

## Q&A: INTERNATIONAL HUMANITARIAN LAW AND BUSINESS



### Ten questions to Philip Spoerri, ICRC Director for International Law and Cooperation

*With the globalisation of market economies, business has become an increasingly prominent actor in international relations. It is also increasingly present in situations of armed conflict. On the one hand, companies operating in volatile environments are exposed to violence and the consequences of armed conflicts. On the other hand, some of their conduct in armed conflict may lead to violations of the law.*

*The International Committee of the Red Cross (ICRC) engages with the private sector on humanitarian issues, with the aim of ensuring compliance or clarifying the obligations that business actors have under international humanitarian law (IHL) and encouraging them to comply with the commitments they have undertaken under various international initiatives to respect IHL and human rights law.*

*In times of conflict, IHL spells out certain responsibilities and rights for all parties involved. Knowledge of the relevant rules of IHL is therefore critical for local and international businesses operating in volatile contexts. In this Q&A section, Philip Spoerri, ICRC Director for International Law and Cooperation, gives an overview of the rules applicable to business actors in situations of conflict, and discusses some of the ICRC's engagement with business actors.*

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**1. Are business actors aware of the existence of international humanitarian law, and of their obligations under this body of law?**

Over the years, companies have become increasingly familiar with human rights law. More and more business actors are making an effort to respect human rights and not to become involved in human rights abuses. This evolution can only be welcomed. However, business enterprises are in general less aware of IHL. They do not necessarily know that in times of armed conflict, this special body of law applies, and that it includes provisions that might be relevant to them.

International humanitarian law applies to both international armed conflicts (which oppose two or more states) and non-international armed conflicts (colloquially known as ‘civil wars’ – which oppose a state and an organised armed group or two or more such groups), but it does *not* apply to situations of internal disturbances and tensions. It is important to recognise the difference between international and non-international armed conflict because, whereas the first category is covered by an extensive range of IHL treaty rules, the second is governed by a more limited set of treaty rules. Internal disturbances and tensions, on the other hand, are regulated by human rights law and domestic law.

IHL and human rights law are two distinct but complementary bodies of law. In situations of armed conflict, human rights continue to apply and complement and reinforce the protection conferred by IHL. However, IHL remains the body of law specifically designed to apply in times of armed conflict. So in cases where *both* bodies of law regulate an issue and there is a conflict of norms, IHL will prevail and human rights law will be interpreted in accordance with IHL standards. For example, during hostilities, the right to life of a soldier must be interpreted in light of the IHL rules, which permit attacks on combatants. Furthermore, while certain human rights norms can be derogated from in certain situations, one cannot derogate from international humanitarian law. Most importantly, for business enterprises one of the main differences between human rights law and IHL is that IHL is binding on states, non-state actors, and individuals, whereas human rights law is explicitly binding on states.

This is what the ICRC wants business enterprises to be aware of, in terms of the applicable legal framework. In parallel, our institution engages in dialogue on humanitarian issues with business enterprises – a dimension of the ICRC’s work that is discussed in a separate article in this issue of the *Review*.<sup>1</sup>

1 See Claude Voillat, ‘Pushing the humanitarian agenda through engagement with business actors: the ICRC experience’, in this issue.

## ***2. How are business actors bound by IHL if they have not signed any commitment to respect those rules?***

IHL consists of several treaties – such as the 1949 Geneva Conventions and their Additional Protocols of 1977 and 2005 – and customary international law. Those treaties are indeed signed by states, not by business enterprises. Nevertheless, they clearly contain obligations for non-state actors. This is not much different from other legal fields. Imagine, for example, at the domestic level, a national law on taxation. Business enterprises are bound by that law – they will need to pay taxes – but they did not sign the law. The same goes for the obligations under IHL. Once the business enterprise finds itself operating in an armed conflict and carries out activities related to the armed conflict, IHL applies. In this case, the business actors will be bound by the rules of IHL and have certain obligations, which if violated could lead to criminal or civil liability. Conversely, IHL also accords a certain protection to staff and property of enterprises in times of armed conflict.

## ***3. What are the basic rules of IHL and how are they relevant to business actors?***

IHL applies to acts related to the armed conflict, so if the activities of an enterprise are not linked to the hostilities, but are private economic ones, IHL will not be applicable to them. In that case, human rights law and domestic law will remain relevant.

This being said, it remains possible that, in the context of an armed conflict, business activities will become linked with the hostilities – for instance, if an enterprise provides support to a party to the conflict or if some staff of the enterprise are members of an armed group of a party to the conflict. It is thus important for a company manager to be aware of IHL rules and of their scope of application to avoid possible violations and/or complicity in violations by others.

The principle of distinction is one of the main principles of IHL of which business actors should be aware. This principle commands that parties to an armed conflict always distinguish between combatants and civilians. Only combatants may be attacked. Civilians, the civilian population as a whole, or civilian objects may never be deliberately attacked. Indiscriminate attacks are prohibited under IHL. In addition, if a combatant no longer takes part in hostilities, for example because he/she is wounded or because he/she surrenders, then he/she may no longer be attacked and must be treated with humanity.

IHL also contains rules on the means and methods of warfare. For example, weapons causing superfluous injury or unnecessary suffering, or widespread, long-term, and severe damage to the environment, are prohibited. Business enterprises that, because of their usual business activities, might sell components of biological or chemical weapons to parties in a conflict or provide services directly linked to the conduct of hostilities, such as intelligence, specific weapons engineering, or private

military contractors, must be very careful not to assist parties to the conflict in the commission of IHL violations.

Furthermore, certain IHL treaties also oblige states to control the production and trade of prohibited weapons – think of anti-personnel landmines, for instance. Often, there will be a provision in those treaties obliging states to criminally punish persons who do not respect the prohibition.

Some rules also prohibit attacks on specific objects, such as objects indispensable to the survival of the civilian population or works or installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations.

In addition, IHL contains rules on treatment and respect for the sick, wounded, and shipwrecked, as well as prisoners of war and other detained persons.

Due to the nature of the services they offer, some business enterprises are more at risk of being involved in activities ruled by IHL. This is especially the case for private military and security companies. For instance, private contractors involved in detention-related activities in the context of an armed conflict are bound by IHL.<sup>2</sup>

Finally, as I said earlier, business enterprises and their personnel are also protected by IHL as civilians and civilian objects. They must also be aware of this protection, its scope, and the circumstances under which they can lose it.

#### ***4. How does IHL offer protection to business enterprises during armed conflict?***

First, where business actors are carrying out their usual activities (where such activities are not related to hostilities, and where the employees are not embedded in any armed forces), they are considered to be civilians under IHL. As civilians, they cannot be the object of direct attacks by the parties to the conflict.

However, IHL poses a condition for civilians to be protected against direct attack: they have to refrain from directly participating in hostilities. If they do not do so, they will lose their protection for as long as they directly participate in hostilities. This leads to the question of what constitutes ‘direct participation in hostilities’. The ICRC has developed a guidance document on this particular concept.<sup>3</sup> It explains roughly that any act that is intended to support one party to the conflict by directly causing harm to another party (e.g. either by directly inflicting death, injury, or destruction, or by directly harming the enemy’s military operations or capacity) is considered a direct participation in hostilities. In the case of private military and security companies, for example, activities such as guarding captured military

2 See The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, ICRC and Federal Department of Foreign Affairs, government of Switzerland, 2008, (print release in August 2009), available at: [www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf) (last visited November 2012).

3 ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Nils Melzer (ed.), Geneva, May 2009, available at: [www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/participation-hostilities/index.jsp](http://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/participation-hostilities/index.jsp) (last visited November 2012).

personnel, providing to a party to the conflict tactical targeting information for an attack, operating weapons systems in combat operations, or delivering ammunitions to combatants in the battlefield are considered direct participation in hostilities.

The reasoning is similar regarding the equipment of an enterprise – cars, factories, buildings, and so on. Normally these are considered to be civilian objects (which should protect them from being directly attacked). However, if they make an effective contribution to the military action of a party to the conflict, they may lose their protection and become legitimate military objectives. For instance, if an enterprise let the armed forces of a party to the conflict use its vehicles or installations for military action, these vehicles and installations would become military objectives and IHL would allow the enemy to attack them.

Of course, despite the protective rules of IHL, business employees or assets, like any other civilians and civilian objects, may nevertheless lawfully become the victim of an attack. IHL prohibits parties to carry out an attack if the expected civilian loss would be excessive in relation to the anticipated military advantage. This means that there may be cases in which, although the civilians are not the direct object of an attack, the civilian loss will be deemed *not* excessive to the concrete military advantage, and as a result, the attack will be considered lawful.

Furthermore, besides the employees, as I have already explained, IHL also protects business property and goods. Goods, for example, could become the object of confiscation or seizure. IHL prohibits the confiscation of private property for personal or private use. Seizure of business property is allowed only under very strict circumstances. In those cases, the property has to be returned at the end of the conflict and compensation needs to be paid. The unlawful taking of private assets in such a context may amount to pillage, which is a war crime.

***5. Are there other rules of IHL, besides the rules on the use of force, that business actors should be aware of when operating in situations of armed conflict?***

IHL indeed covers more than the use of force alone. So even if an enterprise is not itself somehow involved in the ongoing violence, it will need to take into account rules of international humanitarian law. Of particular importance for business enterprises, for example, are the rules on the acquisition of property. The acquisition of property and the participation in the acquisition of property through the use of force, or even by threat or intimidation is considered pillage and prohibited under IHL. If the acquisition of the property also forces persons to relocate, this could amount, in certain situations, to prohibited forced displacement. On the other hand, as I mentioned before, IHL also protects the property of business enterprises. Finally, IHL also contains numerous rules on labour and labour conditions. In some instances states may compel persons to do certain types of work. Business enterprises do not have the same type of rights. They must ensure that no forced labour is associated with their activities.

**6. *Despite those protective rules, as you've noted, business enterprises are often the victim of attacks, restrictions, or confiscations. Would it not be better for a business enterprise to evacuate from an area when a conflict begins?***

Well, in most conflict situations, reality shows that the space for business enterprises to operate or to continue to operate exists. Direct and indirect jobs and the revenues they generate can actually be a source of stabilisation if they are well managed. The challenge in this regard lies in the management of the impact that business enterprises are having on communities, on local and national authorities, and in particular on other armed actors (opposition forces, rebels, and others).

The key issue is what can be done to avoid business activities fuelling the armed conflict. Each situation will create different types of impact and will thus have to be assessed very carefully by the enterprises operating in such environments. Such assessments are complex or even sensitive undertakings since they have to take into account a number of factors and require a broad range of expertise. Ideally, therefore, such assessments connect with a wide range of perspectives and stakeholders. Host and home governments, local authorities, civil society organisations, and international organisations should be approached and should be able to provide input in such exercises. In the end, a company would not only assess whether the environment is secure enough for it to operate, but would also factor in the impact its activities will have on the conflict itself. Clearly, if they choose to stay, enterprises should not be involved in violations of IHL or human rights.

**7. *Can business enterprises ensure their own security in times of armed conflict? If so, how?***

A business enterprise will feel the need to ensure its own security if, because of an armed conflict or a situation of lawlessness, it can no longer safely exercise its usual business functions. The enterprise's choice is sometimes limited by domestic law, which will determine whether security forces must be public (such as police, gendarmerie, and army) or may be private. It is actually not a rare phenomenon for business enterprises to find themselves in situations where they have to make pragmatic arrangements with organised armed groups (rebels, opposition, warlords) or with governmental police or armed forces to ensure their security. Whatever the nature of the security forces, under ordinary circumstances, they must act in accordance with domestic law and international standards of law enforcement. That is to say, they may only use force when it is strictly necessary and the force used must be proportionate to the threat. Business enterprises must take all necessary and feasible measures to ensure that the security forces they engage comply with these standards.

A point to bear in mind is also that, depending on how the security is managed and by whom it is provided, there is a risk of engaging directly in the

conflict. For instance, if the security forces hired by the company or provided by the authorities actually form part of the armed forces of either party to the conflict, the security forces personnel will be considered combatants or fighters. In other words, as far as IHL is concerned, they will be a legitimate target for the enemy. I will not expand further on this issue, but clearly the issue of trying not to organise one's own security in a way that will make one a direct participant in the conflict is a challenge.

I should also emphasise that when a company hires a security force, it may bear criminal or civil responsibility for violations of IHL and human rights law committed by security guards. So if the security personnel violate international humanitarian law, the business itself as well as its managers and directors might also risk being held legally accountable.

### **8. What does the risk of criminal liability in cases of non-compliance mean concretely for businesses?**

First, under IHL, states have an obligation to investigate war crimes allegedly committed by their nationals or members of their armed forces or on their territory, or war crimes over which they have jurisdiction, and to prosecute if appropriate. Furthermore, states have the right to vest universal jurisdiction in their national courts over war crimes, i.e. to prosecute regardless of where the crime was committed or of the nationality of the alleged perpetrator.

Second, individual criminal responsibility for war crimes is now a well-established principle of international law. There is no doubt that anyone, including staff, managers, and directors of enterprises that commit such crimes, will engage his/her criminal responsibility.

The scope of criminal liability can be quite vast. Indeed, under international criminal law, besides the main perpetrators of the crime, accomplices can also be held criminally responsible if they aid and abet, or otherwise assist, order, or encourage the commission of that crime. For instance, a businessman selling chemical products that can be used to fabricate weapons to a party to a conflict, knowing or consciously disregarding the fact that the products will indeed be used to commit war crimes, could be held responsible as an accomplice.<sup>4</sup>

As for superiors, both civil and military, they can also be held individually responsible under international criminal law for crimes committed by their subordinates if they did not exercise proper control over the perpetrators where they knew (or should have known)<sup>5</sup> that they were about to commit a crime, and if

4 See e.g. the *van Anraat* case, or the *Zyklon B* case (British Military Court, Hamburg, *Trial of Bruno Tesch and two others*, Case No. 9, 1–8 March 1946, published in *Law Reports of Trials of War Criminals*, Vol. 1, United Nations War Crimes Commission, Her Majesty's Stationery Office, 1947, pp. 93–104).

5 Note that the 'should have known' standard is unique to the International Criminal Court (ICC), the *ad hoc* tribunals having used a standard of 'had reason to know'. Furthermore, under the ICC Statute, the

they failed to take all necessary and reasonable measures within their power to prevent or repress the commission of war crimes or to submit the matter to the competent authorities for investigation and prosecution. For instance, the director of a company could be held responsible for war crimes committed by his/her employees in the course of any activities under the control of the director (while carrying out their tasks, ensuring the security of the company, working in the compound of the company, and so on).<sup>6</sup>

As I said, the criminal liability of individuals working for a company poses no legal or conceptual challenge, notwithstanding the task of identifying the individual(s) to be held accountable within the corporate structure. However, the question of the criminal liability of the corporation as such is less straightforward. For the time being, the International Criminal Court has jurisdiction solely over natural persons. However, in many countries, such as Switzerland and Canada, legal persons such as business enterprises can be held criminally liable for the commission of war crimes.

Furthermore, during the last decade, there have been developments in the field of civil litigation for international crimes, including war crimes, committed by corporations and their directors. It is thus possible for victims, in some countries, to lodge complaints against business actors for their implication in the commission of war crimes and to ask for reparation. So today, there is a real risk for business actors of facing criminal prosecutions or civil litigations for their alleged involvement in the commission of war crimes.

### ***9. Can states also be held responsible for the involvement of business actors in armed conflict?***

Indeed, the primary responsibility to ensure respect of IHL rests with states. This means that states have to take all reasonable measures to prevent violations of IHL. With respect to business actors, this can be done, for instance, by disseminating IHL amongst the business sector, by adopting appropriate legislation to regulate private security services, by requiring proper training for private security guards and public officers, or by establishing mechanisms of control in this respect.

As I mentioned, states also have an obligation to investigate and prosecute war crimes, including those committed by staff, managers or directors of business enterprises. A state can also be held responsible under international law if it fails to exercise due diligence to prevent, prosecute and/or punish human rights violations committed by business actors.

Furthermore, a state can be held responsible for violations of IHL committed by business actors when their conduct can be attributed to that state.

*mens rea* requirements for military and civilian superiors are different. See respectively Arts. 28(a)(i) and (b)(i) of the Rome Statute of the ICC.

<sup>6</sup> See International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Trial Chamber I, 27 January 2000, para. 880.



This is the case, for instance, if business actors are incorporated into the state's organs, including its armed forces, if they act under the command or control of the state, or if they are empowered to exercise elements of governmental authority. This would be the case, for instance, activities related to law enforcement or to the guarding of detained persons.

Therefore, states have a crucial role to play in the establishment of an environment that allows business actors to operate in conflict areas in a way that respects IHL and human rights and to take action in case of violations.

### ***10. How would you describe the engagement of the ICRC with business actors?***

In the field, the ICRC's engagement with business actors still remains rather modest. However, we are presently witnessing two trends that are likely to have an impact on the ICRC's engagement with business actors in the field. First, the ICRC now clearly sees the importance of developing its capacity to analyse the impact of business on the conflict environment and to consider appropriate responses. Second, business actors operating in challenging contexts are increasingly seeking advice and guidance from humanitarian or development organisations.

These two trends have already created and will continue creating additional opportunities for humanitarian actors – and the ICRC in particular – to engage with business. In such situations the challenge consists in making sure that any engagement with business actors ultimately supports the ICRC's mission to protect and assist persons affected by armed conflict or other situations of violence. In his article in this issue of the *Review*, Claude Voillat provides a few examples of such ICRC engagement in the field.<sup>7</sup>

The ICRC's engagement with business actors at the corporate level has been more intensive. On the one side, the ICRC has been involved in a handful of initiatives seeking to mitigate the potential negative impacts of business operations. There are at present many such initiatives, some of them led by governments or multilateral organisations, others promoted by groups of companies or industry associations, and still others developed as multi-stakeholder initiatives. The ICRC focuses only on initiatives that are connected in one way or another with its mission and mandate. In these initiatives the ICRC seeks to ensure that IHL is appropriately referred to and that basic humanitarian principles are promoted. Our organisation also seeks, when relevant, to share its expertise in operating in conflict-affected areas.

The ICRC does not stop there, however. In its work alongside business actors, it has realised that the latter need practical guidance and tools in support of their endeavours to mitigate their potential negative impacts and to 'do no harm'. In this spirit, the ICRC has published an information brochure called *Business and*

7 See above note 1.

*International Humanitarian Law*,<sup>8</sup> which is intended to inform businesses of their obligations and rights under IHL. The brochure explains when IHL is applicable, what the main purpose of this body of law is, and how businesses can conduct themselves in times of armed conflict so as to avoid violations of the law.

The ICRC has also taken part, jointly with other organisations, in the development of practical guidance. It has, for instance, worked with the International Finance Corporation, the International Council on Metals and Mining, and the International Petroleum Industry Environmental Conservation Association to develop the Implementation Guidance Tools for the Voluntary Principles on Security and Human Rights. Since their release, there has been repeated evidence that these guidance tools have been picked up and utilised in their operations by many companies – be they formal members of the Voluntary Principles initiative or not.

The ICRC has also remained very engaged on the question of private military and security companies (PMSCs). As you may be aware, the Montreux process was a joint ICRC and Swiss government initiative, which aimed at compiling the relevant legal obligations and good practices of states with respect to PMSCs. The Montreux Document has been signed by more than 45 states and the European Union, and has acted as a ‘vector’ for more recent initiatives, such as the International Code of Conduct for Private Security Service Providers. It has also permitted us to support legislative efforts in contexts like Afghanistan and Iraq.

Finally, the ICRC is aware of the fact that the above initiatives would remain futile if they were not translated into practice. The ICRC continues to actively promote the Montreux Document and to further encourage states to sign it and implement the good practices set forth in it. One effective way to promote the implementation of such standards is also through training. The ICRC will continue to explore with its delegations in the field options for meaningful contributions to such efforts, and will encourage initiatives in this regard.

8 ICRC, *Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law*, Geneva, December 2006, available at: [www.icrc.org/eng/resources/documents/misc/business-ihl-150806.htm](http://www.icrc.org/eng/resources/documents/misc/business-ihl-150806.htm) (last visited November 2012).