities in Zaire/Democratic Republic of Congo: 1994 - 3 February 1999* (International Committee of the Red Cross, Geneva).

[15] Turner T, *The Congo Wars: Conflict, Myth and Reality* (Zed Books, New York 2007) 150.

[16] Autesserre (n 5) 47; Reyntjens F, *The Great African War: Congo and Regional Geopolitics, 1996-2006* (CUP 2009) 194-231.

[17] ibid.

[18] United Kingdom Home Office, 'UK Home Office Immigration and Nationality Directorate Country Assessment -Democratic Republic of Congo' (1 April 2002) 3.13 <www.refworld.org/docid/3c2b4e090.html> accessed accessed 5 August 2014.

[19] Arimatsu (n 11) 158-59.

[20] 'Between Frontlines: ICRC Delegates at Work' (ICRC, DRC) <http://icrc.srf.ch/en/kongo#/introduction> accessed 22 July 2014.

[21] The Final Act, 2 April 2003 <www.issafrica.org/af/profiles/DRCongo/icd/finalact.pdf> accessed 27 July 2014.

During the Second Congo War, on the 10th July 1999, the Lusaka Peace Accord aimed to bring a ceasefire to the DRC.[22] It called for the immediate cessation of hostilities within twenty-four hours of its signing.[23] This was to include an end to hostile action, including military movements and reinforcements and hostile propaganda,[24] disarmament of militia groups;[25] and, exchange of hostages and prisoners of war.[26] It also called for peacekeeping, peace enforcement and Security Council authorisation of coercive force to disarm various armed groups.[27] Importantly, the Lusaka Peace Accord also stated that:

> The Parties shall allow immediate and unhindered access to the ICRC and Red Crescent for the purpose of arranging the release of prisoners of war and other persons detained as a result of the war as well as the recovery of the dead and the treatment of the wounded.[28]

In anticipation of forming an interim government, the Lusaka Ceasefire Agreement called for an 'all-inclusive' process to produce a new political order

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[22] 'Letter Dated 23 July 1999 From the Permanent Representative of Zambia to the United Nations Addresed to the President of the Security Council-Annex: Ceasefire Agreement' (23 July 1999) UN Doc S/1999/815.

[23] ibid 'The Cease-fire' art 1 para 2 (c).

[24] ibid art 1 para 2 (b).

[25] ibid Article III 'Principles of the Agreement' para 22.

[26] ibid Article III 'Principles of the Agreement' para 8.

[27] Carayannis in Boulden (n 6) 186-87.

[28] Ceasefire Agreement (n 22) Article III 'Principles of the Agreement' para 9.

for the Congo; 'all parties in the inter-Congolese political dialogue shall enjoy equal status'.[29] Unfortunately, the peace agreement failed and the armed conflict disintegrated into a myriad of privatised, socially and economically motivated, sub-conflicts.[30] To give an idea of the complexity of the conflict of the DRC, in 1998 the conflict consisted of: Kabila (with some elements of the Forces Armees Congolaises (FAC)/ Armed Forces of Zimbabwe (ZDF)/ Angolan Armed Forces (FAA)/ Namibia (NDF), Chad (Armée Nationale Tchadienne (ANT) and Sudan against the military wing of the RCD, the Armée Nationale Congolaise (ANC), the MLC/ Armée de Libération du Congo (ALC), Rwandan Patriotic Army (RPA), Uganda People's Defence Force (UPDF) and Forces Armées Burundaises (FAB). In May 1999 the RCD split into the pro-Rwandan wing (RCD-Goma) and the pro-Ugandan wing (RCD-ML).[31] In addition, Laurent-Desire Kabila was killed by his bodyguard in Kinshasa on 16 January 2001, during the Second Congo War and his son, Joseph Kabila, took his place on 26 January of the same year.[32] Shortly afterwards, Security Council Resolution 1341, of 22 February 2001, demanded that Ugandan and Rwandan forces and all other forces withdraw from the Congo.[33]

This complicated timeline and multitude of actors is symptomatic of a shift in the nature of armed conflict away from traditional battlefield scenarios. The throng of States, armed groups, international organisations and individuals

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[29] ibid 5.2(b).

[30] Prunier G, *Africa's World War Congo, the Rwandan Genocide and the Making of a Continental Catastrophe* (OUP 2009) 225, 235-37.

[31] Autesserre (n 5) 48-49; Kreijen (n 8) 75-77.

[32] Autesserre (n 5) 51.

[33] UNSCR 1341 (22 February 2001) Situation in the Democratic Republic of Congo paras 2, 4, 6, 19-20.

involved in and affected by the conflict seems insurmountable by traditional peacekeeping or humanitarian activities. Chapter three of the thesis considered the shifting nature of conflict and concurred with Ruti Teitel's concept of 'Humanity's Law', in so far as, it shows that IHL, IHRL and international criminal law converge nowadays. The fluidity of war and peace; State armed forces, non-State armed groups and individual combatants; humanitarian aid, protection and assistance and so on is evidence that strict delineation of applicable armed conflicts is no longer possible. The DRC provides clear verification of the argument that conventional approaches to humanitarian protection and assistance would not be adequate to address the needs of civilians on the ground. The complexity of the situation in the DRC requires the ICRC to use its mandate in traditional and novel ways, the particulars of which are considered below.

On the 15 October 2001, more than two years after the signing of the Lusaka Ceasefire Agreement, the Inter-Congolese Dialogue officially opened in Addis Ababa.[34] The Dialogue was intended to allow for the liberation of the Congolese from external occupation and intervention. In December 2002 the Global and All-inclusive Agreement on Transition in the DRC was signed between the Government; (MLC); Rally for Congolese Dialogue (RCD); Political Opposition; Civil Society; factions of the RCD, including RCD-ML, RCD-N; and Mai-Mai.[35] It called for the establishment of a transitional

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[34] Institute for Security Studies, 'The Peace Process in the DRC: A Reader (A Publication of the African Security Analysis Programme at the ISS, funded by the Governments of Sweden and Switzerland) <www.issafrica.org/cdDRCReader/bin/fulldoc.pdf> accessed 23 July 2014.

[35] 'Global and All-inclusive Agreement on Transition in the DRC' (Pretoria, Republic of South Africa) (16 December 2002), available at: <http://reliefweb.int/report/democratic-republic-congo/global-and-inclusive-agreement-transition-dr-congo-inter-congolese> accessed 27 July 2014.

government by the following summer. It reflected a deal between the principal warlords as to how they would share power at the governmental level during the twenty-four month transition period, at the end of which elections should be held.[36] However, 'fighting continued in the east involving the Mai-Mai, dissident factions of the RCD-Goma and the Democratic Forces for the Liberation of Rwanda (FDLR)'.[37] The trouble in the North Eastern district of Ituri was threatening the process and in 2003 massacres in Ituri put the whole national peace process at risk.[38] Nevertheless, the final session of the Inter-Congolese Dialogue was held in Sun City on 1-2 April 2003, during which the Final Act was signed. It endorsed all agreements approved until then.[39]

The period between 2003 and 2006 is considered to be the 'Transitional Period', that is, the period of transition to a democratic government. During 2005-2006 the first 'free elections' took place, which saw the election of Kabila.[40] Presidential elections were then held in 2011, between Kabila and

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[36] ibid part IV.

[37] Arimatsu (n 11) 171.

[38] Hellmüller S, 'The Power of Perceptions: Localizing International Peace building Approaches' (2013) 20(2) Intl Peacekeeping 219, 220.

[39] The Lusaka Ceasefire Agreement (10 July 1999); Sub-plans for Disengagement and Redeployment (DR) of Forces in Accordance with the DR Plan Signed at Kampala on 8 April 2000 (18 November 2000); Memorandum of Understanding between the Governments of the Democratic Republic of Congo and Rwanda on the Withdrawal of the Rwandan Troops from the Territory of the DRC and the Dismantling of the Ex-FAR and Interahamwe Forces in the DRC (30 July 2002): Agreement between the Governments of the Democratic Republic of the Congo and the Republic of Uganda on Withdrawal of Ugandan Troops from the Democratic Republic of the Congo, Cooperation and Normalisation of Relations between the Two Countries (6 September 2002); Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo (17 December 2002); Amendment of the Agreement Signed Between the Democratic Republic of Congo and Uganda (10 February 2003); Draft Constitution of the Transition (31 March 2003) and The Final Act (2 April 2003). These agreements are printed in full in the Institute for Security Studies (n 34).

[40] Autesserre (n 5) 3-5.

Etienne Tshisekedi. They saw Kabila triumph over his opponent.[41] Tshisekedi and international observers questioned Kabila's win.[42] Moreover, the result of the 2011 election sparked renewed violence.[43]

In the last couple of years, the composition of armed groups in the DRC has continually changed. The National Congress for the Defence of the People (CNDP), for example, were integrated into the Forces Armées de la République Démocratique du Congo (FARDC).[44] In addition, perhaps most significantly, a number of ex-CNDP soldiers formed the 'March 23 Rebel Movement' (M23).[45] Its activities sought to destabilise the region and have had a 'negative impact on the deteriorating security and humanitarian situation in South Kivu and Katanga'.[46] In addition, it committed 'serious violations of IHL and abuses of human rights'.[47] In 2013 the UN Intervention Brigade against M23 was established 'consisting inter alia of three infantry battalions, one artillery and one Special force and Reconnaissance Company with headquarters in Goma, under direct command of the United Nations

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[41] ICRC, 'The Democratic Republic of Congo: The Cycle of Violence' <http://icrc.srf.ch/en/kongo#/introduction> accessed 5 August 2014.

[42] ibid.

[43] ibid.

[44] MONUSCO, 'Report of the United Nations Joint Human Rights Office on Human Rights Violations Perpetrated by Soldiers of the Congolese Armed Forces and Combatants of the M23 in Goma and Sake, North Kivu Province, and In and Around Minova, South Kivu Province, from 15 November to 2 December 2012' (May 2013) <www.ohchr.org/Documents/Countries/CD/UNJHROMay2013_en.pdf> accessed 5 August 2014.

[45] Stearns J, Luff J, Kiepe T and Nash J, *From CNDP to M23: The Evolution of an Armed Movement in Eastern Congo (Usalama Project)* (Nicoll F and Thill M eds, Rift Valley Institute, London 2012).

[46] UNSC Res 2098 (28 March 2013) Democratic Republic of Congo, preamble.

[47] ibid; See also 'Special Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes Region' (27 February 2013) UN Doc S/2013/119.

Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) Force Commander'.[48] It has the 'responsibility of neutralizing armed groups' and 'the objective of contributing to reducing the threat posed by armed groups to state authority and civilian security in eastern DRC and to make space for stabilization activities'.[49] Its mandate comes to an end on 31 March 2015.[50] It is outside the scope of this thesis to consider UN involvement in the conflicts in the DRC, but, needless to say, this particular development speaks volumes about the severity of the situation on the ground in the DRC. Indeed, the local conditions, including the insecurity of vulnerable populations, continue to thwart outside attempts to bring peace and security to the region. Unfortunately, the FDLR, Mai-Mai and Lord's Resistance Army continue to fight and commit atrocities against civilians and the humanitarian situation remains fraught.[51] To this end, human insecurity continues to permeate the DRC.

This brief 'timeline' of events in the DRC shows the ongoing nature of the conflict in the DRC. In addition, it shows that multiple actors and stakeholders are affected by and involved in the conflict and violence. This case study will now, in the context of the work of the ICRC, reflect on the conclusions drawn earlier in the thesis on the sovereignty as responsibility paradigm. It also builds on the analysis of humanity and human security, which, this thesis has shown,

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[48] UNSC Res 2098 (28 March 2013) Democratic Republic of Congo para 9.

[49] ibid.

[50] UNSC Res 2147 (28 March 2014) Democratic Republic of Congo para 1.

[51] MONUSCO 'Press Releases 2014' <http://monusco.unmissions.org/Default.aspx?tabid=11469&language=en-US> accessed 5 August 2014.

are evidence that the humanisation of international law is embedded into the international legal order.

c) The ICRC in the Democratic Republic of Congo

The cycles of violence in the DRC makes any kind of sustainable project very difficult:

> The level of involvement of the authorities is so poor because they don't have means and then sometimes it's difficult to say, 'oh they are all corrupt'. You have to put your feet in their shoes and realise that when you don't have means, when the money is not there, when you have to run services without money and budget, it is very difficult to provide services for the community.[52]

i) *Traditional Roles: Dissemination, Detention and Health*

The first chapter of this thesis introduced a quote from Peter Maurer, President of the ICRC. He stated in 2012 that:

> The motivation behind our work has not changed since the final pages of Henry Dunant's ground-breaking book "A Memory of Solferino". What changes, however, is how the organization adapts its response to difference patterns of conflict and different contexts.[53]

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[52] INTERVIEW 001.

[53] 'Interview with Peter Maurer' (Winter 2012) 94 (888) IRRC 1, 2.

The interviews conducted with ICRC delegates, in Geneva in April 2014, reinforce such a proposition. The humanitarian activities currently being undertaken in the DRC are the broadest operations in terms of both protection and assistance.[54] In a protracted armed conflict, where warring factions can change, it is crucial that the ICRC maintains its reputation as a neutral organisation.

The key role of the ICRC, as guardian of the Geneva Conventions 1949, has always been the dissemination of IHL.[55] Indeed, 'in practice, armed opposition groups have frequently allowed the ICRC to disseminate international humanitarian law to civilians living in areas they controlled'.[56] In the DRC, the ICRC has a sustained dialogue with the FARDC and armed groups operating at ground level. Critically, however, it also works with MONUSCO, which is considered to be a party to the conflict.[57] This is, in part, because the UN Force Intervention Brigade under MONUSCO has a defensive mandate to carry out operations against active armed groups.[58]

The ICRC continues to provide protection and assistance in other traditional areas of practice such as detention and healthcare. The Annual Report 2013 states that:

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[54] INTERVIEW 001.

[55] Statutes of the IRCRCM art 5; Statutes of the ICRC art 4.

[56] ICRC, 'Rule 143 Customary IHL: Dissemination of International Humanitarian Law among the Civilian Population' <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule143> accessed 27 July 2014.

[57] INTERVIEW 001.

[58] INTERVIEW 001.

Nine health centres serving some 83,000 people regularly benefited from drugs/medical supplies, staff training, monitoring of care, and infrastructure upgrades. At these facilities: destitute patients had their treatment costs covered; 2,768 patients were referred to secondary care; some 19,800 vaccinations were performed out of a total of over 82,400, of which 96% were for children, as part of ICRC-supported national immunization campaigns; and women received mosquito nets after learning about malaria prevention at antenatal-health consultations.[59]

In the period January to May 2014, the ICRC estimates that it visited or helped 17000 detainees in the DRC.[60] This included the provision of medical and nutritional support, distribution of hygiene items, and the carrying out of renovation work in some facilities that helped improve living conditions.[61] The ICRC also believes that 'some detainees are facing protection issues in terms of ill treatment and possibility of disappearance in detention'.[62] The ICRC, therefore, provides individual case follow-ups and also provides water, sanitation and health programmes in detention facilities in the DRC.[63] It also works to establish nutritional programmes in detention facilities. The concern

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[59] Annual Report 2013 (n 2) 137.

[60] 'ICRC in the DRC: Facts and Figures' <www.icrc.org/eng/where-we-work/africa/congo-kinshasa/index.jsp> accessed 22 July 2014.

[61] ibid.

[62] INTERVIEW 001.

[63] INTERVIEW 001; Annual Report 2013 (n 2) 138.

for the ICRC is that budgets for food do not always actually reach the detainees.[64] In terms of health, more broadly:

> The ICRC works to address the whole chain of care. When people are first wounded they need first aid and stabilisation and then they need to be referred to a medical facility. In some cases this leads to necessary referral to a secondary health facility where they can be treated and then some people might need rehabilitation and prosthetics.

Moreover, the ICRC is supporting small-scale rehabilitation and orthopaedic centres in the Kivus.[65]

It is clear, therefore, that some activities such as visiting detainees and providing healthcare are common to many operations but there are also projects specific to the DRC. Child protection, for example, is something specific to the DRC. This thesis has not specifically focused on the human insecurity of children during armed conflict but it is interesting and reassuring to note that the ICRC in the DRC gives children specific attention. The ICRC specifically tries to sensitise communities and armed groups in order to prevent recruitment, or re-recruitment of children into armed groups, which something not commonly found in other delegations. It is a pilot programme to try and address this specific vulnerability.[66] Another protection role specific to the ICRC is that for the trauma of children recruited to the Lord's Resistance Army,

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[64] INTERVIEW 001.

[65] INTERVIEW 001.

[66] INTERVIEW 001.

which is restricted to one province of the DRC.[67] It will come to an end at the end of this year at which point the ICRC intends to pass the programme to the community.[68] This is significant as chapter six highlighted the importance, indeed necessity, of local ownership of humanitarian protection and assistance projects. The work of the ICRC for the protection and assistance of children appears to be in sync with this proposition. This case study provides a more specific analysis of local ownership below.

Of course, no analysis of human security in the DRC could fail to consider sexual violence. For a time it seemed, from academics and the media, that sexual violence was the main problem to be solved in the DRC. Autesserre articulates why the world was so ready to give sexual violence prominence. Firstly, sexual violence carries an emotional impact for outsiders; secondly, victims are often tortured and subject to social stigma after the event; and finally, sexual violence continued after the 2006 election, which was evidence to the outside world that the DRC remained in conflict.[69] This thesis does not

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[67] INTERVIEW 001.

[68] INTERVIEW 001; ICRC 'DR Congo: Invisible Wounds and Local Paths to Recovery' (10 October 2012) https://www.icrc.org/eng/resources/documents/feature/2012/congo-kinshasa-drc-mental-health-feature-2012-10-10.htm accessed 14 March 2015- 'Since September 2011, the ICRC's psychosocial team has trained over 150 Congolese Red Cross volunteers, teachers, and religious and spiritual leaders in the villages of Doruma, Banda and Dakwa, to better understand psychological and emotional symptoms and integrate this kind of care into their normal work. Two counsellors from each community were also trained to provide more specialized support. After the successes of this work in creating more "fertile" ground for children's recovery, the ICRC plans to launch similar programmes in other villages'. For additional information on the ICRC working with former child soldiers see ICRC, 'Democratic Republic of the Congo: 152 Demobilized Children Reunited with Families' < https://www.icrc.org/en/document/democratic-republic-congo-152-former-child-soldiers-reunited-families#.VQRZdEJZFNO> accessed 14 March 2015; ICRC, 'Democratic Republic of the Congo: Tackling child recruitment by armed groups'<https://www.icrc.org/en/document/democratic-republic-congo-tackling-child-recruitment#.VQRZJ0JZFNM> accessed 14 March 2015.

[69] Autesserre S, 'Dangerous Tales: Dominant Narratives on the Congo and their Unintended Consequences' (2012) 111/443 African Affairs 202, 215.

focus on sexual violence, as the impact of conflict on local populations reaches far beyond sexual violence. This is not meant to reduce the horror of sexual violence for its victims, but rather, to accept Autesserre' s contention that sexual violence cannot be the only narrative of the DRC conflicts. In fact, Autesserre highlights that 'international focus has also led to unintentionally counterproductive results, namely discrimination against other vulnerable populations and, at times, an increase in the use of sexual abuse by combatants'.[70] Nevertheless, in addition to traditional protection and assistance activities, the ICRC has a specific focus in DRC on sexual violence, which is a relatively new activity for the ICRC.[71] In these contexts, its psychosocial activities are probably more developed than in other situations.[72] The ICRC takes both a physical and psychosocial approach to victims whilst documenting and approaching alleged perpetrators.[73] This includes trying to establish a

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[70] ibid.

[71] In addition to the interview data, there are resources available on the ICRC sexual violence projects. See, for example, UN Human Rights Council (Statement by the ICRC) 'High Level Dialogue in Combatting Sexual Violence in the Democratic Republic of the Congo' (24 March 2014); ICRC, 'Sexual violence in the Democratic Republic of the Congo: Telling the story and overcoming the trauma: Interview with Caroline Marquer' (4 June 2014) <https://www.icrc.org/eng/resources/documents/audiovisuals/video/2014/06-04-sexual-violence-drc.htm accessed 14 March 2015; Sarah Cotton and Charlotte Nicol, 'The ICRC's response to sexual violence in armed conflict and other situations of violence' (Humanitarian Practice Network) <http://www.odihpn.org/humanitarian-exchange-magazine/issue-60/the-icrcs-response-to-sexual-violence-in-armed-conflict-and-other-situations-of-violence> accessed 14 March 2015.

[72] INTERVIEW 005.

[73] INTERVIEW 005; ICRC Annual Report 2013 (n 2) official numbers- The ICRC Annual Report 2013 accounts for the provision of psychosocial support for 4,544 victims of sexual violence in North and South Kivu. Of these, 2,205 were referred to nearby ICRC-supported health facilities for treatment. Another 2,077 people suffering from trauma linked to the conflict in North and South Kivu and to LRA-related attacks in five areas in Bas and Haut Uélé in Province Orientale also received psychological support from trained community counsellors.

dialogue with the perpetrators, whilst in no way having any involvement in the judicial process or prosecution at all.[74]

The ICRC, as described in chapter one, must remain very remote from any kind of judicial activities, as it must not be perceived as documenting violations in order to feed prosecutions.[75] One interviewee highlighted that in contexts like the DRC, where the ICC is very active, perpetrators of violence know which of their colleagues are already in The Hague. It is crucial, therefore, for the continuing work of the ICRC that the perpetrators of violence understand that the ICRC is not collaborating with the ICC.[76] If suspicions were raised of such a situation then the dialogue that the ICRC has established on the ground would be ruined. This would have repercussions, not only from the perspective of dissemination of IHL to those involved in conflict, but also for the people relying on the protection and assistance of the ICRC.

One interviewee described the ICRC support for sexual violence related counselling services.[77] The ICRC aims to work with communities to provide additional support to existing programmes for victims of sexual violence.[78] This includes training counsellors to listen to women that have been attacked and also works to refer those women as quickly as possible to primary healthcare. The aim is for the women to be treated within the first seventy-two hours to prevent other medical issues. For the ICRC, the sexual violence

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[74] INTERVIEW 002; INTERVIEW 003; INTERVIEW 004; INTERVIEW 005.

[75] INTERVEW 002.

[76] INTERVIEW 002.

[77] INTERVIEW 001.

[78] INTERVIEW 001.

initiatives can also be linked to projects that address economic vulnerabilities. It might offer small donations to help women restore their livelihoods, for example. The interviewee who described this project was keen to emphasise that this is a new project for the ICRC and it cannot be said, to what extent, the results will be positive.[79] The outcomes of the projects could potentially be investigated as a later research project.

It is argued that although the ICRC is able to adapt its mandate to respond to the humanitarian needs of victims of armed conflicts, ultimately, local and national authorities must change the status quo. Sexual violence is a crime against humanity and, as was considered in chapter four, it can be punished through judicial mechanism. However, in the mean time, it is critical that the ICRC, as an invaluable humanitarian actor, is able to respond to the needs on the ground. The effectiveness of the ICRC action can be said to be in its utility for victims of sexual violence. The adaptation of its mandate to provide specific assistance to victims of sexual violence is an invaluable asset, having said that, sexual violence continues to be used as a weapon of war. To this end, the protection and assistance activities of the ICRC are having a positive impact in terms of the recovery of victims, in particular women, but the ICRC cannot prevent the recurrence of such offences of IHL. In terms of the concept of humanity's law, therefore, it is suggested that although in theory and in academic literature, there may be evidence of a shift in thinking, it is difficult to transpose such ideals onto the ground. In particular, it is very difficult to change the practices of the State and non-state armed groups in protracted and violent armed conflicts. For the ICRC, therefore, it is still responding to the

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[79] INTERVIEW 001.

immediate affects of armed conflicts on the ground, it is just that the victims and types of conflict are changing.

ii) Food Security and Water

In 2013, the ICRC reported that in the DRC 'over 1 million people had access to safe drinking water as a result of coordinated action by local water authorities, communities, the DRC Red Cross and the ICRC.' [80] In addition the ICRC provided food commodities to 253,295 beneficiaries.[81] The ICRC's work on food security concerns mainly trying to bring food and non-food items to those who have been displaced.[82] Military operations and activities of armed groups create situations where people are displaced for a short period of time. People living in rural communities may, for example, regularly flee into jungle areas to hide for a number of days before returning to their homes.[83] The ICRC tries to address their immediate needs through donation of food or non-food items to last a few weeks.[84] One interviewee estimated that the ICRC provides food to around 50000 families per year. This amounts to roughly 220000 individuals, which is evidence of the 'logistical quagmire' and insecurity of the DRC.[85] The interviewee stated that 'it is quite remarkable that [the ICRC] manages to provide such an amount of food and non-food items'.[86]

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[80] ICRC Annual Report 2013 (n 2) 137.

[81] ibid 135.

[82] INTERVIEW 001; INTERVIEW 003; INTERVIEW 004.

[83] INTERVIEW 003; INTERVIEW 004.

[84] INTERVIEW 003.

[85] INTERVIEW 001.

[86] INTERVIEW 001.

The ICRC also works to reconnect or establish water supplies in the DRC. In urban areas like Goma and Bukavu, it is now rehabilitating the water network of the city with another organisation, Merlin, as it is a huge programme.[87] The ICRC is working on the production sides, including pump stations, the lakes, and curation and sending to the network, which is curated by Merlin. It will do the same for Bukavu. The ICRC is also working on several other rural projects throughout the Kivus and Katanga, where it is rehabilitating smaller networks. The ICRC usually works within priority areas, defined of course, according to the conflict zones. Within these priority areas it looks at the needs of the populations and then tries as much as possible to apply a multi-disciplinary approach to address problems in a more holistic manner. 'Usually you will never help people fully recover because the other problem being unaddressed will weigh a lot on the community'.[88]

The work of the ICRC to ensure food security and reconnect water supplies is an ongoing project. It is argued that these projects are logical expansions of the more traditional role of bringing food and water to wounded soldiers. It is argued that food security and clean, running water is necessary, not only during the conduct of hostilities, but it is also essential for the creation of broad human security and sustainable peace. The space constraints of this thesis have not permitted exploration of the specific effects of lack of resources on armed conflicts but it is important to note the importance of access to food and water to prevent recurrence of hostilities. In some cases, lack of food and water could be a root cause of the conflict. The ICRC provides help for those affected by

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[87] INTERVIEW 001.

[88] INTERVIEW 001.

conflict to survive and become self-sufficient. Its efforts to improve healthcare and, as a related activity, provide access to water and decent sanitation are crucial to post-conflict recovery and the ability of local people to overcome the conflict.

iii) Economic Security

This thesis has shown that economic security is tied into both the establishment of human security and socio-economic development. Trefon has written on the economic insecurity of people in Kinshasa.

> Sacrifice is omnipresent in contemporary Kinshasa. The term here pertains to the hard reality of doing without. People do without food, they do without fuel wood, they do without primary health services and they do without safe drinking water. They also do without political participation, security, leisure or the ability to organize their time as they would like.[89]

For the people living in Kinshasa economic security does not mean a secure, salaried job in the formal economy. The economic crisis and poverty is endemic and, as a consequence, the ability of people to establish or find economic security is incredibly difficult. It should be noted that much of the ICRC's work focuses on the East of the DRC, in particular, North and South Kivu and as such its economic security projects, when discussed in the interviews, are referring to the East. The abstract from Trefon provides context

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[89] Trefon T (ed), *Reinventing Order in the Congo: How People Respond to State Failure in Kinshasa* (Zed Books, London 2004) 4.

to the type of economic insecurity faced in the DRC, which is somewhat different to economic insecurity in the UK, by example.

Trefon argues that the generations born and raised during Mobutu's 'Le Mouvement Populaire de la Révolution (MPR)' lack individual initiative because Mobutu claimed to be responsible for all Zairean's from cradle to death.[90] The overall feeling during this time was that 'individual interests supplant[ed] collective ones; corruption, theft, extortion, collusion, embezzlement, fraud, counterfeiting and prostitution' were all means of survival'.[91] Moreover, massive nationalisation of large and small foreign owned companies launched a 'fend for yourself culture'.[92] Alternative means of income included accosting boats on the Congo River and doing deals over the produce aboard, also known as 'Les Mamans Manouvres'.[93] Overall, during Mobutu's reign, in the DRC, the foundations of a legitimate nation State were eroded by economic mismanagement. The people were:

> Left to live by their wits, residents developed parallel networks of interdependence and revenue generation, ranging from the 'tax' demanded at the police roadblock to the 'little present' made to a hungry official. Donors and humanitarian organisations played along with the intellectual fiction that was Zaire.[94]

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[90] ibid 21-23.

[91] ibid 23.

[92] ibid 21.

[93] ibid 25ff.

[94] Wrong M, 'Congo Lesson: Africa's Colonial Borders are Dissolving' *International Herald Tribune* (Europe, 31 January 2001) 7.

These circumstances precluded the realisation of socio-economic development and economic security. In the DRC, the ICRC works to enable families affected by conflicts to meet their own basic needs.[95] In 2013 this necessitated providing 78000 households with essential household items, food supplies to 88200 people, 60400 received seeds to grow produce to feed them and earn a living, and 360 people received support to build fishponds and 150 people benefited from the 'cash-for-work' project.[96] From the perspective of the ICRC delegates, the situation in the DRC changes over time and from place to place.[97] When situations are less violent communities might try to plant and grow food in the hope that the situation will remain stable until it is ready to harvest.[98] In terms of distributing seeds or assisting with farming, 'every activity is based on a direct assessment of the needs of the people but also the environment and the perspectives of the people on the move who have been displaced for a long times and will probably remain displaced in a camp for a long time'.[99]

One interviewee identified that in the 'Eastern Congo' displacement is usually short term, as people spend 3-4 days in the bush and come back to see what the situation is like and determine whether they can return.[100] In such volatile and

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[95] 'ICRC in the DRC: Facts and Figures' <www.icrc.org/eng/where-we-work/africa/congo-kinshasa/index.jsp> accessed 22 July 2014; See also Annual Report 2013 (n 2) 135.

[96] ibid.

[97] INTERVIEW 003; INTERVIEW 004; INTERVIEW 005.

[98] INTERVIEW 004.

[99] INTERVIEW 004.

[100] INTERVIEW 004.

changing environments it is difficult for the ICRC to establish the same kinds of activities that it can when people have been in a camp for months and it is likely that they will stay there for a long time afterwards.[101] The interviews show that the ICRC has to be adaptable and be able to adjust to constantly changing situations.[102] Finally, if we reflect on the arguments made for local ownership in chapter six, interviewees argued that the conflict in the DRC is not countrywide so responses by the ICRC have to be much contextualised and work at a very local level.[103] The ICRC will work with local people by approaching a community, talking to individuals to understand the precise needs and then working on a response that includes as many people as possible because they are all affected by the same situation.

When interviewees were asked further questions about economic assistance, they were keen to explain that the initiatives undertaken by the ICRC are on a very small scale.[104] The ICRC works on giving a family the means to survive for the next three to six months.[105] The ICRC, stated the interviewee, are not involved in large economic impact projects.[106] To this end, the initial assessment undertaken by the ICRC will determine whether a particular community would benefit from agricultural support or whether the best the ICRC can do is provide food parcels.[107] In the DRC, the ICRC also works with

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[101] INTERVIEW 004.

[102] INTERVIEW 001; INTERVIEW 002; INTERVIEW 003; INTERVIEW 004; INTERVIEW 005.

[103] INTERVIEW 004.

[104] INTERVIEW 002; INTERVIEW 003; INTERVIEW 004.

[105] INTERVIEW 004.

[106] INTERVIEW 005.

very small projects with the Institute Internationale de Rochercher Monamique.[108]

In terms of economic security, the ICRC also facilitates Micro-economic Initiatives (MEI) for farmers, which are 'an income-generating programme that is implemented through a bottom-up approach, whereby each beneficiary is involved in identifying and designing the assistance to be received'.[109] The specific example of an MEI provided during an interview was of a project whereby the ICRC helped to develop seeds resistant to diseases prevalent in the DRC.[110] In the first year, the primary association of Congolese farmers affiliated to the project had a history of working together and luckily, in that year, the seeds grew well. In the second year, however, the farmers involved in the project were more opportunistic. The interviewee stated that the second group of farmers only wanted the economic incentives provided by the ICRC. They did not; therefore, repeat the growing of seeds the second year.[111]

This problem was also seen with MEIs for women who were victims of sexual violence; many asked for money to start small shops or tailoring businesses, but the women who received the money really needed it for something else and the businesses were never started or closed very quickly. The ICRC could not provide constant financial support to the women and the MEIs failed.[112]

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[107] INTERVIEW 004.

[108] INTERVIEW 005.

[109] ICRC, *Micro-Economic Initatives: Handbook* (ICRC, Geneva 2002) 11 <www.icrc.org/eng/assets/files/other/icrc_002_0968.pdf> accessed 27 July 2014.

[110] INTERVIEW 005.

[111] INTERVIEW 005.

[112] INTERVIEW 005.

However, the interviewee argued that the ICRC is still keen to support 'Social Safety Net' type economic projects but in lessons learnt have determined that money should be provided in stages.[113] As yet there are no new projects to report on but the ICRC and British Red Cross commence one such initiative collaboratively in June 2014.[114]

The interviews identified that the ICRC might also utilise economic projects to bring communities together. It is argued that such projects can work towards not only human security but also the prevention of future recurrence of hostilities. In the Kivus, for example, for a period of two to three years, the ICRC ran vaccination and animal treatment programmes separately in two communities, one was predominantly made up of people of Rwandan heritage and the other Congolese. The aims for the ICRC, stated an interviewee, were to try and benefit the two communities and at the same time improve attitudes between communities.[115]

Interviewees recognised that the ICRC has to take the security of local communities into account when making the assessments as to the kinds of support that can be made available.[116] The ICRC will open a dialogue with armed groups and authorities in the region.[117] In fact, one interviewee stated that 'the protection the ICRC can provide is more thanks to the contacts we can

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[113] INTERVIEW 005.

[114] INTERVIEW 005.

[115] INTERVIEW 005.

[116] INTERVIEW 001.

[117] INTERVIEW 001; INTERVIEW 003; INTERVIEW 004.

have with the different parties [that is] high ranking military officers on both sides'.[118]

The establishment of a dialogue is always done in full transparency and the security of the beneficiaries is taken into account before providing assistance, as the ICRC does not want to exacerbate the problems on the ground.[119] In terms of security, therefore, what is interesting is that the ICRC, in starting a dialogue with armed groups or those in authority, will not necessarily talk to them about the Geneva Conventions I, II, III and IV 1949 and their IHL obligations.[120] The ICRC is more pragmatic and talks about the impact of the groups' activities on the living situation of the people in an area.[121] The ICRC will opt to use such humanitarian arguments when it is apparent that talking about breaching specific laws won't make the group sensitive to the people around them.[122]

In this regard, dissemination has taken on a more practical approach. The humanitarian goals of the ICRC take priority over the dissemination of specific provisions. Accordingly, the activities of the ICRC have evolved. If we think back to the conclusions earlier in this thesis that IHL and IHRL are increasingly intertwined, based, in particular, on their synonymous 'human' core, it is logical that the ICRC can rely on discourse beyond strict dissemination of IHL.

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[118] INTERVIEW 005.

[119] INTERVIEW 003.

[120] INTERVIEW 004.

[121] INTERVIEW 004.

[122] INTERVIEW 004.

An issue to keep in mind when considering the practicalities of the ICRC establishing a dialogue with key actors in the DRC is the sheer number of armed groups; the UN has recorded fifty-four armed groups in the Kivus. These armed groups are forming and reforming or gaining representation at the political level. The means employed by the UN to establish dialogue with these groups varies from one to the other.[123] When they are in control of particular areas it's very easy to promote and then to advocate for those in authority to take responsibility to provide basic services, to ensure that people can get food and water and then the ICRC is able to engage in a dialogue.[124]

Overall, therefore, the establishment of economic security in the DRC encounters a quandary of difficulties. The traditional protection and assistance models, such as dissemination, detention and healthcare, are coupled with economic support and initiatives to try and help people get back on their feet but still the majority of people in the DRC are on survival mode. For the ICRC, when people are on survival mode and there are high levels of corruption, lack of basic infrastructure and difficulties in sustaining ICRC action, then the initial aims of the ICRC have to be amended.[125]

d) Conclusion to Case Study

It is almost impossible for academic literature to provide an overview of the conflict in the DRC, or convey the horrors of such a protracted armed conflict. This case study has shown the changing role of the ICRC in the DRC, its potential in terms of the establishment of human security and sustainable peace,

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[123] INTERVIEW 003; INTERVIEW 004.

[124] INTERVIEW 001.

[125] INTERVIEW 001.

and its relationship with the local population. The motivation behind the establishment of the ICRC, to protect and assist victims of armed conflicts continues to this day. The type of conflict seen in the DRC during its thirty-six year presence however is indicative of broader trends on the international stage towards protracted internal armed conflicts. This is very different from the situations anticipated by the ICRC following Solferino, the First World War and during the drafting of the Geneva Conventions I, II, III and IV 1949.

This case study has shown that what was missed in the decolonisation process, a voice still missing in recovery from armed conflict today, is a local voice. A voice that is able to articulate what is needed on the ground to make life positive and secure. The interviews showed that for the delegates of the ICRC it is important, in fact essential, to build a dialogue with people on the ground. For the ICRC, when working with armed groups, it is also pertinent to explain the requirements of humanity under IHL or IHRL. Overall, the ICRC delegates will emphasise the humanitarian core of both legal frameworks. Pragmatically, therefore, it is about teaching the people involved in the conflict about their responsibilities towards those involved and not involved in conflict. The ICRC will, at the same time, work with local communities on projects to improve their daily lives. It is argued that creating projects with the involvement of local populations is the core strength of the ICRC. The ICRC can work from the bottom-up for the creation of human security. This can be seen in food projects, micro-economic initiatives, and the provision of health care for detainees and victims of sexual violence and, finally, sustained dialogue with those involved in the conflict.

In the DRC multiple non-State armed groups have authority over certain areas and the leaders of the DRC, even when supposedly democratically elected, have inflicted suffering on the civilians of the State and plundered the resources to preclude true economic development. Somehow the ICRC has, in practice, maintained a trusted presence since 1978 and has forged links with local actors and the National Society. Its proven record of confidentiality and neutrality in the DRC allowed it to build a dialogue and create context specific protection and assistance projects for the people of the DRC. Sometimes the ICRC utilises IHRL, or human rights more generally, to convey the humanitarian message; the implications of human rights for the ICRC are concluded fully in the final chapter conclusion.

As was shown in chapter four, the security paradigm on the international stage has shifted. Whilst State sovereignty and territorial integrity remain, the 'Common Understanding Resolution' shows that the international community has accepted human-centric security concerns. For the DRC, this progression to human-centric ideas is particularly interesting. Westphalian sovereignty is both external and internal sovereignty. If we recall from chapter four, external sovereignty 'is about the relationship between States, as legal persons, whereas internal sovereignty is about the State and its relationship with NSA's within its territory'.[126] It is argued that although external sovereignty has become part of the DRC framework, internal sovereignty has never really been established in the DRC. Although the 'State' fulfils the Montevideo requirements and it is a member of the UN, it does not, in terms of security, provide the population

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[126] Peters A, 'Humanity as the A and Ω of Sovereignty' (2009) 20(3) Eur J Intl L 513, 514, 515-16.

with human security. The people of the DRC have always faced the challenges recognised by the UNDP in 1994; in fact, the types of human insecurity in the DRC closely resemble those included in the broad Freedom from Want narrative of human security. To this end, political security, such as democratisation and the rule of law, championed by MONUC and MONUSCO will not bring true security to the population of the DRC.

This case study has shown that the ICRC focus on food, water, health, sexual violence and economic insecurity reaches people at a local level. If the people relied on the realisation of human rights frameworks to establish the right to health or water and so on, it would be fruitless. There is not a 'State' to receive, adjudicate and provide remedies for human rights claims. Nor are there adequate resources to achieve even the minimum core of economic, social and cultural rights. To this end, this case study has suggested that the ICRC dialogue with the state, non-state armed groups and local communities using 'humanitarian' language and projects are valuable currency for the realisation of human security on the ground. In addition, the ICRC's economic security projects on the ground in the DRC aim to help victims of armed conflict, in particular at the local level. The ICRC cannot be involved in peace building, as to do so would compromise its neutrality and impartiality. However for people on the ground, reconciliation of different groups, economic stability of farming communities and improvements in health, sanitation and the availability of food all contribute to a more stable environment. That being said, this does not answer the question of whether these departures from the Geneva Conventions I, II, III and IV 1949 and Statutes of the ICRC are lawful? Can the ICRC argue 'humanitarianism' every time it undertakes an activity that is difficult to

reconcile with any wording of the Geneva Conventions? Does its small scale successes such as those shown in this case study preclude any real assessment of whether it can lawfully undertake these activities or projects? These issues are considered, taking into account all chapters of the thesis, in the final conclusion.

CONCLUSION

Since the creation of the ICRC in 1863, the type of armed conflicts fought has changed. The current situation, as regards armed conflict, can be viewed in two ways. On the one hand, armed conflict continues, as the situations in the DRC, Syria and the Ukraine show. The nature of armed conflict, however, continues to change; the 'front line' is a myriad of continually shifting lines, often spreading into areas populated by civilians. The gloom of war, therefore, continues to hang over States and the people within them. Moreover, the human cost of conflict increasingly affects those not taking part in hostilities. On the other hand, the significance of IHL continues to develop. It is designed to protect the people not directly participating in hostilities and limit the effects of armed conflicts. The drafting and ratification of the Geneva Conventions I, II, III and IV 1949 and Additional Protocols I and II and the drafting of the Customary Study on IHL are evidence of State acceptance of limitations on their actions during armed conflicts. In addition, it was shown in chapter three that other legal frameworks including IHRL apply during hostilities and echo the humanitarian core of the ICRC.

The ICRC has continued to focus on its traditional mission whilst constantly adapting to new situations of armed conflict, new actors in those conflicts and the changing needs of the civilian population. The ICRC has worked to develop the law and its activities to reflect the humanitarian needs of people on the ground. The ICRC is well placed to understand the dynamics behind violence and why some actors choose to ignore IHL. The issue at hand in this thesis however was how far the ICRC can push its boundaries and remain true to the principles and purposes of the Geneva Conventions since 1864 and its

founding Committee of Five. To this end, this thesis has addressed the protection and assistance roles of the ICRC, both traditionally and currently.

One of the purposes of this research was to consider what kind of international organisation the ICRC is, that is, whether it resembles an intergovernmental organisation with ILP, or, whether it is more closely akin to an NGO, like Amnesty International or Human Rights Watch. It was concluded that the ICRC is difficult to define in terms of its organisational 'type' and should, as such, be considered *sui generis*. Nevertheless, it does possess ILP. The conclusion was reached by testing the law and practice of the ICRC against the *Reparation for Injuries* Advisory Opinion. The ICJ stated that:

> In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a *large measure* of international personality and the capacity to operate upon an international plane… [It] could not carry out the intentions of its founders if it was devoid of international personality.[1]

Chapter two showed that ICRC exhibits the objective test requirements for ILP as described in the *Reparation for Injuries* Advisory Opinion: that is associated by States, established by international agreement and possesses privileges and immunities on the international stage. Critically, the ICJ specifically stated that an organisation could possess a 'large measure' of international personality.

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[1] *Reparation for Injuries Suffered in the Service of the United Nations,* (Advisory Opinion) [1949] ICJ Rep 174, 179 (emphasis added).

This thesis has shown, therefore, that ILP should not be understood as a black and white determination.

The ICRC exhibits elements of the objective test requirements. Private Swiss citizens created it, but its mandate is determined by the International Conference and international treaties, including the Geneva Conventions I, II, III and IV 1949, Additional Protocols I and II and the Statutes of the ICRC. It has also brought claims for compensation following the deaths of its delegates, but it is immune from being brought before international courts and tribunals to give evidence. Its autonomy and possession of rights and duties on the international stage set it apart from other humanitarian organisations.

The structure of the ICRC, IRCRCM and the content of its mandate were examined in chapter one. The ICRC, the International Federation and the 189 National Societies are the three components of the International Red Cross and Red Crescent Movement (Movement).[2] Their mandates are found in details in their respective Statutes or Constitution and also, in the Statutes of the IRCRCM. The three components, along with all of the High Contracting parties to the Geneva Conventions meet every four years at the International Conference to debate major humanitarian challenges.[3] The Conference is the supreme deliberative body for the Movement, as described in chapter one. In terms of its roles, under the Geneva Conventions the ICRC has the right to be active in International Armed Conflicts.[4] The right of initiative, in terms of

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[2] Chapter one.

[3] International Conference <https://www.icrc.org/en/who-we-are/movement/international-conference> accessed 15 March 2015.

[4] Geneva Conventions I, II, III and IV 1949 arts 9, 9, 9, 10.

NIAC is different; the ICRC can 'offer' its services.[5] The basis of its presence in either case will be the Headquarters Agreement that is negotiated with the State.[6] The Headquarters Agreements have minimum requirements, in particular the immunity of staff, which was discussed in chapter one. Finally, in addition to the international mandate and Headquarters Agreements, the ICRC also has a mission statement, which is inspired by the mandate and which stems from an ICRC 'Doctrine/Policy' that is adopted by the Assembly, its supreme governing entity. The Assembly is the only body that can amend and adopt 'Doctrine/Policy'.[7]

The conclusions to chapters one and two, established the position of the ICRC as an organisation and ILP. This provided the building blocks for the thesis to consider the development of the activities of the ICRC. The International Conference provides States with the opportunity to develop the mandate of the ICRC, to this end; States continue to be involved in the overall direction of the ICRC. After such, the delegates at headquarters and in the field undertake the day-to-day work of the ICRC. This thesis showed that just because an entity is a legal person does not enable it to act outside its constitutional mandate. Likewise, just because an entity does not have ILP does not mean that it cannot respond to situations as it sees fit, for example, an NGO. The ICRC, therefore, has the capacity for autonomous development of its rights and duties. It is clear however that the purposes of the ICRC are not as extensive as the UN and, therefore, expansion of powers by the ICRC is more circumspect. The ICRC

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[5] See Geneva Conventions I, II, III and IV 1949 common art 3; Additional Protocol art 18.

[6] See analysis in chapter one.

[7] --, 'ICRC Strategy 2015-2018: Adopted by the ICRC Assembly on 18 June 2014' https://www.icrc.org/fre/assets/files/publications/icrc-002-4203.pdf accessed 15 March 2015.

has been able to develop its legal framework and practice in response to changing nature of conflict and security paradigms. Nevertheless, the ICRC must remain true to its object and purposes, including its principles of humanity, neutrality, impartiality and independence. In addition, States must consent to the presence of the ICRC on their territory. This thesis has shown that the ICRC continues to balance its willingness and ability to provide humanitarian protection and assistance with the necessity of remaining true to the fundamental principles. The later parts of the thesis, which looked at the current protection and assistance roles of the ICRC, identified the challenges to the ICRCs reputation as a neutral actor, when it becomes part of more contentious activities. The overall conclusions to such will be examined later.

Once the thesis had considered the ICRC, as an organisation and whether it possessed ILP, it sought to establish the relationship of the ICRC to other areas of international law and organisations. The normative development of the *jus ad bellum* and *jus in bello*, following the end of the Second World War, took two distinct paths. The UN, keen to 'never again' witness a world war, sought to preclude the use of force on the international stage, except in specific and limited circumstances. The ICRC recognised that hostilities and armed conflicts would continue. The ICRC therefore pursued the development of legal frameworks to limit the suffering of people not involved in conflicts. Chapter three argued that these two distinct, both commendable, approaches to armed conflict were ultimately thwarted by not only the continuation of inter-State conflicts but the increase in the types of conflict commonly seen today, that is, protracted NIACs. Nowadays people within States fight one another, not just other States, and the reasons for armed conflict no longer reflect the

concerns of the allies and other States in 1945, that is, predominantly territorial gain. Today, lack of access to resources, religious disputes, more localised land disputes and political ideological clashes perpetuate conflict and strife in many countries. This thesis recognises the importance, therefore, of the protection and assistance work provided by the ICRC in such fragile circumstances.

Chapter three examined the normative development of different legal frameworks linked to armed conflict, including the *jus ad bellum*, *jus in bello* and human rights. Ruti Teitel's 'Humanity's Law' echoes this Authors argument that there is an inherent humanisation of international law. This thesis built on existing literature, which shows the inherent links between IHL, IHRL and international criminal law. It examined how the concept of humanity's law can be reconciled with the mandate of the ICRC. It was shown that the strict delineation of the principle of humanity as something to be protected during armed conflict has expanded into other situations of violence. Critically it can no longer be restricted to the protection of humanity of those involved in the conflict.

Chapter four added to the thesis, and existing literature, by presenting a doctrinal critique of the principles of humanity and neutrality and the limitations they place on the ICRC. Chapter four also highlighted the suggestions in chapter three that 'humanity's law' is, in fact, in existence. Chapter four built on case law and academic literature, both historical and current, to present an overview of the development of the concepts of humanity and neutrality in terms of the ICRC mandate.

Peter Maurer, President of the ICRC, recognised in 2012 'in situations where the government or international coalitions are unable to assert their control, the

ICRC must be able to reach vulnerable groups in an effective manner'.[8] The ICRC is, in fact, in a position to put people first. Despite the nature of conflict changing, State sovereignty and territorial integrity remain significant; this is something the thesis does not try to deny. However, what this thesis has shown is that the changing nature of conflict forced the ICRC, UN and international community to recognise the needs of people within States were part of the 'security' paradigm of armed conflict. Whereas, historically, the type of security linked to international armed conflict was primarily national security, which required military responses to aggression or intervention. Nowadays, the predominantly internal conflicts show that human security is of paramount importance, not only to States but the people, the civilians and victims, living within those States. The thesis showed therefore that the protection and assistance roles provided in the Geneva Conventions contain potential for the realisation of that human security.

The 'big picture' in this regard is that ultimately international law is shifting, it is moving away from resolute notions of sovereignty towards a model of sovereignty that incorporates human-centric norms, that is, sovereignty as responsibility. To this end, security can be measured not only by lack of military aggression, but also by security in the daily lives of the population. This includes food, economic, health, personal, political, community and environmental security.

Chapters four and five, taken together, consider the 'narrow' or IHL understanding of humanity and, using human security and RtoP, show unequivocally that 'humanity' is subject to wider interpretation in the

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[8] ibid.

international community than is provided for in the IRCRM Statutes. It showed that the ICRC definition of humanity is no longer reflective of human needs on the ground given the type of conflicts seen today and also it provided a reference point to show that the ICRC work is reflective of a wider concept of humanity. To this end, the analysis of human security and RtoP provided context to the argument that the ICRC is working beyond its mandate and to what this Author considers to be the peripheries of humanitarianism as it is more widely understood. The analysis of the principle of neutrality included an examination of the extent to which it limits the development of 'humanity' by the ICRC. The ICRC is more restricted than organisations than can be openly politically motivated. This works to its advantage when negotiating headquarters agreements and making contact with non-State armed groups. It was shown that the ICRC has adapted its practice on the ground to respond to broader humanitarian needs and that in doing so it may have expanded its definition of humanity, in line with key human-centric concepts that have emerged over the past two decades, including human security and RtoP. This thesis does not suggest that the ICRC is creating a new concept of humanity, rather that the definition of humanity, as provided for in the Statutes IRCRCM could be read very narrowly by the ICRC but the practice of the ICRC suggests that it is now defining 'humanity' more broadly. The extent to which is assessed against other concepts of 'humanity' in the wider international community, such as human security and RtoP.

The definition of humanity provided in the Statutes IRCRCM states that 'its purpose is to protect life and health and to ensure respect for the human being'. If we take the mandate of the ICRC then its right to visit prisoners of war or

provide health care to wounded soldiers are clearly linked to this part of the principle of humanity. This thesis addressed whether 'protection' and 'assistance' have had to adapt to new types of conflict and broader humanitarian concerns.

This thesis showed that the concept of human security is reflective of a normative shift on the international stage whereby States, including within the UN and other groups, have recognized the central role that 'humanity' has during and after armed conflict. It is argued that the principle of humanity, once restricted to IHL and Red Cross work, now permeates the international stage and is reflected in the concept of human security. It is argued that the threats to security contained in the concept of Human Security, as created by the UNDP and now contained in the 'Common Understanding Resolution', more aptly identify the corpus of humanitarian concerns facing individuals and communities nowadays, given the changed nature of conflict.

This thesis identified how the international community has moved on from the binary distinction between war and peace, institutionalized by the UN and ICRC at the end of the Second World War, to adopt a concept, which, at its centre, reflects the principle of humanity. Human security is a human-centric reconceptualisation of traditional public international law principles, including state sovereignty and non-intervention. Its adoption at the General Assembly shows that the international community, at large, now recognizes the importance of seeing human beings as a central concern.

It is argued that the ICRC is edging into a 'human security' interpretation of its mandate. The ICRC works 'in other situations of violence', it undertakes long-term projects which continue beyond the cessation of hostilities, and it has

clear links to Economic Security. The specifics of which were explored in chapter five and the case study and will be concluded below.

In terms of the mandate of the ICRC, these chapters considered at the reality on the ground in terms of humanitarian assistance and initiative. The thesis shows that in terms of 'humanitarian initiative' the ICRC may be responding to the 'needs' of the people on the ground but it is walking a fine line in terms of its neutrality. It is this aspect of its mandate which is most likely to see consent revoked by States. The conclusions to chapter five therefore drew on the principles discussed throughout the thesis, the question of the usurpation of its mandate and whether there might be consequences for the ICRC, reflecting on analysis on chapter two.

The crux of the thesis is that the ICRC is expanding its activities on the international stage and legally speaking it takes its powers from the Geneva Conventions and the Statutes of the ICRC. There is a small provision in Common Article 3, which acknowledged the potential utility of the ICRC in NIAC. At the time that they conventions were drafted it wasn't expected that this article would have much use as conflicts until the end of the Second World War were predominantly international. To this end, the ICRC draws its rights and duties on the international stage from articles 9, 9, 9 and 10 Geneva Conventions I, II, III and IV 1949. It has traditionally interpreted its protection and assistance mandates from such to include the right to visit detainees, administer the central tracing and messaging service and providing medical assistance to the sick and wounded. Under Additional Protocol I it 'may also carry out *any other humanitarian activities* in favour of these victims, subject

to the consent of the Parties to the conflict concerned'.[9] Increasingly, however, its mandate and its practice have come to involve newer activities, such as economic security. Legally speaking therefore the ICRC can attempt to justify the expansion of its activities to include economic security by subsuming them under 'any other humanitarian activities' provided for in Additional Protocol I, which only applies during international armed conflicts. This is difficult to reconcile with its current roles, as so many conflicts are now NIACs. Thus, even if it can explain its activities under 'any other humanitarian activity', this thesis has shown that there may come a time when it has encroached so far into long-term projects which do not appear, to States, to be within the mandate provided in the Geneva Conventions or Statutes IRCRCM. If and when this happens States are likely to revoke their consent for the presence of the ICRC or they will deny it access in the first instance. In the latter scenario, its traditional roles and activities will also be stopped. The argument is, overall, that the ICRC has many legal provisions from which it can explain its practice, and some were drafted rather broadly. All of which States had to consent to, but this does not mean that States have to consent to every activity of the ICRC on their territory. States may consent to laws at the International Conference but this does not bind them to consent to everything that the ICRC does within its territory.

This thesis argued that human security and RtoP have attracted the most attention within the sovereignty as responsibility paradigm. The thesis explored both approaches and considers them to exist on a spectrum. Human security encompasses broad security concerns for the civilian population, including

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[9] Emphasis added.

food, economic, health, personal, political, community and environmental security, whereas RtoP, following its final 'definition' in the 'Outcome Document 2005', concerns just four core crimes and allows military intervention as a response to their committal. Sovereigns have responsibility for the creation of all aspects of human security, but under RtoP, so long as the sovereign does not commit or allow the committal of the four core crimes within State borders, then it has fulfilled its obligations. In terms of the ICRC the thesis concludes that it has the potential to help the realisation of human security but its principles preclude its involvement in RtoP.

The 'Common Understanding' of human security is contained in General Assembly resolution A/68/685.[10] It states that:

> Governments retain the primary role and responsibility for ensuring the survival, livelihood and dignity of their citizens. The role of the international community is to complement and provide the necessary support to Governments, upon their request, so as to strengthen their capacity to respond to current and emerging threats.[11]

In addition:

> Human security must be implemented with full respect for the purposes and principles enshrined in the Charter of the United Nations,

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[10] Report of the Secretary General, 'Follow-up to General Assembly Resolution 66/290 on Human Security' (23 December 2012) UN Doc A/68/685 para 4.

[11] ibid para 4(g).

including full respect for the sovereignty of States, territorial integrity and non-interference in matters that are essentially within the domestic jurisdiction of States. Human security does not entail additional legal obligations on the part of States.[12]

This thesis has shown that, in terms of the final sentence, human security is inextricably linked to IHL and IHRL. Indeed this thesis has shown, however, that IHRL obligations, in particular those contained in ICESCR, could contribute to the realisation of human security.

The question remaining was how the establishment of human security could be judged, is it the presence of peace? Wealth? Democracy? Healthcare? Education? Chapter four, therefore, considered the overlaps between human security, humanitarian protection and assistance, and IHRL. These overlaps are evidence of human-centric norms in the international legal order. To this end, it was shown that the ICRC could potentially utilise its humanitarian role to realise the human security needs of the population of an armed conflict. The synergy between these legal frameworks is evidence of the broader human-centric progress of the international legal order.

Chapter six of the thesis focused on the extent to which humanity informs the current practice of the ICRC. The UN and the ICRC, by their establishing Charter and Covenants, are intended to exist and function in two distinct realms, war and peace, but in modern day conflicts this dichotomy is no longer appropriate. The line between war and peace has become increasingly blurred.

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[12] ibid para 4(h).

Chapter six examined whether the ICRC protection and assistance roles are usurping its mandate. The ICRC acknowledges that 'in many situations, conflicts have become entrenched, forcing assistance work to cover the longer term, to meet needs that are at once urgent and recurrent, or even chronic'.[13] The international response to current conflicts has been termed the 'new humanitarianism' as humanitarianism has expanded to include human rights, provision of medical aid, economic development, promotion of democracy, and even building responsible state'.[14] The current roles of the ICRC include protecting civilians; visiting detainees; reuniting families; ensuring access to medical care, water, food, and essential household items; and running programmes for sustainable food production and micro-economic initiatives.[15]

Chapter six and the case study of the thesis also considered whether, *if* the ICRC continued to work beyond a strict understanding of its humanitarian mandate, would it affect the willingness of States to allow the ICRC to enter? At the moment, the ICRC relies on its reputation of neutrality and independence and promises of confidentiality to ensure access to fulfil its protection and assistance roles. Under paragraph 4(2) Statutes of the ICRC 'the ICRC may take *any humanitarian initiative* which comes within its role as a specifically neutral and independent institution and intermediary, and may

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[13] 'ICRC Assistance Policy (Adopted by the Assembly of the International Committee of the Red Cross on 29 April 2004) Public Version' (ICRC) 677 <www.icrc.org/eng/assets/files/other/irrc_855_policy_ang.pdf> accessed 28 July 2014.

[14] Duffield M, Macrae J and Curtis D, 'Editorial: Politics and Humanitarian Aid' (2001) 25(4) Distasters 269; Barnett M, 'Humanitarianism Transformed' (2005) 3(4) Perspectives on Politics 723 in Abiew FK, 'Humanitarian Action under Fire: Reflections on the Role of NGOs in Conflict and Post-Conflict Situations' (2012) 19(2) Intl Peacekeeping 203, 213.

[15] Ki-Moon B, 'The ICRC and the Changing Humanitarian Landscape' (2012) 94 IRRC 1251, 1252.

consider any question requiring examination by such an institution'.[16] This broad power of initiative is also found in the Statutes IRCRCM.[17] Chapter one argued that this right to humanitarian initiative is intentionally flexible, but it is limited by its principles. The thesis reflected on whether the ICRC's work in human security areas compromises 'its role as a specifically neutral and independent institution'.

Traditionally the role of the ICRC ended with the end of the conflict, but nowadays the ICRC stays longer. The ICRC's principles of neutrality, independence and consent preclude it from engaging with politicised activities. The ICRC is, however, able to command the respect of States whilst utilising its proximity and National Societies to reach the people on the ground. This thesis explored, therefore, to what extent the ICRC can contribute to human security. It also considered whether within its expanding protection and assistance role, the ICRC could provide a localised method to develop human security on the ground for the victims of armed conflict, in particular, protracted armed conflict.

When the ICRC can get access to vulnerable groups who are out of reach of other organisations, whether because they are already present in an area at the outbreak of conflict or serious violence, then they might engage in basic humanitarian roles, such as feeding people. The problem for the ICRC is that if a particular community is linked to the current government then it might look like they are not being impartial. For the ICRC, potentially, the concern is not usurpation of their mandate by expanding their powers too far, but rather the

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[16] Emphasis added.

[17] Statutes of the IRCRCM art 5(2)(d) and 5(3); Statutes of the ICRC art 4(2).

risks posed by looking partial and too closely linked to the government. The ICRC, in these instances, continues to walk a fine line between assisting those in need and compromising its reputation.

The interviews conducted in Geneva were essential to the analysis of the ICRC present roles and its economic security roles. The conclusions drawn up to the point of interviewing were abstract theories based on laws, academic literature and theories behind human security. It was imperative, therefore, to test them with the people who work on the ground and to ask what they see their role as being. The interviews were undertaken during the third year of the research. They were useful as a means to test theories about the mandate of the ICRC and how it is interpreted on the ground. The interviews provided unique insight into the inner workings of the ICRC. The current literature on the ICRC is often drafted by ICRC delegates or is available in the IRRC. In terms of understanding and critiquing the mandate of the ICRC it proved useful to ask delegates how they interpret it on the ground. In addition, the interviews were a unique and invaluable opportunity to gather first hand knowledge of the situation on the ground of the DRC. The utility of this case study was examined in the introduction and the case study. The number of interviewees was five and much of the used data was provided in the INTERVIEW 001. The interviewee was particularly forthcoming and willing to share experiences from the field. The other interviewees contributed useful qualitative data and informed this Author's understanding and argument. All of the interviews were transcribed and common themes and arguments were extrapolated to assist in the structuring of chapter five and the case study. The use of interview data

ensured that this thesis contributes an original piece of research to existing literature on the ICRC.

The interviews showed that the ICRC does not, in its protection and assistance roles, try to substitute the activities that governments traditionally take care of. The ICRC will try, first and foremost, to remind authorities of their responsibilities to the people in a State or their region of control. This can include reminding authorities about provision of food and health care. The intervention of the ICRC into the provision of such services begins when the authorities are no longer in a position to provide them. The ICRC will then have to decide if it has the capacity to intervene and provide those services. It must, therefore, maintain a dialogue with local communities and parties to the conflict. This dialogue can help in maintaining the view of the ICRC as neutral and impartial.

For the ICRC perhaps the most telling statement came from an interview conducted in April 2014. An ICRC delegate stated that:

> We have to be very humble. I am always suspicious of those who believe that what they are doing is perfect and they have reached all the beneficiaries. And I would say that the level of difficulties that you can reach on the ground is incredible and it's remarkable that you can move on and you can acquire certain expertise that will help you to, or at least you can learn from past mistakes, which is always what we do when we are making projects. So of course with 150 years of past mistakes, I would say, we are quite knowledgeable, but we are now definitely in some operations we have gained certain expertise that will

help us to reach out. But again when you talk about the conflict like

the DRC, the level of needs is absolute.[18]

The case study also explored the conclusions drawn in the first six chapters of the thesis. In part, State sovereignty's traditional corollary, non-intervention, allowed newly independent DRC to turn against its own population and commit mass atrocities against people unable to ensure their own human security. When we look at the historical development of the conflict, it appears that actors have scant regard for the UN Charter or the Geneva Conventions I, II, III and IV 1949. Nevertheless the ICRC and the UN have been present in the DRC for decades. With the emerging concept of sovereignty as responsibility, in Kofi Annan's 1999 report, the development of RtoP, and the evolution of human security, the idea of a human-centric international agenda was prosperous and could have offered people on the ground hope for a future resilient to recurrence of conflict. The typical means to enforce the idea of sovereignty, as responsibility has, however, remained military intervention or complete inaction on the part of the international community.

For the ICRC, therefore, it is concluded that it has the power to develop its capacities to respond to the needs on the ground. It is also, as an organisation, inextricably linked to other normative and legal frameworks including human security and IHRL. It can thus draw on these synergies when acting on the international stage, within States and local communities. In terms of human security it is submitted that the ICRC can build on its position on the international stage. Its human-centric origins, its relationship with National

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[18] INTERVIEW 001.

Societies and its proximity to conflicts allows it to actually connect to the needs of people on the ground. This is not to say that the progression of the ICRC is without concern. Whilst this thesis shows that the ICRC should be considered as a crucial component the establishment of human security, it is walking a fine line between what is lawful under the Geneva Conventions I, II, III and IV 1949, Additional Protocols I and II and the Statutes of the ICRC.

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APPENDIX 1

a) Information Sheet for Interviewees

About me

I am a final year law PhD student at the University of Nottingham and former volunteer with the British Red Cross and Armenian Red Cross Society. The ICRC has the right to provide humanitarian assistance during armed conflict. It has developed its role to include economic security, development and transitional justice. This thesis considers whether this expansion of powers is legitimate and whether it compromises the ICRC's neutrality and independence to the extent that its value as a humanitarian actor is challenged. It also considers whether the ICRC has a peacebuilding role and whether it can help to establish human security on the ground. The thesis uses a case study of the Democratic Republic of the Congo to consider the practice of the ICRC.

Project

PhD Thesis: "The International Committee of the Red Cross, Human Security and Peacebuilding: Law and Practice"

Instructions to the interviewer (opening statements)

I will record this interview to faclitate note taking at a later date. I will be the only person privy to the tapes, which will be destroyed after they are transcribed. The transcriptions will be electronically stored with password access. The information provided may appear in the main body of my PhD thesis and in an Appendix. The transcripts will be anonymised. Thank you for agreeing to participate.

I have asked you to be part of the research for my PhD as you are an expert in your field and have a great deal to share on the current humanitarian assistance practice of the ICRC and its role in the DRC. The research project as a whole focuses on the ICRC in peacebuilding contexts and whether its practice can establish human security on the ground for people. This research has a particular interest in the conflict in the DRC. I am trying to learn about the extent of the development of 'humanitarian assistance' into realms beyond those envisaged by

the drafters of the Geneva Conventions 1949/ Additional Protocols 1977 and whether experts within the ICRC feel that these developments are legitimate, in law and practice.

b) Consent Form

Project title

"The International Committee of the Red Cross, Human Security and Peacebuilding: Law and Practice"

Researcher's name:

Christy Shucksmith

Supervisor's name:

Professor Nigel White

- I have read the Participant Information Sheet and the nature and purpose of the research project has been explained to me. I understand and agree to take part.

- I understand the purpose of the research project and my involvement in it.

- I understand that I may withdraw from the research project at any stage and that this will not affect my status now or in the future.

- I understand that while information gained during the study may be published, I will not be identified and my personal results will remain confidential.

- I understand that I will be audiotaped / videotaped during the interview.

- I understand that data will be stored electronically on a password protected home computer which only the interviewer has access to. Tapes will be destroyed after transcripts are made. A transcript of the interview is available to the interviewee on request.

- I understand that I may contact the researcher or supervisor if I require further information about the research, and that I may contact the Research Ethics Coordinator of the School of Law, University of Nottingham, if I wish to make a complaint relating to my involvement in the research.

Signed ……………………………………………………………………… (research participant)

Print name ……………………………**Date** …………………………………

Contact details

Researcher:

Christy Shucksmith

Llxcs13@nottingham.ac.uk

07739 845084

Supervisor: nigel.white@nottingham.ac.uk

c) Interview Protocol/ Participant Information Sheet

Project

PhD Thesis: "The International Committee of the Red Cross, Human Security and Peacebuilding: Law and Practice"

Instructions to the interviewer (opening statements)

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Key research questions to be asked

* What ICRC actions come under the umbrella of humanitarian assistance? What forms do humanitarian assiatance take in the DRC?

* Is the ICRC constrained by the mandate given to it in the Geneva Conventions or has it managed to adapt to the times and maintain legitimacy on the international stage?

* Do you think the development of humanitarian assistance to include economic security/ transitional justice roles (ie humanitarian aspects of peace agreements), challenges the ICRC's neutrality and independence?

* Although the ICRC is careful to distance itself from the term peacebuilding, to what extent do you think economic security work fits into a peacebuilding legal framework?

* To what extent does the ICRC coordinate with the UN on the ground in the provision of aid, involvement in economic projects and rule of law?

* How does the ICRC engage with/ include the civilian/ local population in humanitarian assistance roles? Do you think the ICRC is better placed, than MONUSCO, to reach local people and create human security?

My Comments and Reflective Notes