ARMS TRANSFER DECISIONS

Applying international humanitarian law criteria

PRACTICAL GUIDE

ICRC

ICRC

International Committe of the Red Cross
19 Avenue de la Paix
1202 Geneva, Switzerland
T + 41 22 734 60 01 **F** + 41 22 733 20 57
E-mail: shop.gva@icrc.org
www.icrc.org

PRACTICAL GUIDE

ARMS TRANSFER DECISIONS

Applying international humanitarian law criteria

PRACTICAL GUIDE

International Committee of the Red Cross
Geneva, June 2007

States should make respect for international humanitarian law one of the fundamental criteria on which arms transfer decisions are assessed. They are encouraged to incorporate such criteria into national laws or policies and into regional and global norms on arms transfers.

28th International Conference of the Red Cross and Red Crescent, Agenda for Humanitarian Action, Final Goal 2.3 (adopted by consensus on 6 December 2003)[1]

1. Introduction

When a State transfers military weapons or equipment, it is providing the recipient with the means to engage in armed conflict – the conduct of which is regulated by international humanitarian law (IHL). Under Article 1 common to the Geneva Conventions of 1949, States have an obligation to "respect and ensure respect" for international humanitarian law. To ensure that violations of humanitarian law are not facilitated by unregulated access to arms and ammunition, arms transfer decisions should include a consideration of whether the recipient is likely to respect this law.

On the basis of the conclusions of its study entitled *Arms Availability and the Situation of Civilians in Armed Conflict* (1999)[2], the ICRC has proposed that **all national and international standards for arms transfers should include a requirement to assess the recipient's likely respect for international humanitarian law and to not authorize transfers if there is a clear risk that the arms will be used to commit serious violations of this law**.

Since 1999, the ICRC has urged that criteria based on international humanitarian law be included in regional arms transfer documents and in national laws and policies. It is pleased to note the considerable progress made in this area. An increasing number of regional arms transfer instruments, as well as national laws and regulations, require that States assess whether there is a risk that the proposed transfer of arms or military equipment will be used to violate humanitarian law. Most instruments further stipulate that if the risk is considered to be substantial, States are required to deny such transfers. The specific wording of these "international humanitarian law criteria" varies (see Box 1).

[1] The International Conference of the Red Cross and Red Crescent is the supreme deliberative body of the International Red Cross and Red Crescent Movement. It comprises representatives of the ICRC, the International Federation of Red Cross and Red Crescent Societies, all National Red Cross and Red Crescent Societies as well as the 194 States party to the Geneva Conventions.

[2] *Arms Availability and the Situation of Civilians in Armed Conflict*, ICRC, Geneva, June 1999.

Now that a large number of States have committed themselves to taking respect for humanitarian law into account in their arms transfer decisions, steps must be taken to ensure that these criteria are applied in practice. The present document aims to assist States or regional organizations in this endeavour. It proposes that regulations or guidelines be developed for assessing the risk of arms transfers being used to violate international humanitarian law. It also outlines a set of indicators that can be used as a basis for such exercises.

Box 1

Examples of international humanitarian law criteria in existing arms transfer instruments

"Each participating State will, in considering proposed exports of small arms, take into account (...) the record of respect for international law governing the conduct of armed conflict."

"Each participating State will avoid issuing licences for exports where it deems that there is a clear risk that the small arms in question might (...) threaten compliance with international law governing the conduct of armed conflict."

(Document of the Organization for Security and Co-operation in Europe on Small Arms and Light Weapons, 2000; and the Wassenaar Arrangement Best Practice Guidelines for Exports of Small Arms and Light Weapons, 2002)

"Member States will take into account (...) the record of the buyer country with regard to (...) its compliance with its international commitments (...) including under international humanitarian law applicable to international and non-international conflicts."
(European Union Code of Conduct on Arms Exports, 1998)

"The National Authority shall prohibit brokering activities and refuse to grant licenses if it has reason to believe that the brokering activities will, or seriously threaten to (...) lead to the perpetration of war crimes contrary to international law."
(Organization of American States Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition, 2003)

"States Parties shall not authorize transfers which are likely to be used (...) for the commission of serious violations of international humanitarian law."
(Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons, 2005)

"Transfer of conventional and non-conventional weapons, small arms and light weapons, munitions, explosives and related materiel will not take place from or to States that commit and/or sponsor crimes against humanity or breaches of human rights, or which commit grave breaches of the laws and customs of war contained in the 1949 Geneva Conventions or their Additional Protocols of 1977 or of other rules and principles of international humanitarian law applicable during armed conflict between or within States."
(Code of conduct of the States of Central America on the transfer of arms, munitions, explosives and related materiel, 2005)

"A transfer shall not be authorised if the arms are destined to be used (...) for the commission of serious violations of international humanitarian law (...)."
(Economic Community of West African States Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials, 2006)

"A Contracting party shall not authorise international transfers of arms (...) in circumstances in which it has knowledge or ought reasonably to have knowledge that transfers of arms of the kind under consideration are likely to be (...) used in the commission of serious violations of international humanitarian law applicable in international or non-international armed conflict."
(Draft Arms Trade Treaty, proposed by the Control Arms Campaign)

2. The practical application of international humanitarian law criteria

A strict international humanitarian law criterion, on paper, will not effectively prevent weapons from falling into the hands of those likely to use them to commit violations unless it is applied in a rigorous and consistent manner. To assist export licensing authorities and other government officials involved in arms transfer decision-making, it would be useful to develop regulations or guidelines outlining the various factors that should be taken into account when assessing the risk of weapons transfers being used to violate humanitarian law. This would also contribute to the development of more systematic and objective approaches to such assessments.

The ICRC has been encouraged by several States and regional organizations to provide suggestions in this regard. Section 3 below highlights some key questions to be considered in the application of international humanitarian law criteria.

Box 2 presents a set of indicators that States should take into account when assessing the risk that a proposed transfer of arms or military equipment will be used in the commission of serious violations of international humanitarian law. These are further elaborated on in Section 4 with short explanatory comments. Section 5 provides a list of sources of information that could facilitate such assessments.

Box 2

Proposed indicators to assess the risk that transferred arms or military equipment will be used in the commission of serious violations of international humanitarian law

- Whether a recipient which is, or has been, engaged in an armed conflict, has committed serious violations of IHL;
- Whether a recipient which is, or has been, engaged in an armed conflict has taken all feasible measures to prevent violations of IHL or cause them to cease, including by punishing those responsible;
- Whether the recipient has made a formal commitment to apply the rules of IHL and taken appropriate measures for their implementation;
- Whether the recipient country has in place the legal, judicial and administrative measures necessary for the repression of serious violations of IHL;
- Whether the recipient disseminates IHL, in particular to the armed forces and other arms bearers, and has integrated IHL into its military doctrine, manuals and instructions;
- Whether the recipient has taken steps to prevent the recruitment of children into the armed forces or armed groups and their participation in hostilities;
- Whether accountable authority structures exist with the capacity and will to ensure respect for IHL;
- Whether the arms or military equipment requested are commensurate with the operational requirements and capacities of the stated end-user;
- Whether the recipient maintains strict and effective control over its arms and military equipment and their further transfer.

3. Applying international humanitarian law criteria: Key questions

3.1 What is international humanitarian law?

International humanitarian law (also known as the "law of armed conflict" or "law of war") is a set of rules intended, in times of armed conflict, to protect people who are not or are no longer taking part in the hostilities (e.g. civilians and wounded, sick and captured combatants), and to regulate the conduct of hostilities (i.e. the means and methods of warfare). It regulates how to use armed force, but not the legality of the recourse to armed force, which is regulated by the UN Charter.

The most important instruments of international humanitarian law are the four Geneva Conventions of 1949 and their Additional Protocols. They are supplemented by treaties on particular matters including prohibitions of certain weapons and the protection of certain categories of people and objects, such as children and cultural property (see Annex 1 for a list of the main treaties).

International humanitarian law imposes obligations on all parties to an armed conflict, including armed groups. The rules that apply in internal armed conflicts are laid down in Article 3 common to the four Geneva Conventions, Additional Protocol II,[3] and other treaties specifically applicable to non-international armed conflicts (e.g. the 1980 Convention on Certain Conventional Weapons). In addition, there are rules in customary international humanitarian law that apply to all parties in non-international armed conflicts.

3.2 Several "codes of conduct" and "best practice guidelines" contain criteria on respect for international human rights law and international humanitarian law. What is the relationship between the two?

International humanitarian law is applicable in armed conflict – international or non-international – and in connection with some consequences of armed conflict, such as the release of prisoners of war, landmine clearance, missing persons, and prosecution of war crimes. Certain obligations set out in international humanitarian law also apply in peacetime, for example to include the study of humanitarian law in programmes of military instruction[4] and to search for and prosecute or extradite persons suspected of war crimes.[5]

The rules of international humanitarian law – for example on the treatment of persons in the power of the adversary, limitations on the means and methods of warfare, the status of combatants and prisoners of war, and the protection of the red cross, red crescent and red crystal

[3] The threshold for application of Protocol II is higher than for Common Article 3 and it only applies to non-international conflicts when certain criteria are met as outlined in its Article 1.

[4] Art. 47 of Geneva Convention I, Art. 48 of Geneva Convention II, Art. 127 of Geneva Convention III, Art. 144 of Geneva Convention IV and Arts 83 and 87 of Additional Protocol I.

[5] Art. 49 of Geneva Convention I, Art. 50 of Geneva Convention II, Art. 129 of Geneva Convention III, Art. 146 of Geneva Convention IV and Art. 85 of Additional Protocol I.

emblems – are specifically designed for the particularities of armed conflicts. Therefore, in decisions concerning the transfer of military-style arms and ammunition, the recipient's respect for international humanitarian law is a particularly relevant consideration and must be accorded the same importance as the recipient's compliance with human rights law.

International human rights law protects the individual at all times (in peacetime and during armed conflict) against the arbitrary action of the State. Though fundamental human rights such as the right to be spared torture are guaranteed by both international humanitarian law and human rights law, the latter also extends to domains outside the scope of international humanitarian law.

Some human rights treaties permit governments to derogate from certain rights in situations of public emergency threatening the life of the nation. No derogations are permitted under humanitarian law because it was designed to apply precisely to the exceptional circumstances constituted by armed conflict. From the outset, it takes into account not only the dictates of humanity but also military imperatives.

Traditionally, international human rights law is seen as imposing obligations on States only, while international humanitarian law is quite unique in international law in that it is binding not only on States, but also on non-State armed groups.

3.3 Which acts are considered serious violations of international humanitarian law?

Serious violations of international humanitarian law include grave breaches of the four Geneva Conventions of 1949. Each Convention contains definitions of what constitutes a grave breach (Articles 50, 51, 130, 147 respectively). Articles 11 and 85 of Additional Protocol I of 1977 also include a broader range of acts to be regarded as grave breaches of that Protocol. For the list of these definitions, see Annex 2.

In addition to grave breaches of the Geneva Conventions, the Rome Statute of the International Criminal Court includes other serious violations of the laws and customs applicable in international and non-international armed conflict, which it defines as war crimes (Article 8, sub-sections b, c and e).[6] See Annex 3 for the full text of Article 8.[7]

[6] The enumeration of war crimes in Article 8 is not exhaustive.

[7] For the full text of the Rome Statute, see: http://www.un.org/law/icc/statute/romefra.htm

3.4 Should there be a time limit for previous violations to be included in an assessment? Should only very recent conflicts be taken into consideration or could violations committed long ago still be relevant?

There should be no set time frame. Rather, the focus should be on whether past trends are continuing or not. Evidence of recent violations would normally indicate a clear risk, except where the situation has evolved significantly, for example owing to a change of government or political system. In an armed group, a new leadership or a split into different factions might constitute similarly important developments.

If, on the other hand, there has been no meaningful change in circumstances, then even violations committed long ago could still be relevant. Evidence of past violations or of past compliance is not in itself a sufficiently reliable guide to present or future conduct, but must be assessed in the light of other relevant facts.

3.5 When we talk of a recipient's respect for international humanitarian law, are we referring to States only or also to other entities?

Some of the existing arms transfer instruments specifically require an assessment of the recipient country's likely compliance with international humanitarian law, while others refer to recipients more broadly. An assessment of the risk that transferred weapons will be used to commit violations of humanitarian law should be conducted regardless of whether the recipient is a State or a non-State entity (e.g. a non-State entity authorized to import weapons on a State's behalf, a private military company, or an armed group).[8] The risk of diversion to recipients other than the stated end-user is an additional reason why a broad risk assessment is required.

Several of the indicators proposed (e.g., whether strict control is maintained over stocks of arms and ammunition) are relevant for any entity requesting arms or military equipment. Other indicators (e.g., formal commitment to respect international humanitarian law, prevention of recruitment of children) apply mainly to States or non-State armed groups. Finally, one indicator (penal repression of serious violations) is applicable only to a recipient State.

3.6 At which point does the risk of violations become "likely" or "clear"?

Isolated incidents of violations of international humanitarian law are not necessarily indicative of a recipient's attitude towards that body of law and may not by themselves be considered a sufficient basis for denying an arms transfer. However, any discernible pattern of violations, or any

[8] Some States have committed themselves to supplying small arms only to governments (either directly or through duly licensed entities authorized to procure weapons on their behalf), but most States have not made such commitments.

failure by the recipient to take appropriate steps to put an end to violations and to prevent their recurrence, should cause serious concern.

In cases where there is uncertainty about the risk, States should seek further clarification from the recipient or from other sources. If concerns persist after further examination, there should be a presumption against authorizing transfers in light of the obligation of States under Article 1 common to the Geneva Conventions to "respect and ensure respect" for international humanitarian law.

Box 3

The responsibility to "ensure respect" for international humanitarian law

Common Article 1 is generally interpreted as conferring on third-party States not involved in an armed conflict a responsibility to "ensure respect" for international humanitarian law by the parties to an armed conflict. This includes both a negative obligation to refrain from encouraging a party to violate international humanitarian law and to not take action that would assist in such violations, as well as a positive obligation to take appropriate steps to cause such violations to cease.[9]

Such third-party States have a particular responsibility to intervene with States or armed groups over which they might have some influence. States that transfer weapons can be considered particularly influential in "ensuring respect" for international humanitarian law owing to their ability to provide or withhold the means by which violations may be committed. They should therefore exercise particular caution to ensure that the weapons transferred are not used to commit serious violations of this law.

4. Specific indicators to be considered in the assessment

A thorough assessment of the risk that the arms or military equipment transferred will be used in the commission of serious violations of international humanitarian law should include an inquiry into:

- the recipient's past and present **record of respect** for international humanitarian law;
- the recipient's **intentions as expressed through formal commitments**; and
- the recipient's **capacity** to ensure that the arms or equipment transferred are used in a manner consistent with international humanitarian law and are not diverted or transferred to other destinations where they might be used for serious violations of this law.

[9] International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, report prepared by the ICRC for the 28th International Conference of the Red Cross and Red Crescent, 2-6 December 2003, pp. 23, 47-51. Available at: http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/conf28

Factors outside the strict purview of humanitarian law, such as the security situation in the recipient country, the treatment of citizens in situations other than armed conflict and the control that the recipient exercises over its weapons stocks, can be relevant to such assessments.

The final decision should be based on an overall assessment of the situation after considering each indicator separately. Assessments should be based on all available information and specify why there is believed to be or not to be a risk of serious violations of international humanitarian law.

4.1 Record of respect for international humanitarian law[10]

- **Whether a recipient which is, or has been, engaged in an armed conflict has committed serious violations of IHL;**

- **Whether a recipient which is, or has been, engaged in an armed conflict has taken all feasible measures to prevent violations of IHL or cause them to cease, including by punishing those responsible.**

Explanatory comments:

I. Relevant questions regarding violations of IHL include:

- Have grave breaches or other serious violations been committed? (See Annexes 2 and 3.)

- Have violations been committed by any actor for which the recipient is responsible? (E.g., for a State, this would include State organs, including the armed forces; persons or entities empowered to exercise elements of government authority; persons or groups acting *de facto* on its instructions or under its direction or control; and private persons or groups having committed violations which it acknowledges and adopts as its own conduct.[11])

II. Relevant questions regarding the measures taken to prevent or punish IHL violations include:

- Where these are known to have occurred, has the recipient taken measures to prevent and suppress violations of IHL committed by its nationals, on its territory or by persons under its command? (These might include changing military orders and instructions, disciplinary or penal sanctions against offenders, actions to protect the civilian population, public expression of regret for violations, assurances of non-repetition, reparation for victims, etc.)

[10] These criteria are not relevant to States that have not previously been engaged in an armed conflict. It will nevertheless be necessary to conduct a thorough risk assessment on the basis of the country's formal commitments, capacities and other relevant factors.

[11] State practice establishes as a norm of customary international law that violations by these actors can be attributed to the State. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 2 volumes, Vol. 1, Cambridge Univ. Press, 2005, pp. 530-536.

- Has the recipient country failed to investigate grave breaches and other serious violations of IHL allegedly committed by its nationals or on its territory?

- Has the recipient country failed to search for and prosecute (or extradite) its nationals or those on its territory responsible for grave breaches and other serious violations of IHL, or has it failed to cooperate with other States or international courts in connection with criminal proceedings relating to grave breaches and other serious violations of IHL?

4.2 Formal commitments

- **Whether the recipient has made a formal commitment to apply the rules of IHL and taken appropriate measures for their implementation;**

- **Whether the recipient country has in place the legal, judicial and administrative measures necessary for the repression of serious violations of IHL;**

- **Whether the recipient disseminates IHL, in particular to the armed forces and other arms bearers, and has integrated IHL into its military doctrine, manuals and instructions;**

- **Whether the recipient has taken steps to prevent the recruitment of children into the armed forces or armed groups and their participation in hostilities.**[12]

Explanatory comments:

I. Relevant questions regarding formal commitments to IHL include:

- Has the recipient country ratified any IHL instruments (i.e. the four Geneva Conventions of 1949 and their Additional Protocols of 1977, treaties that contain express prohibitions or limitations on transfers of specific weapons,[13] or other key treaties of IHL)?[14]

- Has the recipient country taken the implementation measures required by the IHL instruments to which it is party, including the adoption of national legislation and regulations?[15]

- If the recipient is an armed group, has it committed itself to respect IHL, for example through a unilateral declaration or an agreement?

[12] Additional Protocols I (Art. 77) and II (Art. 4) put the minimum age for the recruitment of children and their participation in hostilities at 15 years, as does the Convention on the Rights of the Child (Art. 38). Additional Protocol I and the Convention on the Rights of the Child also encourage parties, in recruiting among those aged from 15 to 18, to give priority to the oldest. States party to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict must ensure that persons under the age of 18 are not compulsorily recruited into their armed forces (Art. 2) and take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities (Art. 1). Under the Optional Protocol, armed groups distinct from the armed forces should not, under any circumstances, recruit or use in hostilities persons under the age of 18 (Art. 4). The Rome Statute establishes as a war crime both in international (Art. 8, 2, b, xxvi) and non-international (Art. 8, 2, e, vii) armed conflicts conscripting or enlisting children under the age of 15 into the armed forces or armed groups or using them to participate actively in hostilities. A list of States party to these treaties is available at: http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf

[13] This includes Protocols II as amended (Art. 8) and IV (Art. 1) to the Convention on Certain Conventional Weapons and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Art. 1).

[14] See Annex 2 for a list of the main international humanitarian law treaties.

[15] Ratification of treaties is not in itself sufficient to ensure that the rules of international humanitarian law are respected. It is necessary to also examine whether the recipient country has taken active steps to fulfil the requirements of the treaties to which it is party.

II. Relevant questions regarding the repression of serious violations[16] of IHL include:

- Is there national legislation in place prohibiting and punishing grave breaches and other serious violations of IHL and legislation allowing cooperation with international tribunals?[17]

- Does the recipient country cooperate with other States, ad hoc tribunals or the International Criminal Court in connection with criminal proceedings relating to grave breaches and other serious violations?

III. Relevant questions regarding the dissemination of IHL include:

- Does the recipient country educate and train its military officers as well as the rank and file in the application of the rules of IHL (e.g. during military exercises)?

- Has IHL been incorporated into military doctrine and military manuals, rules of engagement, instructions and orders?

- Are there legal advisers trained in IHL who advise the armed forces?

- Have the same measures been taken to ensure respect for IHL by other arms bearers (i.e. police) that may operate in situations covered by IHL?

- Have requirements been put in place for military commanders to prevent and suppress grave breaches and other serious violations of IHL, and to take action against those under their control who have committed such violations?

- Have mechanisms, including disciplinary and penal sanctions, been put in place to ensure accountability for violations of IHL committed by the armed forces and other arms bearers?

- In the case of recipients other than State entities that operate in situations of armed conflict (e.g. armed groups, private military companies), have measures been taken by the recipient to ensure that the arms will be used in accordance with IHL (e.g., the adoption and distribution of codes of conduct consistent with IHL, standard operating procedures and rules of engagement that comply with these rules, the provision of training in IHL, and the establishment of internal disciplinary procedures)?

[16] The focus here is on grave breaches and other serious violations of international humanitarian law, though States must ensure compliance with all provisions of international humanitarian law and take measures to prevent and suppress violations of these.

[17] For grave breaches, such legislation must cover all persons, regardless of nationality and where the act was committed – i.e., it must incorporate the principle of universal jurisdiction.

IV. Relevant questions regarding the recruitment of children into the armed forces or into armed groups and their participation in hostilities include:

- Is the recipient known to have recruited children and to have used them to participate actively in hostilities?

- Has the recipient country ratified legal instruments establishing a minimum age for the recruitment of children and their participation in hostilities (Additional Protocols I and II, the Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflict)?

- Is there an established minimum age for the recruitment (compulsory or voluntary) of persons into the armed forces (or the armed group)?

- Have legal or other measures been adopted prohibiting and punishing the recruitment or use in hostilities of children?

4.3 Capacity to ensure that weapons will be used in accordance with international humanitarian law

- **Whether accountable authority structures exist with the capacity and will to ensure respect for IHL;**

- **Whether the arms or military equipment requested are commensurate with the operational requirements and capacities of the stated end-user;**

- **Whether the recipient maintains strict and effective control over its arms and military equipment and their further transfer.**

Explanatory comments:

I. Relevant questions regarding the authority structures include:

- Does the end user (e.g. armed forces or armed group) operate under clear and accountable lines of command and control?

- Is there an independent and functioning judicial system in the recipient country, capable in particular of prosecuting serious violations of IHL?

- Is there a risk of a sudden or unexpected change of government or authority structures (e.g., overthrow of the government, disintegration of State structures) that could adversely affect the recipient's willingness or ability to respect IHL?

- What is the general degree of concern and respect shown for the situation of the civilian population?

II. Relevant questions regarding the arms or military equipment requested and the operational requirements and capacities of the stated end-user include:[18]

- Does the end user have the knowledge and capacity to use the arms or equipment in accordance with IHL? (E.g., if military weapons are transferred to arms bearers other than the armed forces – such as the police or a private military company – who will be operating in situations covered by IHL, have they been adequately trained in that body of law?)

- Does the end user have the capacity to maintain and deploy these arms or equipment?[19]

- Are the type, quality and quantity of arms or equipment commensurate with the stated end-user's military requirements (e.g. its existing inventory and force structure)?[20]

III. Relevant questions regarding the recipient's control over its arms and military equipment include:

- Are previous transfers of arms or military equipment to this recipient known or suspected to have been re-transferred or diverted to a third party when there was a clear risk that they would be used to violate IHL?

- Does the stated end-user have adequate procedures in place for stockpile management and security, including for surplus arms and ammunition?

- Are theft and leakages from stockpiles or corruption known to be a problem in the recipient country?

- Is illicit trafficking of weapons a problem in the recipient country? Do groups involved in illegal arms trafficking operate in the country?

- Are border controls adequate in the recipient country or are the borders known to be porous?

[18] Military advisers should be consulted as part of the assessment process.

[19] If not, there may be reasonable concern as to how they will be used and as to whether they may be diverted to others.

[20] This is another highly relevant consideration when attempting to uncover attempts at diversion to other end-users.

- Does the recipient country have an effective arms transfer control system in place (import, export, transit and trans-shipment)? Does such a system include criteria for decision-making based on IHL?

- Is the recipient the actual "end user" of the arms or military equipment? Is the recipient willing to accept verification of this and to undertake not to transfer the arms or military equipment to third parties without the authorization of the supplier State?

5. Sources of information[21]

The ICRC recommends that a list of information sources relevant to assessments be included in any regulations or guidelines developed so as to assist those involved in the decision-making process. The list below is only intended to be illustrative.

- National diplomatic missions in the recipient State;
- Media reports;
- Open- and closed-source information from international agencies operating in the recipient State;
- Human rights reports by States;
- Reports by NGOs on country situations, which may include relevant information regarding compliance with international humanitarian law;
- International Committee of the Red Cross website (ratification of treaties[22] and database on national implementation of treaties[23]);
- Judgments and reports by the International Criminal Court and ad hoc tribunals;
- Military doctrine, manual and instructions;
- Reports by research institutes on weapons/arms transfer issues (i.e. regarding illicit trafficking, national controls on arms and ammunition, etc.).

[21] The ICRC takes no responsibility for the content of these sources.

[22] http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/section_ihl_nat_treaties_and_states_parties

[23] http://www.icrc.org/ihl-nat

Annex 1

Main treaties of international humanitarian law

- Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.
- Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949.
- Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
- Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. Geneva, 8 June 1977.
    - Declaration provided for under article 90 of Additional Protocol I: Acceptance of the Competence of the International Fact-Finding Commission.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. Geneva, 8 June 1977.
- Convention on the Rights of the Child, New York, 20 November 1989.
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, New York, 25 May 2000.
- Rome Statute of the International Criminal Court, 17 July 1998.
- Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954.
- Protocol to the Convention for the Protection of Cultural Property in the Event of Armed conflict, The Hague, 14 May 1954.
- Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999.
- Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, New York, 10 December 1976.
- Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925.
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, opened for signature in London, Moscow and Washington, 10 April 1972.

- 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. Geneva, 10 October 1980.
    - Protocol on Non-Detectable Fragments, 10 October 1980 (Protocol I to the 1980 Convention).
    - Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices, 10 October 1980 (Protocol II to the 1980 Convention).
    - Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, 10 October 1980 (Protocol III to the 1980 Convention).
    - Protocol on Blinding Laser Weapons, 13 October 1995. (Protocol IV to the 1980 Convention).
    - Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended to the 1980 Convention).
    - Amendment to the 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, 21 December 2001.
    - Protocol on Explosive Remnants of War, 28 November 2003 (Protocol V to the 1980 Convention).

- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993.

- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997.

Annex 2

Grave breaches specified in the 1949 Geneva Conventions and in Additional Protocol I of 1977

Grave breaches specified in the four 1949 Geneva Conventions (Art. 50, 51, 130, 147 respectively)	Grave breaches specified in the third 1949 Geneva Convention (Art. 130)	Grave breaches specified in the fourth 1949 Geneva Convention (Art. 147)
■ wilful killing; ■ torture or inhuman treatment, including biological experiments; ■ wilfully causing great suffering or serious injury to body or health; ■ extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (this provision is not included in Art. 130 third 1949 Geneva Convention).	■ compelling a prisoner of war to serve in the forces of the hostile Power; ■ wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in the Convention.	■ compelling a protected person to serve in the forces of the hostile Power; ■ wilfully depriving a protected person of the rights of fair and regular trial prescribed in the Convention; ■ unlawful deportation or transfer or unlawful confinement of a protected person; ■ taking of hostages.

Grave breaches specified in Additional Protocol I of 1977 (Art. 11 and Art. 85)

Article 11 (4):

Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

Article 85 (2):

Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

Article 85 (3):

In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

- making the civilian population or individual civilians the object of attack;
- launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
- launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
- making non-defended localities and demilitarized zones the object of attack;
- making a person the object of an attack in the knowledge that he is *hors de combat*,
- the perfidious use of the distinctive emblem of the red cross, red crescent or other protective signs.

Article 85 (4):

In addition to the grave breaches defined in the preceding paragraphs and the Conventions, the following shall be regarded as grave breaches when committed wilfully and in violation of the Conventions or the Protocol:

- the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- unjustifiable delay in the repatriation of prisoners of war or civilians;
- practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- making the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives or used by the adverse party in support of its military effort;
- depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

Annex 3

Rome Statute of the International Criminal Court

Part 2. Jurisdiction, admissibility and applicable law

Article 8: War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
  (i) Wilful killing;
  (ii) Torture or inhuman treatment, including biological experiments;
  (iii) Wilfully causing great suffering, or serious injury to body or health;
  (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
  (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
  (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
  (vii) Unlawful deportation or transfer or unlawful confinement;
  (viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
  (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
  (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
  (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
  (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
  (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
  (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
  (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
  (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
  (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
  (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
(xii) Declaring that no quarter will be given;
(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
(xvi) Pillaging a town or place, even when taken by assault;
(xvii) Employing poison or poisoned weapons;
(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:
(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
(iii) Taking of hostages;
(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;
(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
(ix) Killing or wounding treacherously a combatant adversary;
(x) Declaring that no quarter will be given;
(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.

ICRC

0916/002 06.2007 2000