

International Institute of Humanitarian Law



International Institute of Humanitarian Law
Institut International de Droit Humanitaire
Istituto Internazionale di Diritto Umanitario

The Distinction between International and Non-International Armed Conflicts: Challenges for IHL?

STUDI



Politica



FrancoAngeli

International Institute of Humanitarian Law
Institut International de Droit Humanitaire
Istituto Internazionale di Diritto Umanitario

The Distinction between International and Non-International Armed Conflicts: Challenges for IHL?

38th Round Table on Current Issues
of International Humanitarian Law
(Sanremo, 3rd-5th September 2015)

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Preface

The distinction between international armed conflict and non-international armed conflicts and their interaction from the perspective of the application of international humanitarian law gives rise to a number of difficult challenges for the international community when considering contemporary international scenarios. These challenges were at the heart of the 38th Sanremo Round Table organized, as is the tradition, by the International Institute of Humanitarian Law and the International Committee of the Red Cross.

The subject is not entirely new and partly dates back to the 1949 Geneva Conventions mainly concerning international armed conflicts. When drafting the Conventions, the States who took part in the negotiations felt the need to include some rules applicable to non-international armed conflicts, in particular the fundamental ones contained in Common Article 3. Only later, the 1977 Additional Protocols developed the legal framework applicable to non-international armed conflicts and stressed the differences and pointed out the elements which characterize both forms of conflict.

Almost forty years after the Additional Protocols, in view of the conflicts currently occurring in the world do those differences still have the same meaning? At what level and under what conditions could treaties and customary international law applicable in international armed conflicts apply to non-international armed conflicts? And how can compliance with international humanitarian law by the different actors, particularly non-State armed groups, involved in current armed conflicts be improved?

The Round Table addressed these questions and many more through constructive debates and open discussions aimed at clarifying the legal framework in which current conflicts fall from the perspective of international humanitarian law and human rights law. Representatives of Governments and International Organizations, members of the academic community, military commanders, international legal experts from all over the world, took part in this Round Table. Their experiences contributed to the debates which were conducted in an informal and positive atmosphere, providing a meaningful and invaluable contribution to humanitarian dialogue which the Institute has spearheaded since its foundation.

I am sure that the publication of the proceedings of the Round Table will help to highlight the growing importance of the promotion, implementation and teaching of international humanitarian law in the current scenarios of conflict, and hopefully will contribute to the affirmation of the humanitarian principles which are the foundation of the respect for international law, conflict prevention and peace.

Fausto Pocar

President of the International Institute of Humanitarian Law

Opening session

Opening remarks

Fausto Pocar

President, International Institute of Humanitarian Law, Sanremo

Excellencies, Civil and Military Authorities, Colleagues and Friends, Ladies and Gentlemen,

As President of the International Institute of Humanitarian Law in Sanremo, it is for me a great pleasure and indeed a distinct honour to open this 38th Round Table on current issues of international humanitarian law, organized by the Institute in co-operation with the International Committee of the Red Cross. This long-standing co-operation has permitted military and academic experts from all over the world to gather here once more on this yearly occasion with a view to discussing significant features of the contemporary law of armed conflicts in a friendly environment characterized by the well-known “spirit of Sanremo”.

A tous les participants à la Table Ronde qui sont dans cette salle ou qui viendront nous rejoindre dans la suite de nos travaux je voudrais donner la bienvenue la plus chaleureuse au nom de l’Institut en souhaitant que leur séjour à Sanremo soit fructueux et agréable.

Nel porgere un saluto caloroso di benvenuto a tutti i partecipanti desidero innanzitutto esprimere la mia gratitudine al Presidente della Repubblica italiana per il conferimento della targa del Presidente della Repubblica a questa 38° edizione della Tavola Rotonda. È un riconoscimento che ci fa onore del quale siamo estremamente grati al Capo dello Stato.

Desidero anche esprimere un vivo ringraziamento a tutte le autorità civili e militari presenti e alle illustri personalità che prenderanno la parola in questa cerimonia di apertura: al sindaco di Sanremo, dott. Alberto Biancheri, la cui presenza testimonia anche oggi la costante, significativa tradizione umanitaria di Sanremo e l’appoggio costante dell’Amministrazione comunale all’attività dell’istituto; l’Ambasciatore Gian Ludovico de Martino di Montegiordano, presidente del Comitato interministeriale per i diritti umani che rappresenta oggi il Ministero degli Affari Esteri e della Cooperazione internazionale; l’Ambasciatore Francesca Tardioli, vice-direttore generale per le operazioni della NATO, organizzazione con la quale l’istituto ha intensificato i rapporti, organizzando negli ultimi anni importanti attività di formazione; e la Signora Christine Beerli, Vice-presidente del Comitato internazionale della Croce Rossa che ci onora della sua presenza nel Consiglio dell’istituto e che desidero personalmente ringraziare per la preziosa collaborazione che il Comitato ha in questi anni dato all’istituto e all’organizzazione delle nostre tavole rotonde.

Vorrei infine esprimere un sincero ringraziamento al Ministero degli Affari esteri e della Cooperazione internazionale e al Ministero della Difesa del governo italiano, entrambi per aver accordato come in passato il patrocinio dei Ministeri alla nostra riunione. Un ringraziamento particolare rivolgo al Governo della Confederazione elvetica per il sostegno dato anche quest'anno alla realizzazione della tavola rotonda.

Consentitemi infine di esprimere il mio personale ringraziamento ai coordinatori di questa edizione della tavola rotonda: la vice presidente dell'Istituto, Elizabeth Wilmhurst, il membro del Consiglio Carl Marchand, e il Consigliere giuridico del Comitato internazionale della Croce Rossa Tristan Ferraro, che hanno formulato il programma della tavola rotonda, hanno scelto i relatori e hanno collaborato alla riuscita della tavola rotonda in concorso con lo staff dell'istituto, al quale va anche il mio pensiero riconoscente.

Le sujet de la table ronde de cette année est un sujet central du droit international humanitaire si l'on considère les conflits armés qui se déroulent maintenant sur la planète. Il s'agit de la distinction entre conflits armés internationaux et conflits armés non internationaux et de leur interaction du point de vue de l'application du droit international humanitaire. A vrai dire le sujet n'est pas entièrement nouveau et certains de ses volets remontent aux conventions de Genève de 1949, dont les règles concernent essentiellement les conflits armés internationaux. Lors de leur élaboration les Etats participants à la conférence où elles furent adoptées ont jugé néanmoins nécessaire d'y insérer également des règles applicables aux conflits armés non internationaux, tout particulièrement la règle fondamentale minime contenue dans les dispositions de l'article 3 commun aux quatre conventions. Les protocoles additionnels de 1977 ont développé la réglementation juridique des conflits armés non internationaux, mais ils ont également mis l'accent sur les différences qui devraient caractériser les deux formes de conflits sous l'aspect de leur discipline juridique. Il suffit de mentionner, à pur titre d'exemple, l'absence dans le deuxième protocole additionnel d'un régime équivalent à celui prévu dans les Conventions de 1949 et dans le premier protocole pour prévenir et réprimer les violations graves de règles fondamentales y contenues, à savoir le régime de graves violations. Quarante ans après, ou presque quarante ans après les protocoles additionnels, est-ce que ces différences ont encore le même sens quant aux conflits en cours dans le monde? A quel niveau et sous quelle condition les traités et la coutume internationale applicables aux conflits armés internationaux pourraient-ils s'appliquer au même titre aux conflits armés non internationaux? Voilà des questions qui constituent un défi pour le droit international humanitaire actuel et sur lesquelles la table ronde se penchera dans le but de contribuer à clarifier le cadre juridique dans lequel

les conflits actuels se situent du point de vue de leur réglementation juridique.

An answer to these questions does not imply – it is pertinent to say it – a denial of the fundamental distinction between international and non-international armed conflicts as recognized in the international humanitarian law treaties and assessed by eminent lawyers on the basis of customary international law. It is in principle well accepted that an international armed conflict exists when hostilities are carried out between different States and that an intervention of a foreign State in an internal conflict in support of the government against non-state actors does not automatically alter the nature of that conflict as non-international. However, does this necessarily imply that the rules governing international conflict should not be applicable to that conflict, to that non-international conflict? Just to mention an example, and I refer again to the grave breaches regime, following the Tadic seminal decision of the International Criminal Tribunal for the former Yugoslavia, most of the grave breaches of international humanitarian law which qualify as international crimes in international armed conflicts are equally recognized as international crimes when they are committed in a non-international armed conflict. In this perspective, the distance between the law governing international armed conflict and non-international armed conflict has been reduced substantially as compared with that resulting from the two protocols. But this does not mean in itself, however, that other features of the existing international legislation should follow the same path. It is a matter for discussion.

The above-mentioned themes related to the law governing non-international armed conflicts are further complicated by existing scenarios where conflicts commencing as being non-international become international or the other way round, or where a conflict appears to match in part the description of a non-international armed conflict and in part that of an international armed conflict, or where a conflict presents the characteristics of one or the other in different geographical areas of the same conflict. How should such situations be dealt with from the point of view of the applicable law? How far does one body of law impact or should impact on the other? These scenarios will be at the core of the debate during the Round Table and will be approached in general terms, i.e. in the general terms of the interaction between international and non-international armed conflicts, as well as through the lens of selected issues, including the use of force, the conduct of hostilities, the question of detention, human rights and humanitarian assistance. In this respect, our discussions will also dwell on issues that were debated in our last Round Table on the conduct of hostilities and partly constitute its logical continuation.

An assessment of the governing law in international and non-international armed conflicts respectively will not only be a stimulating

legal discussion. The definition of the legal regimes will have a significant practical impact and may reveal its importance in strengthening compliance with international humanitarian law. Compliance is a theme to which the Institute dedicated its Round Table two years ago but also a theme which is a reason for its very existence and that of its partner in the organization of the Round Table, the ICRC. May I recall that the ICRC has taken an important initiative, together with the Swiss Government, aimed at strengthening compliance with international humanitarian law. We are following this initiative closely and wish it every success.

Let me conclude by expressing the hope that our debates in the forthcoming days may contribute to clarify the difficult issues before us and by so doing affirm the principle of humanity, as one of the driving principles of international humanitarian law, in all kinds of armed conflicts.

Welcome address

Alberto Biancheri

Mayor of Sanremo

It is a real privilege for me to extend, on behalf of the city and the Municipality of Sanremo, my warmest welcome to the distinguished authorities, international experts and all the guests who are here this morning at the opening session of this important Round Table on Current Issues of International Humanitarian Law, organized by the International Institute of Humanitarian Law, which my city has had the honour to host for forty-five years now and which the Municipality of Sanremo co-founded.

I am pleased to remind those present that the Institute plays an important role for the City of Sanremo, not only as a centre of excellence in the field of training and research but also as a forum for reflection on a wide range of challenges that humanity is facing today. It is because of this unique role played by the Institute since 1970 in this city and around the world, that I would like to confirm the commitment of the Municipality, already expressed at the beginning of my mandate as Mayor, to support, wherever possible, the activities of the Institute and to reiterate its determination to strengthen its co-operation and collaboration.

This 38th Round Table matches very well the vocation and tradition of Sanremo, which, since its origins has served as a crossroads for international exchanges and meetings between nations. The presence, once again, of such a large group of important and prominent representatives of governments and International Organizations, leading academics and senior military Officers coming from different regions of the world gathered in our city is a great source of pride which should inspire us to further support the initiatives organized by the Institute.

Nowadays, each of us is daily confronted with images of sufferance and death arising from the numerous outbreaks of crisis and armed confrontation all over the world, where alarming atrocities against the civilian population are witnessed.

This year's Round Table on the topic "The Distinction between International Armed Conflicts and Non-International Armed Conflicts: Challenges for IHL?" will focus its attention on one of the most important issues of International Humanitarian Law considering the alarming increase of non-international conflicts and the traumatic effects such conflicts have on the general public. The need for in-depth reflection and constructive debate has never been so pertinent.

I am sure that, thanks to the work of the eminent experts invited by the International Institute of Humanitarian Law, this Round Table will provide,

once again, constructive and fruitful debates and will set out the guidelines for possible solutions.

Let me now express my warm thanks to Professor Fausto Pocar, President of the International Institute of Humanitarian Law and Dr. Helen Durham of the International Committee of the Red Cross.

I wish you all a successful Round Table and hope that you may return to this city in the future. Sanremo will be very happy to welcome you again!

Keynote address

Gian Ludovico de Martino di Montegiordano

Presidente del Comitato Interministeriale per i Diritti Umani,
Ministero degli Affari Esteri e della Cooperazione Internazionale,
Roma

Desidero innanzitutto far pervenire a tutti voi il più caloroso saluto del Ministro degli Affari Esteri e della Cooperazione Internazionale, Paolo Gentiloni, in occasione di questa trentottesima Tavola Rotonda sui problemi attuali del Diritto Internazionale Umanitario, organizzata – come è ormai tradizione – dall’Istituto di Sanremo in collaborazione con il Comitato Internazionale della Croce Rossa, e dedicata quest’anno alla “Distinzione fra conflitti armati internazionali e conflitti armati non internazionali: una sfida per il diritto umanitario?”.

Ad oltre sessant’anni dall’adozione delle Convenzioni di Ginevra, l’impianto giuridico del diritto umanitario deve oggi confrontarsi con nuove sfide: la proliferazione di gruppi armati non statuali, alcuni dei quali rifiutano l’esistenza stessa del diritto internazionale umanitario; la natura asimmetrica dei conflitti armati contemporanei, che accentua le differenze tra belligeranti in termini di capacità tecnologiche e militari; la crescente difficoltà di distinzione tra combattenti e civili nelle operazioni militari; l’outsourcing di attività militari a compagnie private; la possibilità del ricorso ad attacchi cibernetici.

L’affermazione del principio dello stato di diritto e l’esigenza di preservare la vita e la dignità umana e garantire il rispetto dei diritti umani e delle libertà fondamentali, anche negli scenari di conflitto armato, impongono alla comunità internazionale l’adozione di risposte immediate ed efficaci per queste nuove sfide e le altre che si manifesteranno negli anni a venire. Tali risposte non potranno non ispirarsi allo spirito delle Convenzioni di Ginevra, i cui principi continuano e continueranno a rappresentare la base fondamentale ed imprescindibile per proteggere i combattenti, i prigionieri e le popolazioni civili nei teatri di guerra.

Il diritto umanitario deve poter disporre di meccanismi efficaci per tutelare e rafforzare il rispetto dei diritti umani, nell’attuale contesto internazionale dove, sempre più spesso, alla base dei conflitti vi sono gravi violazioni dei diritti umani stessi. Il dibattito in corso su tale argomento non è un esercizio teorico ma risponde a all’esigenza pratica di definire adeguate soluzioni e all’Istituto di Sanremo va tutto il nostro apprezzamento e ringraziamento per aver favorito questo dibattito.

I conflitti che scaturiscono dalle violazioni dei diritti umani comportano nuove e ulteriori violazioni dei diritti umani delle popolazioni coinvolte, in

una spirale difficile da arrestare. È pertanto particolarmente importante promuovere un progressivo innalzamento degli standard dei diritti umani e introdurre sistemi di allerta precoce in chiave preventiva. Sotto questo profilo un obiettivo prioritario dell'azione dell'Italia è la promozione e protezione dei diritti umani intesa anche in chiave di prevenzione dei conflitti, attraverso iniziative di educazione e formazione ai diritti umani e di promozione del dialogo interreligioso e interculturale.

È per questo motivo che l'Italia sostiene fortemente il "Framework of analysis", nuovo meccanismo di valutazione del rischio e prevenzione delle atrocità di massa, sviluppato dall'Ufficio degli Special Advisers per la Prevenzione del Genocidio e la Responsabilità di Proteggere, anche con il contributo di idee e finanziario italiano. In quest'ambito, il nostro Paese ospiterà il 17-18 settembre prossimo a Treviso uno dei seminari regionali sul ruolo dei leader religiosi nella prevenzione delle atrocità di massa, che il Segretariato ONU sta organizzando quale seguito operativo all'adozione del "Framework of analysis".

A ridosso di tale evento, sempre a Treviso, il 18-19 settembre, si svolgerà una conferenza internazionale organizzata dal Comitato Interministeriale per i Diritti Umani sul tema "Libertà di coscienza, di pensiero e di religione: quali limiti al progresso sociale, economico e culturale?".

Stiamo d'altra parte assistendo a una mutazione delle caratteristiche dei conflitti interni contraddistinti da un prolungamento dei tempi delle ostilità, fino ai limiti della cronicità. Ad un aumento dei focolai di conflitto, soprattutto in Africa e nel Medio Oriente a partire dalla crisi siriana, dalla recrudescenza dell'offensiva DAESH in Iraq e Siria, e fino agli attacchi contro inoffensivi studenti e luoghi di istruzione perpetrati da gruppi terroristi, come Boko Haram in Nigeria e Al-Shabab in Kenya.

L'azione di prevenzione rende necessario l'utilizzo degli strumenti del diritto internazionale dei diritti umani sia pattizio che consuetudinario, e in tale chiave si legge l'impegno degli Stati membri della Comunità Internazionale nei dibattiti che sono stati promossi sul piano internazionale ed europeo nel corso del 2015, e che hanno portato, nel sistema delle Nazioni Unite, al negoziato finalizzato alla elaborazione e all'adozione, nella imminente sessione dell'Assemblea Generale a New York, dell'Agenda globale per lo sviluppo e, in essa, agli Obiettivi più strettamente correlati al tema della protezione dei diritti umani ed alla promozione della democrazia e del buon governo.

Nella prospettiva sempre più di una prevenzione delle crisi piuttosto che della reazione alle stesse, e partendo dal bilancio dell'operato dell'Organizzazione delle Nazioni Unite a settanta anni dalla fondazione, occorre delineare nuove prospettive programmatiche e operative, in relazione ai tre pilastri della missione statutaria dell'ONU: il mantenimento

della pace e della sicurezza internazionali; lo sviluppo; la promozione dei diritti umani e delle libertà fondamentali. Occorre altresì sensibilizzare sui grandi temi trasversali, quali la lotta ai cambiamenti climatici, e attivarsi con iniziative concrete per la prevenzione delle atrocità e dei crimini di massa.

Rilevante è il ruolo e il contributo dell'Italia sotto questo profilo. Il Segretario Generale dell'ONU ha espresso in varie occasioni riconoscenza all'Italia per il sostegno costante ai valori fondamentali in tutti questi campi; per l'azione di mantenimento della pace, specie in Libano, per la lotta contro il terrorismo; per il ruolo svolto nei colloqui per la ricerca di una soluzione alla crisi libica; ma anche per la gestione dei flussi migratori con attenzione agli sforzi umanitari di soccorso dei migranti nel Mediterraneo; per il nostro contributo all'agenda di sviluppo post-2015 e alla lotta al cambiamento climatico.

La nostra azione si caratterizza per l'apprezzata miscela di equilibrio, dialogo e capacità di ascolto degli altri e delle loro istanze. Nelle operazioni di mantenimento della pace, al nostro contributo di risorse si accompagna l'apprezzamento per il nostro metodo, "the Italian way of peacekeeping", basato su equilibrio tra gli aspetti militari e civili, contatto con le popolazioni e capacità professionali. Il nostro sostegno alle attività di mediazione e diplomazia preventiva, anche attraverso il contributo di attori della società civile quali la Comunità di S. Egidio, è riconosciuto in una fase in cui le stesse Nazioni Unite esplorano il modo di favorire la prevenzione dei conflitti rispetto alla reazione ai conflitti.

La promozione dei diritti umani e delle tematiche di genere è una costante della nostra azione al Palazzo di Vetro con iniziative di elevato profilo quali la moratoria della pena di morte, la promozione della libertà di religione o credo e la tutela dei diritti degli appartenenti alle minoranze etniche e religiose, il contrasto alle mutilazioni genitali femminili, la lotta contro i matrimoni precoci e forzati, la promozione del ruolo attivo delle donne.

In materia di intervento umanitario, poi, l'Italia ha sempre mostrato grande sensibilità verso le popolazioni vittime di crisi umanitarie che sia a causa di situazioni di conflitto, come per esempio in Siria, sia in ragione di eventi naturali: terremoti, uragani, da ultimo nel caso di Vanuatu o pandemie quali l'Ebola, lavorando a fianco delle Agenzie specializzate delle Nazioni Unite e della rete delle Associazioni di volontariato e delle Organizzazioni non Governative. Nel 2014 abbiamo sostenuto progetti dell'UNICEF a favore dei bambini in Iraq, Libano e Giordania, e finanziato programmi quali la "No Lost Generation Initiative". Dal gennaio 2015, nella Regione Autonoma del Kurdistan dell'Iraq stiamo finanziando l'assistenza dell'UNICEF alle giovani donne cristiane e Yazidi, vittime di violenza.

Nel sistema dell'Unione Europea, vorrei ricordare le attività della Presidenza Italiana del Consiglio dell'Unione Europea nel secondo semestre del 2014 nel campo dei diritti umani su questioni quali le migrazioni, il lavoro, il genere, le discriminazioni, donne pace e sicurezza, imprenditoria e diritti umani. Esse sono state mirate a definire il percorso ancora da compiere, a promuovere scambi di informazioni e di buone pratiche, a sensibilizzare l'opinione pubblica. Riteniamo sia essenziale operare in stretto collegamento con la società civile e le ONG per raggiungere l'obiettivo della promozione dei diritti umani. Il cammino verso l'adozione di strumenti giuridicamente vincolanti non può prescindere da sforzi concreti – dall'ostruzione alla formazione – per giungere a un cambiamento culturale.

Sempre a livello europeo vorrei inoltre menzionare l'adozione, il 20 luglio scorso, del Piano d'Azione sui Diritti Umani e la Democrazia per il periodo 2015-2019 nel quale i riferimenti alla disciplina del diritto internazionale umanitario hanno assunto un rilievo peculiare: gli Stati Membri si sono impegnati a sostenerne la compliance, insieme alle istituzioni europee – la Commissione, il Consiglio ed il Servizio Europeo per l'Azione Esterna – attraverso le seguenti azioni: entro il 2016: valutare e se necessario rafforzare l'attuazione delle Linee Guida dell'Unione Europea per la promozione del rispetto del diritto internazionale umanitario alla luce dei dibattiti in corso in merito a un sistema di controllo della conformità con il diritto internazionale umanitario. Entro il 2017: formulare e attuare una politica di "due diligence" che garantisca che il sostegno fornito dall'Unione Europea alle forze di sicurezza, in particolare nel quadro di missioni e operazioni di politica di sicurezza e di difesa comune, sia conforme e contribuisca all'attuazione della politica dell'Unione Europea in materia di diritti umani e sia coerente con la promozione, protezione e attuazione del diritto internazionale dei diritti umani e del diritto umanitario internazionale, a seconda dei casi. È inoltre previsto che, ove ritenuto opportuno, i Capimissione e i rappresentanti dell'Unione Europea, inclusi i responsabili delle operazioni civili, i comandanti delle operazioni militari e i rappresentanti speciali dell'Unione, includano nei loro rapporti su un determinato Stato o conflitto una valutazione della situazione del diritto internazionale umanitari, con particolare attenzione alle informazioni relative a eventuali gravi violazioni del diritto internazionale umanitario; formulando quando possibile anche una analisi e proposte di misure che l'Unione Europea potrebbe adottare. Infine: fare il punto sull'attuazione degli impegni assunti dall'Unione Europea in occasione della 31^a conferenza del Movimento della Croce Rossa, prepararsi per la 32^a conferenza nel dicembre 2015 e darvi seguito fino alla 33^a conferenza nel 2019.

Come sopra accennato molti conflitti armati sono oggi caratterizzati dalla proliferazione di gruppi armati non statuali che rifiutano l'esistenza stessa o l'applicabilità del Diritto Internazionale Umanitario. Tale natura frammentata e asimmetrica dei conflitti armati contemporanei mette a repentaglio l'applicazione del Diritto Internazionale Umanitario. Inoltre il forte impianto ideologico e propagandistico dei belligeranti e ribelli di stampo terroristico fa sì che quest'ultimi si pongano quale obiettivo specifico quello di minare il normale svolgimento delle attività educative. Si pensi a Boko Haram, il cui nome stesso esprime la sua avversione per l'educazione di stampo occidentale e alla crescente ideologizzazione dei conflitti asimmetrici.

I luoghi di istruzione non sono più solamente strutture dalle quali le forze armate possono operare o trovare temporaneo rifugio, ma diventano il campo di una battaglia propagandistica contro l'avversario, finalizzata anche al reclutamento di nuovi combattenti, mettendo a repentaglio in molti Paesi il fondamentale diritto che giovani e bambini ottengano un'adeguata istruzione e incidendo profondamente sul benessere psico-fisico delle generazioni future, e gettando così le basi di futuri conflitti.

A tale proposito l'Italia ha sostenuto l'adozione a Oslo il 29 maggio scorso della Dichiarazione sulla Sicurezza delle Scuole che enfatizza la necessità politica di dare concreta applicazione alle norme di diritto internazionale convenzionali e consuetudinarie sulla protezione dei luoghi di istruzione nei conflitti armati, anche nella loro applicazione pratica all'interno degli ordinamenti giuridici di ogni Stato. L'Italia applica concretamente il principio di salvaguardia delle scuole nei conflitti armati. La nostra legislazione penale militare, che viene applicata anche in tempo di pace per le "Missioni internazionali di pace", prevede infatti che il Comandante militare sia obbligato ad adottare provvedimenti per la protezione di edifici, luoghi e cose che devono essere rispettati ai sensi delle leggi nazionali e delle Convenzioni internazionali a cui l'Italia ha aderito; nonché il divieto di distruzione o grave danneggiamento in paese nemico di edifici destinati all'istruzione.

Altro settore di prioritario impegno per l'Italia è quello della formazione delle forze armate e delle unità di Polizia sui temi del diritto internazionale umanitario e dei diritti umani. A questo riguardo, vorrei in particolare segnalare le attività svolte dal CoESPU, Centre of Excellence for Stability Police Units, istituito nel 2005 da un'iniziativa italo-statunitense in ambito G8, che contribuisce in misura sostanziale alla crescente domanda di formazione delle unità di polizia schierate nelle missioni internazionali. Il CoESPU, con la collaudata formula della formazione dei formatori, ha conseguito risultati significativi, addestrando numerose unità di polizia, provenienti in larga misura da Paesi africani e asiatici. Il modello offerto dai Carabinieri fornisce personale con elevata preparazione e autonomia e

capacità di dispiegamento in teatro. Tutti i corsi organizzati dal CoESPU includono moduli sul rispetto dei diritti umani, del diritto internazionale umanitario, la protezione dei civili e la prevenzione della violenza sessuale e di genere. L'Italia sostiene d'altra parte l'azione di formazione specifica in materia di Diritto Internazionale Umanitario svolta dall'Istituto Internazionale di Diritti Umanitario di San Remo, a favore di membri delle forze armate e operatori del settore giudiziario di numerosi Paesi.

La tavola rotonda di quest'anno verte su un tema, quello della distinzione fra conflitti armati internazionali e conflitti armati non internazionali, che costituisce senz'altro una sfida per il diritto umanitario. In effetti, sovente una delle caratteristiche dei conflitti armati non internazionali è il rifiuto da parte di uno o più dei belligeranti dell'esistenza stessa del diritto internazionale umanitario. Si tratta d'altra parte di conflitti spesso originati dal tentativo di imposizione di regimi concettualmente alieni ai principi che stanno alla base del diritto internazionale e antitetici ai diritti umani.

La costante violazione del diritto internazionale umanitario, ovvero il dramma, le tragedie umane che si vivono quotidianamente e in forma ormai cronica nei paesi e nelle regioni dilaniati da conflitti interni, evidenziano in tale fattispecie la contraddizione tra l'impianto teorico – Art. 3 delle Convenzioni di Ginevra, II Protocollo Addizionale del 1977 – e l'applicazione pratica delle norme nella realtà effettuale. Si pone quasi l'interrogativo se la consuetudine che paradossalmente andrebbe affermandosi vada nella direzione della negazione dell'estensione ai conflitti interni del diritto internazionale umanitario. Per stroncare una simile tendenza, quali ulteriori sforzi potrebbe efficacemente compiere la comunità internazionale?

I crimini internazionali e le atrocità di massa esigono risposte ferme e condivise, che sono rafforzate dallo stabilimento di un efficace sistema di giustizia penale internazionale. La Corte Penale Internazionale ha segnato un fondamentale passo in avanti nella lotta all'impunità dei criminali di guerra attraverso l'applicazione di due principi-cardine del diritto: certezza della pena e sottoposizione a un giudice naturale. A tal fine, è necessario assicurare la più ampia cooperazione da parte dell'intera comunità internazionale, in primo luogo nella consegna di coloro che si sono macchiati di crimini di particolare efferatezza nei confronti delle popolazioni civili.

Con l'auspicio che questa tavola rotonda contribuisca significativamente a delineare un percorso che rafforzi la concreta applicazione dei principi del diritto umanitario ai conflitti armati non internazionali, ringrazio per l'attenzione.

Keynote address

Francesca Tardioli

Deputy Assistant Secretary-General for Operations, NATO, Brussels

As an organization committed to peace and security through collective defence and the rule of law, NATO is fundamentally concerned with the application of International Humanitarian Law in the planning and conduct of its operations and missions.

The Rule of Law – which of course includes the obligation to observe International Humanitarian Law – is a core value at NATO, which, along with freedom, democracy and individual liberty, is reflected in the preamble to the North Atlantic Treaty. In other words, compliance with IHL is not only a legal requirement but it is also part and parcel of NATO's values and legitimacy.

In the last decade, in particular, NATO has placed increasing emphasis on the human security dimension in the planning and conduct of its operations. The Alliance has seen excellent progress in the implementation of the Women, Peace and Security Agenda, Children and Armed conflict, as well as in minimising civilian casualties in conflicts. The significance of these policy issues has been recognized at the highest level of the Organization. At the Lisbon Summit, in 2010, NATO and its Operational Partners agreed on an Action Plan to incorporate the principles of UNSCR 1325 on Women, Peace and Security throughout NATO-led operations and missions.

The protection of children was addressed by NATO at its 2012 Summit in Chicago. On this occasion, NATO's Heads of State and Governments tasked the Alliance to develop practical, field-oriented measures to address violence against children in armed conflicts. This led to military guidelines for integrating United Nations Security Council Resolution 1612 into NATO's operations, training and exercises, with a follow up in 2014, after the Summit in Wales.

NATO's focus on human security also stems from our experience in theatre, leading the International Security Assistance Force in Afghanistan (which ended last December); and in other major military operations in the Balkans and Libya.

This shared experience among Allies and operational partners has provided many lessons for future operations. The lessons we have learned have been translated into practical measures. The practical steps in the coming months include:

- Placing specialized personnel, education and training to begin implementing UNSCR 1612 in NATO activities. The result of this will be significant: by recognizing children and armed conflict as a

distinct area of expertise, NATO and its partners are making this issue a part of our everyday business.

- Exercise Trident Juncture 15, NATO's largest ever non-Article 5 exercise to take place next month will now feature children and armed conflict as part of the scenario. Mission Commanders and deployed troops will thus have better, more precise guidance on how to proceed whenever and wherever they encounter grave violations committed against children.

Concerning sexual violence in armed conflicts, just last July, NATO has adopted Military Guidelines on the prevention of and response to conflict-related sexual and gender-based violence. These Guidelines aim to integrate the prevention of conflict-related sexual violence into mission planning and analysis while outlining training needs for deployed NATO-led forces. In particular, the Gender Advisors in the field are now mandated to engage with specialized UN country team staff dealing with conflict-related sexual violence.

Through its work on those themes, the Alliance has established fruitful cooperation with specialized UN agencies and civil society organizations.

Let me now address civilian casualties in conflicts and what NATO has done, and will continue to do, to avoid civilian losses.

I will start with Afghanistan. In leading ISAF, the Alliance faced great challenges providing security in a complex environment. From October 2006, NATO found itself conducting high-intensity ground combat operations with, unfortunately, a high number of civilian casualties, due to the very asymmetric nature of the insurgency that deliberately chose to operate in populated areas, often using civilians as human shields.

It was clear that measures had to be taken to avoid such losses. Since 2007, therefore, successive ISAF Commanders explicitly and consistently addressed civilian losses through measures such as specific training programmes, reporting and tracking measures – most notably the Civilian Casualty Mitigation Team (CCMT) established in 2011 – and the continual update/revision of tactical level documentation. All of these measures ultimately contributed to the right mindset, the right processes and the right conduct of operations to reduce civilian casualties (CIVCAS). No single measure responsible for the drop in ISAF caused CIVCAS numbers, but the whole package of measures, each addressing a specific area.

ISAF has also worked closely with the Afghan National Defence and Security Forces to build up their own civilian casualty reduction capabilities. This was done through training on the elimination of explosive hazards and the development of an indigenous civilian casualty reporting and tracking system.

This work continues with the Resolute Support Mission, the non-combat NATO-led mission currently in place in Afghanistan, where we remain committed to training and assisting the Afghan National Defence and Security Forces as they protect the Afghan people, also by taking measures to limit civilian casualties.

Before ISAF drew to a close, the North Atlantic Council tasked the NATO Military Authorities to undertake an in-depth analysis of how ISAF significantly reduced civilian casualties. The resulting study capturing these important lessons was shared with the Allied nations, operational partners, UNAMA and certain NGOs last July. Our long-term vision is to now develop the necessary policies, practices and doctrine for the widest possible adoption by NATO Allies and Operational Partners.

Work to minimize civilian losses continued during the UN-mandated operation in Libya. As you will recall, NATO's support to the International Community effort in Libya aimed to protect civilians and civilian-populated areas from the Gaddafi regime. During Operation Unified Protector, NATO demonstrated its rigorous implementation of IHL, and, indeed, applied standards exceeding what was required under IHL. These measures contributed significantly to an extraordinarily low incidence of harm to civilians.

In particular, rigorous targeting procedures and the sole use of precision-guided munitions were just some of the precautions taken by the Alliance to mitigate harm to civilians. Targeting and strike methods were designed and implemented to avoid civilian casualties as was humanly possible. Indeed, the International Commission of Inquiry on Libya, established by the Human Rights Council, concluded that NATO (quote) "conducted a highly precise campaign with a demonstrable determination to avoid civilian casualties" (end quote).

Unfortunately, despite taking every precaution to minimize risk to civilians in a complex military campaign such risk can never be reduced to zero. We deeply regret any instance of civilian casualties for which NATO could have been responsible. To this end, NATO made every effort to assess the merit of each allegation and worked diligently to review incidents from the conflict which affected civilians. This included extensive cooperation with the International Commission of Inquiry.

But this is not to say that our work is complete; far from it: we will always continue to do better and better.

Let me now conclude by reiterating that NATO is committed to the protection of civilians and more broadly to IHL.

The responsibilities and obligations imposed by IHL with respect to the protection of civilians transcend legal distinctions between international and non-international armed conflict. Our commitment to these principles is reflected in all we do and as I mentioned, NATO continues to work with

other international organizations, such as the ICRC and UNHRC, to promote greater transparency and accountability. Events such as this Round Table is for us a precious opportunity to reflect and interact on those issues.

Keynote address

Christine Beerli

Vice-President of the International Committee of the Red Cross,
Geneva

The theme of this Round Table “The distinction between international and non-international armed conflicts: challenges for International Humanitarian Law?” invites us to explore the difficulties surrounding the typology of armed conflicts, their classification and the applicable legal frameworks.

Under IHL, it is now well accepted that international armed conflicts occur when one or more States have recourse to armed force against another State, regardless of the reasons for or the intensity of this confrontation. Conversely, non-international armed conflicts are armed conflicts that oppose a State Party against a non-State Party or that exclusively oppose non-State organized armed groups. For non-international armed conflicts to exist they must involve parties demonstrating a certain level of organization and the armed violence must reach a certain level of intensity.

While the basic contours of these two categories of armed conflicts outlined in IHL – international and non-international armed conflicts – seem quite clear, their specific contents and boundaries appear considerably more complex and uncertain.

Although recent years have seen the emergence of a number of new international armed conflicts, non-international armed conflicts remain the predominant form of belligerency. Non-international armed conflicts falling within the scope of Common Article 3 to the Geneva Conventions have involved different factual scenarios. They are no longer confined to the classical notion of armed opposition between governmental forces and an insurgent organized armed group in the territory of a single State. A key development over the past decade has been an increase in non-international armed conflicts with an extra-territorial element.

This extra-territorial element may take various forms. Some non-international armed conflicts have been known to “spill over” into the territory of neighboring States. “Multinational non-international armed conflicts” in which multinational armed forces are fighting alongside a “host” State – in its territory – against one or more organized armed groups have blossomed. “Cross border non-international armed conflicts”, where the forces of a State are engaged in hostilities with a non-state party operating from the territory of a neighboring host State, have also occurred. Concomitantly, the sudden and dramatic rise of the Islamic State group and its so-called affiliated armed groups has created the perception that there

may be a new “transnational non-international armed conflict” involving a group with an unbounded geographical reach.

The brutality of many contemporary armed conflicts is a cause for deep alarm to the ICRC. Egregious violations of IHL are being committed every day, both by States and non-state parties. In many situations, this is linked to a denial of the applicability or relevance of IHL. For example, on the part of non-state armed groups, there is sometimes a rejection of IHL, which some parties do not feel bound by. On the part of States, it is often, though not always, the result of a counter-terrorism discourse, which the ICRC has recently observed to be hardening. It remains the case that some States appear increasingly reluctant to admit that they have become parties to an armed conflict even if facts on the ground prove otherwise and, therefore, deny that IHL applies to their actions. This situation has rendered the ICRC’s task of engaging these States on their obligations under IHL arduous, if not to say impossible. It also entails the disregard of the fundamental protections afforded by IHL in situations where this body of law constitutes one of the last defenses against inhumanity.

It has been argued that all of these situations share one characteristic: uncertainty in determining the applicable law from a material, temporal, geographic but also personal perspective. Indeed, it may appear *prima facie* that these conflicts are outside the classic dichotomy of international/non-international armed conflicts and are thus situated in a grey zone of IHL, subject to a lack of specific provisions. Consequently, many queries have been raised in recent and ongoing legal debates about whether the current IHL dichotomy is still sufficient to deal with these new factual scenarios, and whether new conflict classifications are needed.

In the ICRC’s view, these new features of belligerency do not form a third category of armed conflicts but merely constitute – depending on the specificities of the case – a specific expression of an international armed conflict, a non-international armed conflict or both types concurrently. For us, the contemporary forms of armed conflicts can still be embedded into the classic dichotomy established by IHL. There does not appear to be, in practice, any current situation of armed violence between organized parties that would not be encompassed by one of the two classifications.

Furthermore, the reality of this dichotomy is likely to endure. The division of IHL between rules applicable in international and non-international armed conflicts established by the Geneva Conventions of 1949 was further confirmed in 1977 with their Additional Protocols. More recently, it was also included in the Statute of the International Criminal Court of 1998, which makes a distinction between war crimes committed in international armed conflicts and those committed in non-international armed conflicts.

We all know that the main reason for the persistence of the dichotomy lies in the preservation of States' sovereignty. States remain concerned that equating international and non-international armed conflicts could encourage insurgencies, legitimize non-state organized armed groups, and restrain them in quelling the threat emanating from those groups, notably by granting the latter combatant privilege and immunity. Indeed, extending the law of international armed conflicts to conflicts of a non-international character would mean according combatant and possibly prisoner-of-war status to members of the armed opposition. This would make it impossible to prosecute such members for the mere fact of having taken up arms; a possibility that is maintained in the current law governing non-international armed conflicts. So long as this difference persists, so will the bifurcation between international and non-international armed conflicts.

One cannot ignore the criticisms made regarding the dichotomy of armed conflicts and the correlative difference in the applicable legal framework. This distinction results in significantly lower IHL protections for persons caught in non-international armed conflicts, mainly because of the reduced number of treaty provisions applicable in these situations. However, while these criticisms are not unfounded, they should not be overemphasized.

Notwithstanding the conventional variations in the legal regimes governing international and non-international armed conflicts, a slow but progressive erosion of these differences is already under way. It should be recalled that some States – and international organizations alike – have issued guidance stating that their armed forces, when involved in non-international armed conflicts, would apply as a matter of policy the higher legal standards found in the law of international armed conflicts. It should be noted that this idea of applying in non-international armed conflicts rules that are applicable in international ones is also envisioned in Common Article 3 of the Geneva Conventions. In the same vein, some weapons treaties, such as the Chemical Weapons Convention of 1993 or the Convention of 1997 prohibiting anti-personnel landmines, apply as a matter of law to both international and non-international armed conflicts.

Despite this trend, one cannot simply graft the rules of international armed conflicts onto non-international armed conflicts in an unqualified manner. This not only necessitates political will but also requires a careful consideration of the legal consequences of such an enterprise and of any required adjustments, in particular, with regard to the interaction with other applicable regimes such as human rights law. This Round Table, building on the expertise of its participants, is a perfect platform to address these issues and provide useful guidance.

While speaking about the convergence of the legal rules applicable in all conflict situations, I would like to mention the ICRC's study on customary

IHL. This Study provides evidence that many rules of customary IHL apply in both international and non-international armed conflicts. This is indicative of the extent to which State practice has gone beyond existing treaty law and has expanded the rules applicable to non-international armed conflicts. Customary IHL now provides more detailed rules for non-international armed conflicts than the rules found in Common Article 3 to the Geneva Conventions and their Additional Protocol II. This is particularly true for the rules governing the conduct of hostilities. However, it must be recognized that customary IHL has not yet developed to the point that it has filled all the gaps left by the treaty law of non-international armed conflicts.

If the distinction between the legal framework governing international and non-international armed conflicts is being eroded, this in no way means that a complete unity in the law applicable to these two situations can be observed.

The persistence of the dichotomy established by IHL and the differences that continue to exist between the rules governing international armed conflicts and the rules governing non-international armed conflicts still raise unresolved issues impacting the protection of victims of armed conflicts. The paucity of treaty and customary IHL rules applicable in non-international armed conflicts, particularly in the field of detention, has consequently inspired attempts aimed at clarifying and strengthening the legal framework applicable in this specific type of conflict.

There is a significant disparity between the robust and detailed provisions applicable to the deprivation of liberty in the context of international armed conflicts and the very basic rules that have been codified for non-international armed conflicts. Although treaty and customary IHL contain vital protections, these are quite limited in comparison to what exists for international armed conflicts. This is particularly true in the following areas: conditions of detention, particularly vulnerable groups, grounds and procedures for internment and transfers of detainees.

In this regard, I would like to recall that the ICRC is currently undertaking a major consultation process with States and other relevant actors aimed at strengthening the legal protection for persons deprived of their liberty in non-international armed conflicts. It is doing so based on a mandate assigned to it on the occasion of the 2011 International Conference of the Red Cross and Red Crescent.

Across the broad spectrum of conflict environments, some of the most important humanitarian challenges we face stem from a lack of compliance with existing IHL rules. If there is one area where the laws applicable to international and non-international armed conflicts converge it is clearly the absence of effective compliance mechanisms.

The ICRC has already contended in various fora that the main problem in contemporary armed conflicts is not so much the lack of rules but rather the widespread disrespect of those that already exist. Finding ways and means to ensure greater respect for IHL is thus one of the most pressing humanitarian challenges.

The evidence of the pressing need to do so is all around us. Armed conflicts are occurring in almost all regions of the world with the behaviors observed therein increasingly defying the very notion of humanity. It is patently clear that the suffering of the population caught in the midst of hostilities and the magnitude of humanitarian needs caused by armed conflicts would be far lesser if IHL were properly implemented by the parties to armed conflicts, both States and non-state actors.

This situation was recognized by States and other actors at the 31st International Conference of the Red Cross and Red Crescent in late 2011. The Conference invited Switzerland and the ICRC to identify ways and means to “enhance and ensure the effectiveness of mechanisms of compliance with IHL”. As a result, Switzerland and the ICRC launched a joint initiative to facilitate the implementation of this mandate. I am confident that many aspects of this initiative will be discussed during this Round Table.

We are now embarking on three days of what I am sure will prove to be a very substantial and comprehensive discussion. I look forward to contributing to these discussions and more importantly to listening to your views and comments.

**I. IAC-NIAC, what are we talking about?
Categorizing armed conflicts under IHL**

Typology and categorization of armed conflicts under IHL

Karl Edlinger

Legal Adviser, Austrian Armed Forces; Member, IIHL

The classification of armed conflicts has always been the most challenging and complex topic for lawyers and legal advisers. Previous Round Tables organized by the Institute have also dealt with these issues, either directly or indirectly.

The recent developments on battlefields all over the world, the engagement of armed forces in multinational operations and especially against globally acting non-state actors have made these questions even more challenging.

I was asked to speak about the typology and categorization of armed conflicts under IHL and by doing so lay the basis for the following presentations and discussions of the Round Table.

Consequently, I will try not to talk about issues to be covered later by other speakers such as the temporal and geographical scope of application and about the challenges of categorization arising from new forms of violence. I will mention the consequences of the classification of armed conflicts very generally. I would like to describe the development of the categorization of armed conflicts in a historical context and give an overview of how International Law is categorizing situations of violence today.

Introduction and historical background

Wars have always been governed by the law: they most often started with a declaration of war, the conduct of hostilities was determined by specific rules and customs and the war ended with an agreement on the subsequent relationship between the parties to the conflict.

However, it should not be ignored that belligerents always distinguished between different types of war. This distinction had an impact on the applicable rules in the conflict and especially on the legal status of persons involved in the conflict.

For example, many of the rules of ancient Greek practice of war (such as the interruption of hostilities during the Olympic Games or the release of prisoners for ransom) applied only in wars between Greek city-states and were not applicable in wars with non-Greek states.

Christianity also distinguished between external and internal wars. External wars were conflicts where Christians fought against infidels, whereas internal wars have been fights between Christians themselves. One idea behind the classification was to ensure that heretics and heathens do not benefit from the same treatment, which Christians are entitled to.

Islamic scholars also distinguish between wars against unbelievers on the one hand and fellow Muslims on the other hand. And even wars against Muslims were in turn divided into wars against apostates (ahl al ridda), and wars against rebels (ahl al baghi) and furthermore wars against those who had renounced the authority of the spiritual leader (al muharabin). Each type of war was supposed to be waged by different methods and carried a different set of obligations towards the enemy.

For a long time religious ideas mainly influenced the classification of wars and the rules applicable in the respective types. After the Peace of Westphalia 1648 the influence of religious ideas declined and the newly incepted sovereign nation-states determined largely the relation between entities, including the conflicts between them.

The most famous writers after Westphalia, such as Samuel von Pufendorf, Hugo Grotius and Emmerich de Vattel made a distinction between wars fought between nations and those fought against private citizens. Only States as sovereign powers were proper enemies and if a conflict between these powers was accompanied with certain formalities, such as a declaration of war, it was a real war. Only real wars were regulated by International Law, simply because of the fact that International Law as a whole was only concerned with relations between States.

Conflicts between armed groups or civil wars were not considered to be real wars in the strict sense of the term in International Law. However, there have been internal armed conflicts, which have been treated like international armed conflicts. The *de facto* ability of insurgents to wage war made it necessary for States to define their relation to these armed groups. According to Oppenheim insurgents may be recognized as a belligerent power if the following criteria are met:

1. The insurgents have taken possession of part of the territory of the legitimate government;
2. The insurgents have established a government of their own; and
3. The insurgents fight in accordance with the law.

In the American Civil War (1861-1865), an armed conflict that was fundamentally non-international in nature, the army of the Confederate States was implied and recognized as belligerents. As a consequence of the recognition of belligerency both parties were bound to respect the laws of war and captured soldiers were entitled to POW status.

However, it is important to emphasize that International Law still only governed wars between States and just made applicable this body of law also to civil wars under specific circumstances.

Geneva Conventions (1949)

The situation changed decisively after the Second World War. The adoption of the 1949 Geneva Conventions brought two fundamental changes.

Firstly, the term “war” was replaced by the term “armed conflict”, which was – according to the Commentary – “deliberate”. The formal declaration of war was not considered constitutional any more. By introducing the concept of armed conflict the applicability of International Humanitarian Law should be unrelated to the will of the governments. IHL applies to any armed conflict which may arise on the ground, “even if one of the Parties denies the existence of the state of war”.

However, the documents do not contain a definition of the expression “armed conflict”. Pictet in his Commentary explains that “any difference arising between States and leading to the intervention of members of the armed forces is an armed conflict”. Additionally, the Commentary states that “it makes no difference how long the conflict lasts and how much slaughter takes place”. Consequently, at least in 1949, the intensity of the hostilities between High Contracting Parties was not a requirement for the existence of an armed conflict.

The second development of International Humanitarian Law after the Second World War was the extension of this body of law to internal armed conflicts. However, the idea of the ICRC, recommended in a report in 1948, to extend the Conventions in their entirety to internal armed conflicts was rejected by most States.

But it was agreed instead to incorporate a single provision into the four Geneva Conventions, which would be applicable “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”. This Article 3, common to the four Geneva Conventions did not create a new type of conflict as international and non-international armed conflicts already existed long before 1949 but for the first time, International Law codified minimal guarantees to be respected during non-international armed conflicts.

Unfortunately, Article 3 does not specify precisely its scope of application. The International Criminal Tribunal for the former Yugoslavia (ICTY) in its Tadić decision established that “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State” is to be considered an armed conflict. Consequently the existence of an armed conflict not of an international

character requires – contrary to international armed conflicts – fighting of a certain degree of intensity.

There is wide consensus that the threshold of violence that is required for the application of IHL in non-international armed conflicts is higher than in international armed conflicts. However, the meaning of “protracted” and the question whether this term relates to the duration or intensity of the fighting is not so clear-cut. This topic, which is important for the planning and conduct of military operations, will be covered by Session III, dealing with the beginning and end of armed conflicts for the purpose of the application of IHL.

Additional Protocols to Geneva Conventions (1977)

From 1974 to 1977 the Swiss Federal Council convened a Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. This conference drew up two Additional Protocols to the Geneva Conventions of 1949, which had great influence on the scope of applicability of International Humanitarian Law.

Additional Protocol I applies to all situations of declared war and to armed conflicts between High Contracting Parties. Furthermore the Protocol determines that it shall also apply in “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”.

This provision expanded the field of application of the law of international armed conflicts. Consequently, armed conflicts, which are *de facto*, non-international armed conflicts taking place in the territory of one Party to the Protocol, are under specific circumstances, to be treated like international armed conflicts.

What the ICRC did not achieve in 1949, namely to extend the body of law applicable in international armed conflicts in its entirety to non-international armed conflicts, was now accepted with regard to national liberation movements. The most significant consequence of extending the body of law applicable to international armed conflicts to wars of national liberation is that liberation fighters gain combatant status and, therefore, cannot be prosecuted for mere participation in hostilities.

However, as many States faced with struggles against liberation movements have not ratified Additional Protocol I the protection offered by

the instrument is rendered useless for many liberation movements. In the end this provision, establishing the so-called National Liberation Conflicts, has never been applied in any of these situations.

Additional Protocol II from 1977, which supplements and further develops Common Article 3 of the Geneva Conventions, also amended the scope of application by introducing a new threshold for non-international armed conflicts. Whereas Common Article 3 applies in all situations of armed conflicts not of an international character, Additional Protocol II only applies to armed conflicts between regular armed forces and “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.

Parties to Additional Protocol II accepted restrictions to be respected in non-international armed conflicts but at the same time limited the application of these rules by implementing criteria, which are quite challenging to achieve for organized armed groups. The effect of the different thresholds for the application of IHL is that there are different types of non-international armed conflicts with different responsibilities for the Parties. And again, the borderlines between the types of armed conflicts are not clear-cut. In many cases, the actual type of conflict can only be determined in retrospect of the military operation, whereas commanders have to know the applicable rules already when planning the operation.

Legal framework of the different types of armed conflict

I would like to delineate in a nutshell, the consequences of the categorization of armed conflicts. Already the assessment that an armed conflict exists authorizes armed forces to target military objectives including enemy combatants and persons directly participating in hostilities. In an armed conflict, persons imposing a threat may be detained and attacks only have to be cancelled or suspended if it “may be expected to cause incidental loss of civilian life [...], which would be excessive in relation to the concrete and direct military advantage anticipated”.

Due to customary International Humanitarian Law many provisions applicable in international armed conflicts are also applicable in non-international armed conflicts. What is still different is the legal status of the fighters: Combatant status and consequently POW status do not exist in non-international armed conflicts.

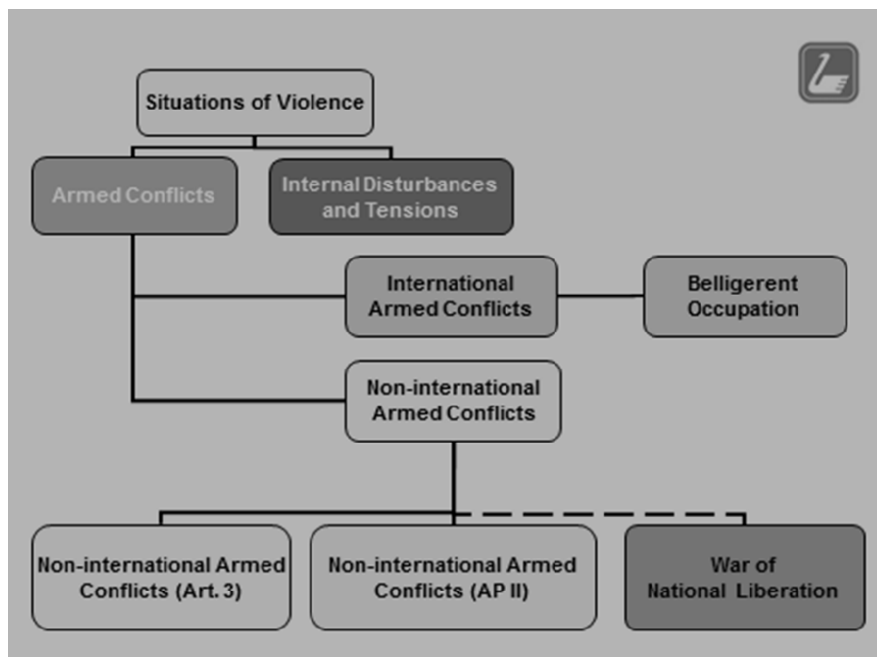
To what extent the legal status of the fighters and other remaining distinctions matter for armed forces will be covered by the next speaker, Brigadier General Gross.

Conclusions

In the end, International Humanitarian Law is only applicable in armed conflicts. Situations, which do not amount to an armed conflict, such as “situations of internal disturbances and tensions, [...] riots, isolated and sporadic acts of violence and other acts of a similar nature”, are not considered to be armed conflicts and are, therefore, governed by domestic law.

International Humanitarian Law does not establish a unitary concept of armed conflict but recognizes two types of armed conflicts: international and non-international armed conflicts. With respect to non-international armed conflicts, we must distinguish between those conflicts covered by Common Article 3, and non-international armed conflicts covered by Additional Protocol II. Furthermore, *de facto* non-international armed conflicts, where peoples are “fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”, also called National Liberation Conflicts, are ruled by Additional Protocol I like international armed conflicts.

Finally, if an international armed conflict results in a situation of occupation and the invading armed forces are exercising effective control over the territory of another State, the law of belligerent occupation is applicable.



The concept of different types of armed conflict established by International Humanitarian Law does not seem complex at all. But the challenges occur as a result of blurring borderlines between the respective types. This uncertainty derives from the following questions: when does the application of IHL start? When does it end? And finally what happens if different types of conflict occur at the same time in the same area?

When dealing with these contemporary challenges it is necessary and helpful to recollect this overview as a basis for further reflection and elaboration.

Does the categorization of armed conflicts really matter for armed forces?¹

Richard Gross

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Does the categorization of conflicts really matter to the armed forces? There are two challenges that I have seen in my career that I hope some speakers will address. The first challenge is: do we even agree we are in an armed conflict in the first place? For example, in Afghanistan, with over 45 nations involved, not everyone agreed it was an armed conflict. There were different categorizations of what we were doing: we were doing nation-building or law enforcement or a police action or “rule of law” (whatever that means). Not every nation agreed we were in a non-international armed conflict in Afghanistan. Therefore, the first challenge often is how do the governments, our armed forces, and our legislatures view a particular armed conflict? Do they even admit that it is an armed conflict in the first place? That is a challenge for us as practitioners and scholars.

The second challenge, at least that I’ve seen in my career, is what do our clients call armed conflict? It may just be a U.S. thing, but I’ve never heard a commander use the phrase “NIAC” or “non-international armed conflict” unless it was in a form of a question back to me, as in “what’s a NIAC, Judge?” Our clients call them “civil wars”, “counterinsurgency”, or “insurrections”; occasionally someone refers to a “transnational armed conflict” or a “transnational non-international armed conflict”, “guerilla warfare”, “unconventional warfare”, “internal armed conflict”, “counter-terrorism”, or “low intensity conflict”. I think you get my point. The commanders, the politicians, and the leaders of our governments do not necessarily use the terms that we use. Frankly, I do not think that they necessarily see things in the same binary fashion that we as legal practitioners and scholars see them. I do not think that they divide warfare into international versus everything else. I think they tend to see it across a spectrum, and that creates challenges for us as legal advisors as we seek to explain armed conflict in the terms of non-international armed conflict and international armed conflict.

Does it really matter to the armed forces that we categorize armed conflict? My answer is “yes” and “no” and “maybe” and I’ll explain all three.

¹ The views expressed are solely those of the author. These are not the official positions or policy of the US Department of Defense, the Joint Chiefs of Staff, or the US Army.

Let us start with “yes”. Yes it matters, it absolutely matters, it matters to policy makers, it matters to strategists and strategic level leaders; it matters to operational planners; and it matters certainly to the legal advisors of armed forces. It is an important question. It is important to determine what sort of armed conflict we are in so that we may advise our clients and so that our clients may make decisions. Let me give you a few examples that I have seen in my career where it might matter significantly whether you are in a NIAC or an IAC. One example is targeting criteria, rules of engagement, and the targeting processes we use – while certainly the underlying principles of IHL apply, the processes may be different, the rules of engagement may be different. I would argue, for example, that if you are fighting a uniformed armed force of a Nation-State, in an IAC, it is probably easier to determine who the enemy is than if you were in a NIAC, for example, in Afghanistan, where the enemy armed group looks exactly like the civilians in the village, and there is no way to distinguish them until they pull a weapon and begin firing at our soldiers. That creates challenges in our processes, challenges in our rules of engagement, and challenges in our targeting criteria. And thus it is up to the legal advisors to work with the operational planners to come up with targeting processes that make sense in each particular type of armed conflict.

The other area where it makes a difference, at this level, is in detention. Arguably, in an international armed conflict, it is a more resource-intensive endeavor to conduct detention operations, given all of the treaty obligations, in particular the Third Geneva Convention, that dictate how we must treat prisoners of war. I have not personally had the chance to see whether it is more resource-intensive, because during the brief periods of international armed conflict that we had in the 2002 and 2003, there were not large numbers of uniformed enemy combatants detained. But I suspect it would be quite resource-intensive.

I suspect in a future IAC, our military planners, who are used to NIACs, are going to underestimate what resources are required to conduct detention operations. I also think our clients will use their categorization of the conflict – whether a counterinsurgency, an internal armed conflict, or counter-terrorism – to determine the planning for detention. One could argue that the facts on the ground, the actual nature of the conflict itself, really determines these questions, not how the lawyers categorize the armed conflict in the beginning, and I think that is a valid argument.

The other issue where the IAC/NIAC distinction will very much matter is the application of domestic law to enemy groups in a NIAC, and we are going to hear speakers talk about that this week. How does a Nation apply its domestic law and sovereign power, as well as its “war power”, against a non-state armed group? A Nation may use military force or its domestic law, and that is going to make a difference.

Finally, I believe the extent to which international human rights law will apply matters in the categorization and distinction between non-international and international armed conflict.

That is my “yes”. Let us get to my “no”. Why would it not matter? Why would a senior legal advisor in the U.S. say it does not matter? Well, when I say “no, it does not matter”, what I really mean is that it should not matter to the individual soldier, to the tactical commander. I want them to do their utmost to uphold the absolute highest standards they can. I do not want a soldier in a split-second decision to have to decide whether he is following NIAC rules or IAC rules. I do not want him to have two sets of rules of engagement when he goes into combat. I do not want him to have to figure out “which type of conflict am I in right now?” and decide how he can use force, or whom he can detain, or how he treats a detainee and so forth. What I want is the soldier and the commander to uphold the highest, absolute highest standards, and I believe that is possible. There are common baseline rules of IHL, such as Common Article 3 that we can train our soldiers and commanders on and insist that they constantly apply them. There are fundamental principles of international humanitarian law that apply to both, and we want our soldiers and our commanders trained and ready on those: humanity, distinction, proportionality, etc. We do not want the soldier to have to decide in the fog of war which set he is following; we want it to be simple and consistent. And we do that first of all, for example, in the United States, as in many of your countries, by applying IHL to all types of conflict by policy. We have made it a policy in the US Department of Defense that they follow all the rules of IHL to the extent practicable in all situations. We train that. We do not train a soldier to decide whether he is in a NIAC or IAC, we train them how to treat detainees, humanely and fairly, and we train them how to use force in accordance with the rules of engagement, in accordance with the principles of IHL. We use vignette training in order to put them in situations where they are tested on that. It’s not just a rule card that they read going out the door, but it is consistent, constant training on what their IHL obligations are. I think in 99% of cases, a soldier, a tactical commander, is going to get it right in all situations if they understand the basic rules and the basic principles. So, that is my “no” answer – why I think it should not matter. Soldiers should follow the rules in all cases.

So, what is my “maybe”? I think maybe it matters because there is so much work being done on this right now. I mean, if you think about the tremendous efforts being undertaken by some very intelligent, well-meaning people in this room who are doing so much work to help us in the armed forces. I personally appreciate their efforts. For example, the ICRC has done a number of projects, some mentioned already, intended to help us clarify the rules. Certainly these projects aren’t without controversy, and I

suspect many of the speakers this week are going to raise some of those controversies and challenge some of the ICRC's underlying assumptions. But it is good that the work is being done; it is good that we are all thinking and talking about it. Examples include the Interpretive Guidance on the Direct Participation in Hostilities and the Customary International Humanitarian Law study, both published by ICRC; the Department of Defense Law of War Manual that has just been published, as well as the law of war manuals many of your countries have recently published or are getting ready to publish. Another ongoing effort, which Ms Beerli mentioned in her introduction, is the project on strengthening IHL protections for persons deprived of their liberty (the NIAC detention study). You are going to hear Professor Sara Cleveland talk about a project she is working on with Sir Daniel Bethlehem to harmonize the standards for armed conflict. She has been advised by a number of people in the armed forces, including myself (so that is a disclaimer as well); this is yet another effort to help clarify these rules for soldiers.

I think, ultimately, this Round Table is going to be very helpful to all of us. It is going to clarify the issues to a degree, but not answer everything. It is just going to move us a little bit further along this journey to try and figure out the differences between NIAC and IAC and what we need to do in the future.

II. Current forms of armed conflicts: a challenge to categorization?

Transnational non-international armed conflicts¹

Noam Lubell

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All that the word transnational actually means is something that occurs across borders, which could include any straightforward international armed conflict between states. So for the sake of clarity, I should point out that I will be speaking about extraterritorial conflicts against armed groups.

This can take a number of forms, including:

- Assisting a state with consent in an internal conflict – this, I would submit – is not overly complicated in terms of classification and in most cases is a clear non-international armed conflict (NIAC).
- Internal conflict in which the armed group occasionally crosses into a neighbouring country, with ensuing cross border operations – this is sometimes called a spillover conflict.
- Conflict with an armed group based primarily in a neighbouring country.
- Conflict with an armed group based in a non-neighbouring state.
- Conflict with multiple armed groups – which may or not be part of the same group/network – spanning across a number of states.

These situations raise a host of questions, such as:

- What is the relevance of crossing borders?
- Is there any connection between the rules of the *ius ad bellum* and the classification of the armed conflict?
- How do we classify extraterritorial armed conflicts against armed groups?
- Is there a conflict between the two states?
- What is the relevance of geographical distance?
- Does international human rights law apply?

Before continuing any further, I wish to point out that I am starting from an assumption that the threshold of intensity and organisation has been crossed. If that is not the case, then it simply is not an armed conflict at all. In these circumstances, we would need to look to the law enforcement

¹ This a copy of the speaking notes only. A more detailed version, fully referenced and covering these and further issues in greater depth, is scheduled to appear in a forthcoming article.

framework as found in international human rights law in order to see which rules govern the operation.

Let's start with the relevance of crossing the border. It certainly is critical insofar as the situation between the two states. However, as far as classification of the situation with a non-state actor is concerned, the crossing of borders is a red herring. This is where a lot of the debate gets confused, and it is vital to disentangle the knot. There are two separate relationships going on here between the outside state and the armed group, and a different situation between the two states. Whilst the action of the outside state is the same one, its legal effect must be viewed separately for each of these two relationships.

The underlying premise at the heart of the classification test is that it is the nature of the parties to the conflict that is the primary determinant. If the opposing sides to the conflict are states, then it is an international armed conflict (IAC); but if on one or both sides the party is a non-state actor, then it is a NIAC.

As to the classification of the situation between the outside state and the armed group, an armed conflict between the state and the armed group should therefore be a NIAC, even if it is extraterritorial. The crossing of the border matters greatly to the *ius ad bellum* between the two states, but it is largely irrelevant to the conflict between the state and an armed group.

Imagine a simple spillover conflict occurring in a desert area where there isn't even any fence for the border. There is no sense in trying to figure out every time the armed group steps this side or that side of the virtual line and constantly shifting the conflict between being international and non-international. This is always the same conflict, a non-international armed conflict between the state and an armed group.

And if the border didn't affect the classification here, there is no reason for it to do so even if the armed group is primarily based in the other state, moving this way across the border. It would still be a conflict between a state and an armed group and hence non-international.

What of the situation between the two states? There are obvious debatable matters of the *ius ad bellum* with regard to the exercise of self defence against armed groups in the territory of other states, but that is not the topic of discussion here. Let's assume, for the sake of these proceedings, that the outside state has claimed the right to self-defence and is using force against an armed group in the territory of another state without the territorial state's consent.

Let's also assume that we have recognised that there is a NIAC between the outside state and the armed group. In addition to the concerns of the *ius ad bellum*, there is now a question in the sphere of the relationship between the two states, as to whether the use of force by one on the territory of

another without its consent, means that automatically we have an international armed conflict between the two states.

Certainly, some would argue that even the most minimal forcible operation on the territory of another state triggers the existence of an armed conflict between the two, and that this is expressly provided for in Article 2 of the Geneva Conventions.

To my mind this is not completely straightforward when the force being used is directed both in intention and its effects only against the non-state actor, and is therefore not between the two states. To help clarify this let's look at the two extremes and something in the middle. At the lower end of the scale we can use an example of a minimal use of force against an armed group that does not affect the state at all for example an operation to kill an individual member of the armed group using one covert operative who poisons the target's dinner. At the other end of the scale, we can imagine situations such as Israel's operations against Hezbollah in 2006 which included heavy bombardment in a wide area of the country, and in the final days significant presence in some of the territory.

In the latter type of case, while I think it is still correct to speak of a NIAC between a state and an armed group, this type of force – and certainly if it includes occupation of territory – will mean that there is also an IAC between the two states. There will therefore be two conflicts simultaneously, IAC and a NIAC.

Let's turn to the example of the single killing. It is irrelevant as to whether the killing is occurring as part of a pre-existing NIAC between the state and the armed group in which the individual is a member; the point is that if one argues that any use of force without consent in the territory of another state triggers an armed conflict, they would need to accept that this type of operation does so as well. Personally, I'm not convinced that this should be considered an international armed conflict between the two states.

If it's not, we're left with the question of those cases in the middle. Imagine here something similar to the operation by Colombia in Ecuador; or any operation which is limited to a single act against what is clearly a militant camp of the armed group in a remote area of the other state. The question then is – at what stage does such an operation become one which clearly triggers an international armed conflict in addition to the non-international one?

I would submit that this would include situations in which the targets – intended or unintended – are anything beyond the armed group itself, or if territory becomes occupied. I realise that there is more nuanced work to be done here but in this presentation I am just seeking to point out the general direction of this approach.

We should also recognise that as complicated as this may all sound, the situation described so far has been relatively simple: we've been talking about a situation in which State A is engaged in an armed conflict with group X on the territory of State B. Recent years have demonstrated that this is a rather simplistic notion and the reality is that this idea has shattered into a vision of fragmented multi-territorial military operations.

Let us then add a new element to this debate: in addition to its operations against group X in State B, State A also engages in military operations against group Y in State C. The question now is whether the two conflicts are linked. One possibility is that they are part of the same NIAC, now spanning more than one territory and another is that they are two separate extraterritorial NIACs (or that one of them is not an armed conflict at all).

On this matter the link between X and Y (the two groups) will have significant bearing. If it's clear that X and Y are one and the same, operating within a single command and control structure equally active in the carrying out of the group's military operations against State A, then military action occurring between State A and Y in State C could effectively be part of the pre-existing NIAC. This is separate to questions that will arise in relation to the legality of A using force in C under the *ius ad bellum*.

Matters become even more complicated if X and Y don't operate within the same command and control structure; in these cases there can be no automatic conclusion that the operations against them would be part of the same conflict. It then becomes necessary to determine the precise nature of the connection between X and Y and whether there is a particular type of link that would entail a conclusion that they are party to the same conflict.

Recent writings and government positions have referred to notions such as 'associated forces' and 'co-belligerents' when discussing such situations, but neither of these concepts provides an obvious ready-made solution. 'Co-belligerents' sounds at first as a clear concept, as it appears to take the starting point of being party to the same conflict, but it is unclear as to what the criteria are to determine this. Moreover, this is a concept developed for states and cannot easily be transposed to non-state actors because of fundamental differences between IAC and NIAC; for example in IAC there is a lower threshold for commencement of conflict, but NIAC has a higher threshold and it would not be enough for one party just to declare common interest.

Accordingly, what would be the criteria for determining the connection between the groups? As noted, being under the same command and control would be an obvious marker. Another situation might be if one group is in control of another, but at this time we do not have an established test in international law for determining control between armed groups to the

same degree as we do for control by states (which itself is still the subject of debate). Finally, the level of coordination and participation in each other's operations might also be a partial indicator. All this requires further development, and as of now, I would submit that in many cases in which there has been talk of associated forces, it might be more correct that these be viewed as separate armed conflicts – if they are armed conflicts at all.

Another point I wish to make, is that it is very hard to discuss these multi-territorial and multi-group conflicts without veering into questions of geographical scope and the concerns over a global battlefield. This is being dealt with in another panel, so I won't delve into details here, but I'd just like to make a few quick observations in the context of my focus on transnational conflicts.

In the situation currently being examined, the question is whether, even if we assume that the two groups X in State B and Y in State C are akin to co-belligerents, the geographical dislocation between them affects the applicability of IHL to the operations State A is taking against Y in State C.

If State A and Y in State C are engaged in two-way high-intensity hostilities, for example, heavy weapons and missile fire from both sides, there should be fewer objections to viewing this as simply one more location in which the pre-existing NIAC is occurring (or a new NIAC, depending on the above assessment).

Where matters become more debatable is in situations in which there is a relatively limited use of force against a small group or even an individual; it is then often claimed that such operations are extending the conflict zone beyond the acceptable.

Geography alone cannot be the primary criterion for applicability of IHL. Crossing borders is a matter for the *ius ad bellum*, not the key for applicability of IHL. As I mentioned earlier, if an armed group operates from a desert area in which it's not even clear precisely when the border has been crossed, this won't change the nature of IHL applicability.

Similarly, it cannot be purely a question of distance from the more central fighting zone. It is quite possible that a small group of commanders is camped far from the central battlefield but remains part of the conflict, just as the generals conducting the war fall within the rules of IHL even if their military base is across the ocean. Whether or not individuals are legitimate targets of attack under the rules of IHL will depend primarily on their individual status and activities in which they are engaged.

There exists no clear legal delineation of the battlefield, and there's significant inconsistency in the writings and case law on the matter. The crucial issue for the purposes of governing military operations and use of force should not be artificial attempts to draw a neat line around a particular area, but rather to determine when and where specific rules of IHL might apply. Indeed it's impossible to have one predetermined area for all IHL

rules, since some of them are context dependent and apply only to particular situations regardless of territory – for example, rules relating to the handling of detainees and prisoners during an armed conflict, whether it be in the territory of parties or even in neutral territory.

IHL was not designed and does not attempt to determine the boundaries of conflict. It is quite the opposite; IHL is designed to apply to actions taken as part of an armed conflict, wherever they may occur.

In conclusion, I should point out that I have focused solely on classification of transnational conflicts and applicability of the *ius in bello*. Many of these matters will be additionally and sometimes more appropriately dealt with through the *ius ad bellum* as well as the interplay with human rights law (for example, I believe that the further away you get from the main area of the fighting and particularly in the context of non-international armed conflict, the greater the role that human rights law needs to play in the interplay between IHL and human rights). I'm sure the next panels will provide further elaboration on some of these issues.

Co-existing international and non-international armed conflicts in one country

Sylvain Vité

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Introduction

Whether and to what extent the co-existence of an international armed conflict and a non-international armed conflict in one country is indeed a challenge to categorization, and thus to the identification of the relevant legal framework? This scenario has been categorized sometimes as ‘mixed armed conflicts’, or ‘parallel armed conflicts’.

This question is not only about how the co-existence of armed conflicts as such should be classified in legal terms, but it also raises a number of issues related to the identification of these situations. The involvement of various armed forces and groups in a given conflict does not necessarily mean that different armed conflicts co-exist. In order to come to this conclusion, it is necessary first to address a number of questions that are challenging both for legal and practical reasons.

Therefore, I would like to start this presentation by highlighting some problems that are related to the identification of co-existing armed conflicts. Then we will see to what extent the legal classification as such of these situations may be problematic.

A. Co-existing international and non-international armed conflicts in one country: Identification

The classical example of co-existing armed conflicts includes situations where the armed forces of a foreign State or a coalition intervene in an existing non-international armed conflict on the side of a rebel armed group. In this case, it is not disputed that there is an international armed conflict, since the foreign State or coalition uses force against another State. This intervention, however, does not necessarily modify the nature of the existing conflict between the territorial State and the rebels. This conflict remains non-international, in so far as the non-state armed group does not act on behalf of the intervening State. There is thus in this case co-existence of an international armed conflict and a non-international armed conflict in the same territory.

If, on the contrary, it may be established that the armed group does actually act on behalf of the foreign State, the whole situation becomes an

international armed conflict. In this case, the group is a *de facto* organ of the foreign State. There is no separate non-international armed conflict.

This example illustrates a first challenge, as it shows that the identification of a mixed armed conflict may depend on how we assess the relationship between the intervening State and the armed group participating in the conflict. As you know, there is much debate today about the criteria or legal test that should be used to determine the degree of control necessary to conclude that an armed group is indeed acting on behalf of a State, and that a non-international armed conflict has been absorbed in the international armed conflict created by foreign intervention. International practice tends to show in this regard that 'overall control' over the group by the State is necessary and sufficient to internationalize the conflict and, therefore, to conclude that there is no co-existence of an international armed conflict and a non-international armed conflict.

Another related challenge is that, regardless of discussions about the legal test to be used in this scenario, practical difficulties may impede proper application of this test. The assessment of the exact nature of the relationship between a State and an armed group may change over time, depending on evolving circumstances on the ground, and supposes access to information that is not always available.

Another interesting and related scenario includes situations where the rebel armed group eventually manages to take control of the country with the support of intervening foreign armed forces, and creates a new government. How should we classify continuing fighting between forces of the ousted government, on the one hand, and forces of the new authorities and of the intervening State, on the other hand? Are we still in a situation of co-existing armed conflicts? Or should we consider that the situation has become purely non-international, as it may be argued that the forces of the foreign State are now fighting against forces which do not represent the territorial State anymore?

The challenge here is that answering this question depends on how we assess the shift of power between the ousted government and the new authorities. This requires using legal concepts and rules that are not specific to international humanitarian law, but are based on general international law. These concepts and rules are those helping to determine at which point the new authorities may be considered as representing the government of the State and, therefore, at which point the former authorities have lost this status.

In relation to this question, it has been discussed whether international recognition of the new government is a relevant factor, which is an additional source of uncertainty in the categorization of these situations. It is usually accepted in this regard that recognition as such is not sufficient. The classification of armed conflicts is a question of facts and does not

depend on formal assessments of these facts by the international community.

Another challenging scenario includes situations of military occupation involving on-going hostilities between the armed forces of the Occupying Power and local non-state armed groups. Are there co-existing armed conflicts in this case, meaning co-existence of military occupation and non-international armed conflict?

This question is still debated today, but it is generally believed that the answer depends on the status of the armed group involved. If the group fighting against the Occupying Power is affiliated with the occupied State, it is usually admitted that hostilities are governed by the law of international armed conflict. If this group is not affiliated with the occupied State, it is not clear how the situation should be classified.

The International Court of Justice, in the *Armed Activities case*,¹ seems to suggest that the situation as a whole should be considered as an international armed conflict. The Court decided to apply in this case Additional Protocol I together with the law of occupation, although the Occupying Power was fighting against non-state armed groups. This decision, however, was criticized by experts who consider that occupation does not internationalize the whole situation existing in the concerned territory. They argue instead that fighting in such a situation should be governed by the law of non-international armed conflict, if the required threshold of application has been reached. In this case, military occupation would co-exist with a non-international armed conflict.

B. Co-existing international and non-international armed conflicts in one country: Classification

In terms of legal classification, the coexistence of international and non-international armed conflicts has also raised doctrinal debate. As this situation combines characteristics of both types of conflicts, it does not clearly belong to one of the categories recognized in international humanitarian law.

Some observers have suggested that the law of international armed conflict should apply each time that a non-international armed conflict is characterized by foreign military intervention. This approach was proposed, for instance, by the ICRC to government experts during the preparatory work for the drafting of the Additional Protocols of 1977. The proposal, however, was not accepted. It was argued that applying the law of

¹ International Court of Justice, *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005.

international armed conflict in these situations would make the conflict worse, since non-state armed groups would try to attract third States in order to benefit from application of this legal framework.

What seems to be the most common view today is that the classification of mixed conflicts should be fragmented, meaning that these conflicts should be split up into separate armed confrontations, each one of them amounting either to an international armed conflict or to a non-international armed conflict. Under this interpretation, mixed conflicts are not considered as a different additional category of armed conflict, but rather as an aggregate of existing categories.

This fragmented application of international humanitarian law was favoured by the International Court of Justice in the Nicaragua Case². In its analysis of the situation, the Court differentiated between, on the one hand, the conflict between the Government of Nicaragua and the opposition armed group, and, on the other, the conflict between that same Government and the Government of the United States.

The International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Court (ICC), more recently have also accepted this approach.

However, the theory of fragmentation may involve a number of practical difficulties, when it comes to applying different legal frameworks to distinct, but connected, armed conflicts occurring simultaneously in the same territory.

This is especially important in relation to detention, as applicable rules and standards may differ in the same context depending solely on who happened to capture a particular person. The third and fourth Geneva Conventions apply only if the person is detained by State forces in relation to an international armed conflict. If the person is detained in relation to a non-international armed conflict, applicable standards are less clear.

But I do not want to anticipate issues that will be addressed in other sessions of the Round Table. I will now end my presentation and I look forward to further discussions with all of you.

² International Court of Justice, *Military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment, ICJ Reports 1986.

Multinational operations: peace support operations and other operations

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Does the involvement of multinational operation forces in armed conflict challenge the categorization of such conflicts?

To answer this question one needs to identify in what way a multinational force differs from other military forces. There are mainly two aspects to consider: the multinational nature of such operations which may include a great number of states, as well as international organisations, and the argument goes that this would bring such a strong international element to the armed conflict that it would be regarded as an international armed conflict irrespective of the nature of the opponent. The other characteristic is that the authority to use force may stem from a decision of the United Nations Security Council (UNSC). In that respect such multinational forces may be regarded as representatives of the international community while multinational forces without a UN mandate will not – and may, depending on their actions, in fact be regarded as acting in contravention of international law. However, and this is a main point I would like to make, that, irrespective of whether the operation is based on a mandate of the UNSC and becomes involved in armed conflict, or is without a UN mandate and in contravention of *jus ad bellum*, the laws of war applies equally to all parties to the armed conflict. This is in fact one of the great strengths of IHL.

The perceived challenge of the involvement of multinational operations in armed conflict to the categorizations of such conflicts is thus primarily based on the multinational nature of such operations and the mandate of the UNSC. I will, therefore, focus primarily on multinational operations acting on a UNSC mandate in order to encompass both perspectives.

It is true that multinational peace operations are only exceptionally involved in armed conflict and that is rather the law enforcement mode that is the default position for such operations. However, there are exceptions; situations where the host state or rather the target state does not consent to the operation, such as the Libya operation and there is an armed conflict already from the outset of the intervention of the multinational operation on the territory of that state; and situations where multinational forces are deployed with the consent of the host nation but are drawn into armed conflict with primarily non-state actors.

In this respect it should also be noted that the classical divide between peacekeeping and peace enforcement operations has become blurred. The UN term of robust peacekeeping denotes operations with enforcement powers under Chapter VII of the UN Charter where the operation is at the same time based on the consent of the host state. This differs from so-called enforcement operations, which lack consent of the host nation. From a legal point of view the relevance of these terms may be questioned as they lack a precise legal meaning. From an IHL point of view what matters are facts on the ground and the nature of the mandate is of less importance. Peace operations in which the military personnel are being authorized to use force only in self-defense may point to the fact that it was not the intention of the UNSC that the operation would become involved in armed conflict. However, if such a force *de facto* is drawn into an armed conflict, the mandate itself could hardly prevent such an involvement. The same holds true also in the opposite situation. The so-called Intervention Brigade in the MONUSCO operation was given a mandate by the UNSC that, by many commentators, was interpreted as authorizing involvement in armed conflict but the existence of such a conflict would be based on the actual conduct of the forces. The Intervention Brigade would need to become involved in actual fighting with organized armed groups to be considered participating in an armed conflict.

It is thus seldom, if ever, possible to construe the mandate as explicitly instructing the forces to become involved in armed conflict and even less so that the mandate itself would involve the forces in an armed conflict. What matters are instead facts on the ground – has the multinational forces become involved in armed conflict with an organized armed group or could we still regard it as a peace operation conducted in a law enforcement mode?

Within a multinational operation there may be different views on whether the military forces have become involved in armed conflict or not. That may certainly create tensions within the multinational operation as such and create problematic situations linked to co-operation. It will not, however, have an impact on the legal situation, since the existence of an armed conflict is based on an objective assessment of the realities on the ground. There is thus nothing in law that suggests that a different threshold applies to multinational forces acting on a UN mandate. The existence of an armed conflict and the involvement of multinational forces in an already existing armed conflict – are based on the same criteria as for other military forces.

The categorization of armed conflict is based on the nature of the parties to the conflict. So, who are the parties to an armed conflict involving multinational peace operation forces? To be a party to an armed conflict brings with it a lot of responsibility under IHL but despite its importance

there does not seem to be a clear definition of a party to an armed conflict in IHL. In multinational operations it is common for states to put their troops at the disposal of an international organisation that leads the operation and that organisation exercises operational control over the troops. The exercise of command or control over the armed forces appears to be vital to the determination of a party to the armed conflict. Article 43 of the AP I states:

“The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.”

The commentaries to article 43 (1) indirectly define a party to an IAC when stating that the armed forces must be subordinate to a party to the conflict which represents a collective entity which at least in part is a subject of international law – which seems to include also intergovernmental organisations. On the “multinational side” of the armed conflict there is thus a question as to whether the troop-contributing states or the intergovernmental organisation that commands the operations should be considered party to the armed conflict – or possibly all of them. For the purpose of categorization of armed conflict it is, however, of less importance to decide if it is the state or the international organisation that is the party to the armed conflict since both represent a state actor. Although an international organisation is not a high contracting party to the IHL instruments it would seem illogical to regard an intergovernmental organisation as a non-state actor for the purpose of categorization of armed conflict but rather view it as a state actor.

The characterization of the armed conflict when multinational forces become involved is instead dependent on the nature of the opponent – being a state or a non-state actor. I would like to stress the fact that it is not the operation as such or the military forces that become a party to the armed conflict but rather the subject of international law that controls the forces. The military force or the multinational operation as such, may become involved in armed conflict but these are not subjects of international law acting independently from a state or international organisation. In the same way as it is not the armed forces of a state that become party to an armed conflict but rather the state to which the armed forces belong.

Multinational forces may thus become involved in NIACs or IACs depending on the nature of the other parties to the conflict. This may be illustrated by two contemporary examples: ISAF in Afghanistan and the intervention in Libya.

In the Afghan context ISAF forces became involved in an armed conflict with insurgent forces. On the multinational side of the conflict

there were close to 50 states contributing troops based on a mandate from the UNSC and led by NATO – supporting Afghan government forces – thus all state or intergovernmental actors. For the purpose of categorization of the armed conflict it is not necessary to identify exactly which of these actors is considered parties to the armed conflict, as it would all lead to the same result. What matters instead is the character of the opposing party – in this case a non-state actor. Even though the multinational side does bring a strong international element to the conflict it should anyway be regarded a NIAC since it is not a conflict between states. The mandate of ISAF did not include anything on the involvement of the forces in armed conflict but only authorized the use of all necessary means to assist the government in the maintenance of a secure environment. The fact that the multinational forces became involved in armed conflict quite soon after the deployment and that the UNSC had ample time to change the mandate in accordance with the new situation during the following ten years and chose not to also says something about the relation between the authority to use force that stems from the mandate and the application of IHL – which is driven by other factors.

In the Libya context the armed conflict was of an international character since the multinational forces became involved in an armed conflict with the Libyan Government. Again, the mandate of the operation did not say anything on the involvement or existence of armed conflict for the multinational forces but only that they were authorized to use all necessary means in order to protect civilians. This also means that had the multinational forces become involved in an armed conflict with rebel forces it would simultaneously have been an NIAC between the troop-contributing states and/or the involved intergovernmental organisations on the one side and the rebel groups on the other and an IAC in relation to the Libyan Government.

There is anyway an argument that the involvement of multinational force acting on a UN mandate in a NIAC would internationalize such a conflict to an IAC. According to this argument, the forces concerned are representatives of the international community when implementing a decision by the UN Security Council and thus act on a higher moral ground than that of their opponents. Therefore, if such forces became involved in an armed conflict they should be held to the highest possible standards, which are those rules applicable to international armed conflicts. I have in this presentation argued that the mandate authorizing the use of force is part of *jus ad bellum* and would not affect the existence of armed conflict nor the categorization of such conflict and that the character of the armed conflict is instead based on the nature of the parties to it and not exclusively on the multinational character of one of the parties. However, if a multinational force based on a UN mandate in fact internationalized an

armed conflict what would be the consequences of internationalization? Would a NIAC transform into an IAC?

Although the need to distinguish between the two types of armed conflict is gradually becoming less important due to the development of customary international law there are still some important remaining differences: one is the impact of national criminal law. Since states have not been willing to endow members of organized armed groups with a combatant privilege, national criminal law continues to apply to the acts of such forces and they run the risk of being prosecuted for the mere participation in the armed conflict.

This relation is also reflected in instruments aimed at the protection of peace operation personnel. The 1994 Convention on the Safety of United Nations and Associated Personnel (Safety Convention) obligates states parties to criminalize attacks against protected personnel. There is, however, an important exception to criminalization of attacks against personnel and that is when such personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies. The Safety Convention thus continues to apply in NIACs, which may be regarded as a reflection of the relation between national criminal law and IHL in NIACs. Moreover, are host states generally under a duty to criminalize attacks against invited peace operation forces through the applicable status of forces agreement?

If the involvement of a multinational peace operation force internationalized an armed conflict it could no longer be considered a crime under national criminal law of that state to attack peace operation forces if the attack were consistent with IHL. It does not necessarily follow from this argument that the host state would need to legitimize attacks against its own forces in the armed conflict between the armed groups and the government. That would in turn create a situation where it would be a criminal act to attack government forces under national criminal law but not invited peace operation forces – for the reason that the involvement of such forces would internationalize the armed conflict and thus provide members of organized armed groups with a combatant privilege in relation to the multinational forces. There simply does not seem to be any support in law for such an argument and it would certainly have a negative effect on the willingness of states to contribute troops to future operations.

One could also argue that the involvement of multinational forces would internationalize the armed conflict as a whole, including the relation between the host state and the armed groups. It may be argued that it would run counter against the spirit of IHL to treat combatants and fighters differently depending on the military forces they were captured by. However, by determining the nature of armed conflict based on the character of the parties to the armed conflict different types of armed

conflicts in the same area can certainly exist and while this may prove difficult in practice it would not seem to be a complicated legal issue and also well within the spirit of IHL.

In conclusion, there does not seem to be any support in law that IHL should apply differently to multinational peace operation forces compared to any other military force. It may certainly be problematic in practice where different states participating in the operation have different views on when and if the IHL in fact applies to the actions of the military forces – but that is not a legal argument as such but rather a different view on the interpretation of the facts on the ground.

Even though IHL is based on equal application of its rules to all parties to the conflict the impact of national criminal law in NIACs will always tip the scale in favor of the government, as it will be a crime to attack government forces. In relation to invited multinational forces the role of national criminal law is reflected in SOFAs and the Safety Convention.

In a *lex ferenda* perspective problems related to the categorization of armed conflict are not specific to the involvement of multinational forces but rather part of the larger question of categorization. IHL applies to multinational forces with or without a mandate from the UNSC in the same way as IHL applies to any other regular armed forces.

III. Selected issues: IHL temporal and geographical scope of application

The beginning of IAC and NIAC for the purpose of the applicability of IHL

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1. Introductory remarks: the need, the relevance, the difficulties in defining the beginning of the armed conflict. Transnational NIACs

By definition, IHL is applicable to and during, situations of armed conflict. Therefore, defining the beginning of an armed conflict is necessary in order to define the moment in which IHL becomes applicable. This, in turn, is essential, as it entails the production of a whole series of legal effects. One may recall the possibility for the armed forces to use force according to wider limits than those granted in peacetime; the coming into operation of a range of protections to which individuals are entitled, e.g. if they fall into the hands of the enemy forces; the eventuality that persons may be prosecuted for war crimes. As IHL does not operate unless there is an armed conflict, war crimes cannot be committed.

A clear tendency exists towards a *rapprochement* between the rules applicable in IACs and those applicable in NIACs; however, the two sets of rules have not yet completely merged into a single set applicable during any type of armed conflict. Some important differences remain, in particular in relation to the treatment of fighters or to the law of occupation, which is only applicable in IACs. Moreover, the conditions required for the existence of an IAC continue to differ from those necessary for the subsistence of a NIAC: this would in any case render it necessary, when we refer to the temporal scope of the rules, to treat the two categories of conflict separately.

Defining the beginning of an IAC, and of a NIAC, is not an easy task, in the absence of any rules in the conventions giving such a definition. The conventions do contain some important provisions concerning their temporal scope of application or the temporal scope of application of some of their rules. In particular, for our purposes, Art. 6, GC IV, according to which “(t)he present Convention shall apply from the outset of any conflict or occupation...” confirms that IHL applies from the beginning of an armed conflict. The same may be said about Art. 3(a), AP I. However, the “outset” or “beginning” remains to be determined.

In order to answer our question we thus need to consider the material scope of application of the rules, and thus to delve into the notion of armed conflict, in particular, the notions of IAC and NIAC. Temporal and material

scope of application are thus strictly interlinked (and they are connected as well with the geographical and personal field of application). Here we find some help in the Conventions, in particular in Common Art. 2, GCs, which has in fact become the customary rule of reference in determining the material and temporal scope of the law of IAC without, however, defining what an IAC is.

By incidence, we may also find in Common Art. 2 a reference to the provisions which shall be implemented in peacetime, to which I will not address any further consideration.

As far as NIACs are concerned, a definition of the higher threshold is contained in Protocol II, while no definition of the lower threshold is provided by Common Art. 3.

Specific additional problems may arise in determining the moment in which a NIAC becomes an IAC, or is flanked by an IAC as a consequence of a phenomenon entailing its internationalisation; or the moment in which an international peacekeeping force becomes involved in an armed conflict, thus entailing it being subject to IHL.

I will not concentrate on the issue of transnational NIACs, as they have been dealt with in another session of this round table, and because either they are proper NIACs or they are IACs, being subject in both cases to the rules that we are now going to consider in relation to the beginning of the two categories of armed conflicts.

2. The relevance of Common Art. 2, Geneva Conventions. The beginning of an IAC

In order to define the beginning of an IAC for the purpose of the applicability of the law of IAC, we thus need to start from Common Art. 2, GCs, which is accepted as the customary point of reference when defining the scope of the law applicable to IACs:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

No other convention modifies the conditions enunciated in Common Art. 2, apart from the addition operated by AP I of national liberation wars (see hereunder). According to Art. 2, therefore, the law of IAC applies in 3 situations:

1. when there is a declaration of war;
2. in all cases of armed conflict between two or more States (States parties, but as this provision corresponds to international customary law, we may read ‘States’);
3. in case of occupation, in the absence of armed resistance (otherwise occupation falls under No. 2).

I will not deal any further with the situation of declared war, which does not correspond to current practice.

What is of matter today is the broad notion of international armed conflict that is covered by this provision. The problem is, as I mentioned before, that the notion of “armed conflict” is not defined. However, it is clear from the text of the norm, which makes reference to “any other armed conflict” and to the fact that qualification by the parties is irrelevant (we may read: “even if the state of war is not recognized by one or by any of the parties”), that the notion encompasses a broad concept. This includes any armed confrontation between States, whatever its scale and its duration, whether it is a “war”, considered as a comprehensive military confrontation, or any military clash “short of war”. This is, in fact, the interpretation followed by Pictet’s Commentary, confirmed by the *Tadic* case and following jurisprudence of international criminal tribunals, and adhered to by the vast majority of commentators. It is what is known as the “first shot theory”, meaning that the protections afforded by IHL become applicable as soon as a single shot is fired, or a single person is captured by the adverse party. So, in fact, no reciprocity is required, violence by one side against the other is sufficient.

A minority view argues that minor border clashes or other small incidents should be excluded from the definition, as the notion of armed conflict would require certain intensity.

However, the prevailing view is more convincing, because it is more in accord with the practice of States (military manuals) and with the purpose of the GCs, to remove States’ exclusive competence in the qualification of the situation, and to afford victims of armed confrontations between States the broadest protection possible. Furthermore, it does not seem that the previous doctrine has provided satisfying criteria in order to determine the threshold of intensity required in order to have an IAC.

Nonetheless, some violent acts need to be excluded from the definition of an IAC, as recognized by various supporters of the first shot theory: in particular, it is specified that acts triggering an IAC shall be the expression of an *animus belli*, representing the will of a State to do harm to the other State. Therefore, even acts that would normally be considered hostile, such as the incursion of troops in foreign territory, do not constitute an armed conflict if they are undertaken with the consent of the territorial sovereign,

or by mistake. Other authors remark that an individual brave act of a single soldier, or even a few soldiers, such as a café fight erupting between drunk soldiers belonging to different States, would certainly not constitute an IAC; nor would the arrest of a foreign soldier belonging to troops legally present on the State's territory, on the basis of a charge of a common crime. These examples refer to events that would rarely raise issues in practice. They are also reasonable, insofar as they point to the need of acts characterized by hostility against the other State, if we except the not minor caveat that even mistakes are capable of causing huge damage, if not horrific consequences, and could go as far as to trigger the explosion of a full scale war. Furthermore, it is important not to understand *animus belli* as *animus belligerandi* (i.e. the will to make war), which would reintroduce through the door a concept that has been chased out of the window. Nonetheless, the issue of what remains outside the concept of armed conflict would deserve further consideration.

With the caveats just mentioned, an IAC can be started even when the troops of State A are regularly present on the territory of State B, in case these troops act, e.g. using force or capturing persons or unduly prolonging their presence in excess of the consent that was given by the territorial sovereign.

An IAC does not necessarily arise from scratch: in various situations in current practice an IAC is the result of an event taking place within a NIAC, producing the effect of "internationalising" that conflict. We may in particular recall two situations:

- i. secession is a first case: whenever rebels successfully manage to operate a secession of part of the territory of the State against which they are fighting, thereby creating a new State, if the conflict continues it has become an IAC. Of course, as the Former Yugoslavia amply testifies, the precise identification of the moment of secession may pose difficulties;
- ii. the second situation consists in foreign intervention in a NIAC. According to the prevailing and more convincing opinion, also accepted by the ICC, this result would follow only when the foreign State intervenes on the side of the rebels, not when intervention takes place in support of the territorial sovereign against the rebels. Intervention aside the rebels would only determine the birth of a new IAC, that would add to the continuing NIAC between the government and the rebels (as e.g. in Afghanistan in 2001 or in Libya in 2011), according to the view already developed by the ICJ in the Nicaragua case in 1986. Differently, if foreign support to the rebels reached the level of "overall control", according to the standard developed by the ICTY, accepted by the ICC and not rejected by the

ICJ, as far as the qualification of a conflict is concerned, the whole conflict would become an IAC.

Although in the previous case, in light of the law in force, the theory according to which two different categories of armed conflict could coexist in a single scenario seems convincing, one cannot overlook the problems that the precise definition of which aspects would be regulated by which law and of the contemporaneous application of different standards to different people may cause.

Finally, two further factors are worth mentioning that can trigger the application of the law of IAC (I will not consider the recognition of belligerency, which does not belong to current practice):

- i. The first consists in the *special agreements* that the parties of a NIAC may conclude *inter se*, as provided by Common Art. 3, entailing the application of further provisions of the GCs between them, as happened e.g. in the Former Yugoslavia. These agreements do not determine, *per se*, the transformation of a NIAC into an IAC, but only the applicability of those provisions of the GCs that the parties will determine, starting from the moment established in the agreements.
- ii. The second is the qualification of a conflict between a State and a non-State actor as a national liberation conflict according to Art. 1.4, AP I. This entails that, whenever the conditions for the applicability of such a rule, as specified in Art. 96.3, AP I, is met, the whole of the GCs plus AP I will be applicable between the parties from the beginning of the armed conflict, determined by the nature of hostilities and according to the threshold provided for NIACs. However, I will not go further into this topic, due to its limited interest in relation to current reality.

3. Occupation as triggering applicability of IHL/occupation law. Common Art. 2, Geneva Conventions and the two types of occupation

As mentioned, also occupation is envisaged in Common Art. 2 as an event triggering the applicability of the law of IAC. However, occupation does not generally determine the beginning of an armed conflict and, consequently, the moment in which the law of IAC becomes applicable. In fact, Common Art. 2, as interpreted, *i.a.* by the ICJ in the *Wall* Opinion, distinguishes between two categories of belligerent occupation: the first is belligerent occupation that arises during an IAC, which is included in the notion of IAC ruled by Art. 2, first paragraph. As it is an event arising during an IAC, and constitutes one of the most evident manifestations of an

armed conflict, it has no influence on the applicability of the law of IAC in general terms. The second paragraph of Art. 2 is merely devoted to occupations, partial or total, that do not meet any armed resistance, and provides that even in those cases, even in the absence of armed hostilities, the Conventions, and we may say the law of IAC, are applicable. This is also confirmed by Art. 6, GC IV, according to which: “The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2”.

This means that Common Art. 2 clarifies that even occupations taking place without any shot being fired, as happened, for example, in Denmark during WWII, determine in legal terms the existence of an IAC and, therefore, the applicability of the law of IAC. Therefore, it cannot be doubted that an IAC can begin even by means of the occupation of a territory meeting no armed resistance. As occupations of this kind, i.e. occupations meeting no armed resistance, are the exception and not the rule, we may conclude that usually an occupation does not alter the situation of an IAC that is already taking place.

The existence of an occupation is, however, always relevant for both categories of occupation, in the determination of the applicability not of the law of IAC broadly considered, but specifically of the branch of this law constituted by Occupation Law. Occupation Law consists of Section III of the Hague Regulations of 1907 (HRs), unanimously considered to be correspondent to customary IL; by Part III, Section III, GC IV, which complements the HRs, is binding on practically all States and is considered broadly correspondent to customary IL; and by a few provisions of AP I, possessing a more uncertain status. By definition, the law of occupation is applicable during occupation, therefore, the determination of what is an occupation and, for our purposes, of when it begins, is fundamental.

Occupation is not defined in the GCs, apart from the specification that it may arise even if it meets no armed resistance. The only definition is provided by Art. 42, HRs:

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

Without entering into the details, what is clearly requested by Art. 42 is that the army of a State (according to ICTY and ICJ case law, this covers the case of non-State actors when acting under the control of a State) establishes its control over the territory belonging to another State; that this control is hostile, which excludes any form of control established on the basis of consent of the territorial sovereign; and that this control is effective.

There are differences in opinion on what constitutes an effective control, but I think they should not be overemphasized. Most commentators, and the case law, including the ICTY and the ICJ, seem to agree that in order to exercise effective control, the Occupying Power (OP) does not need to establish an administration of the territory; and that, however, a presence of some boots on the ground, or at least, close to the ground, such as to allow the OP to intervene at any moment in any part of the Occupied Territory (OT) to impose its authority, is necessary. This supposes the fact that control over such a territory has been lost by the sovereign State.

An occupation will, therefore, begin whenever the conditions just mentioned are met on the ground. As for the armed conflict, what matters is the reality on the ground and not the intention or volition or declarations of the parties to the conflict. Until the moment in which effective control is established, the invasion will not have given birth to occupation of the territory.

I will only mention the fact that a point of contention relates today, since the Iraqi occupation of 2003-2004, to a possible role of the Security Council in determining, *inter alia*, the start of an occupation.

The biggest controversy in relation to occupation pertains, however, to the relationship between HRs and GC IV, or better, to whether the notion of occupation under Art. 42, HRs is also binding under GC IV and/or whether the scope of Part III, Section III, GC IV is broader or equivalent to the scope of Section III, HRs.

According to some, Pictet's Commentary and the ICTY's case law, *inter alia*, would attest that GC IV would not be bound by the notion of occupation accepted under Art. 42, HRs, and that it would follow a broader notion, which would determine a broader field of application, also temporal, of its provisions of Part III, Section III. I would submit that this conception as such is misconstrued. There is no question that there are no two different legal notions of occupation, one under HRs, the other under GC IV. And what about customary IL? Occupation is a unified concept in IHL, which supposes the elements that we have identified under Art. 42, HRs. It does not make sense to pretend that, under the GCs and AP I, occupation would not require the establishment of effective control over territory. I would submit that the real point of controversy does not relate to the notion of occupation or the moment in which occupation begins, but rather, and only, to the field of application of a part of the provisions of Part III, Section III, GC IV. In fact, the heart of the question is that, according to the ICRC Commentary and to the ICTY, on the basis of GC IV, protected persons do enjoy the protections granted to them by GC occupation rules from the moment in which they fall into the hands of the invading forces, even if occupation is not yet established. According to the supporters of this theory, such an interpretation is justified by the purpose of these provisions,

and of the GCs taken as a whole, and by the intention of the drafters. This would not affect the application of those rules in GC IV that clearly require, for their application, that an occupation is established.

This thesis is fiercely opposed by some other commentators, according to whom the text of GC IV, and particularly Art. 4, defining persons protected by this instrument as those who “in case of conflict or occupation” find themselves “in the hands of a Party to the conflict or Occupying Power of which they are not nationals”, determine that the application of the occupation rules of the Convention depended on occupation. Also the specific rules of Section III make reference to their application by “the Occupying Power” and “in occupied territory”.

This issue cannot be dealt with in depth in the context of this paper. However, I will try to offer some tentative conclusions. In my view, there is no doubt that Occupation Law as a whole, including the HRs in their entirety plus GC IV in its entirety, does apply once occupation, in the meaning identified before, is established. There is, however, a certain practice, and especially case law, and there is merit in the theory according to which a part of the provisions of GC IV, Part III, Section III, is applicable from the moment in which a protected person falls into the hands, i.e. under the control of the invading forces, although an occupation may not yet be established. Such a reading seems more in conformity with the purpose of GC IV and leaves no place for what would otherwise be a serious lacuna in the Convention. Of course, solutions proposed in relation to one or the other specific provision are open to debate.

At this juncture, it is necessary to introduce a caveat: it seems that certain elements of the current practice of States would point in the opposite direction. The US and UK military manuals are ambiguous in their determination according to which the application of Occupation Law rules in the areas where troops are passing is recommended “as a matter of policy”. Furthermore, this reference has disappeared from the recently amended version of the British manual. This would point to an increasing resistance of some States to feeling bound by Occupation Law outside the framework of a fully-fledged occupation.

4. The beginning of a NIAC and the definition of the threshold

As is known, the most relevant general instruments applicable to NIACs are Common Art. 3 to the four Geneva Conventions (CA 3) and Additional Protocol II (AP II). There are some further conventions or rules contained in other conventions, applicable in NIACs, such as certain provisions relating to the protection of cultural property, on the basis of Art. 19 of the

1954 Cultural Property Convention, Protocol II to the same Convention, and a good number of the conventions relating to weapons.

There are two thresholds established by IHL instruments for NIACs and both differ from the threshold provided for IACs. The first, lower threshold, is provided in CA 3, the second, higher threshold, is provided in AP II. This second threshold only determines the applicability of the rules of AP II, while all the other instruments are, in fact, considered to incorporate the threshold accepted in CA 3. We will, however, discuss later on whether the ICC Statute provides for a further threshold, determining the existence of a third category of NIACs, although merely for the purpose of the applicability before the Court of some of the war crimes provisions relating to NIACs.

The starting point is CA 3, according to which each Party to “an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties” is bound to respect a series of minimal humanitarian standards relating to the treatment of persons who have fallen into the hands of the adversary. The article contains no definition of what is a NIAC, apart from the specification that it shall occur in the territory “of one of the High Contracting Parties”. However, I will not delve into the interpretation of this clause, which has much to do with the admissibility of the concept of transnational NIACs, and is more related to the geographical than to the temporal scope of the provision.

The interpretation of the contours of the CA 3 threshold has been, to a large extent, clarified by subsequent practice (even the ICRC Commentary is of limited utility), and specifically by the jurisprudence of the ICTY, which has constituted a point of reference for all subsequent judicial decisions, official reports, military manuals and so on.

On the negative side of the coin, I will recall Art. 1.2, AP II, according to which that instrument does not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”. Now, it has been amply clarified that this formulation, which has later been included in other instruments, not least the ICC Statute, does not only apply to armed conflicts considered by AP II but to any NIAC. Which means that, in order for a NIAC to begin, the reaching of a certain threshold of “internal violence” is required, which is above the level of mere riots, isolated and sporadic acts of violence and other acts of a similar nature.

What is intended by these expressions can be better grasped if we look at the positive side of the coin, i.e. at the requirements considered necessary for the existence of a NIAC. The point of reference is the *Tadic dictum* of 1995, already referred to, according to which “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed

groups or between such groups within a State”. A first condition is, therefore, the presence on the ground of organized armed groups. Violence can take place between rebels on the one side and governmental forces on the other side, in the classical situation of insurgencies of various kinds, or between non-State actors, whether the State is unwilling or unable to intervene or there is no more government in place in a failed State situation. These non-State actors must be armed groups, and not merely dispersed individuals. Furthermore, these armed groups shall possess a minimal degree of organization, as has been clarified in the case law, such as to allow them to engage in military activities of a certain intensity, and not merely to put forward sporadic terrorist attacks; and entailing a certain chain of command able to impose discipline on the group, and allowing it to respect at least the basic parameters of IHL. This does not mean that effective respect shall be required, as long as the group is capable of respecting the provisions.

From the foregoing, it appears that organization is not sufficient *per se*, if it is not accompanied by another element, which is a certain level of intensity of the violence. *Tadic* has required “protracted armed violence”, which in itself would seem to require that the fighting should last for a certain amount of time, notwithstanding possible interruptions. However, in some decisions, starting with *Tadic* itself, the ICTY has specified that the second requirement, after organization, is not duration *per se*, but rather a certain intensity of the armed struggle. The fact that the fighting is protracted would thus seem to be not a further condition, but rather one among other *indicia* permitting to conclude that the required intensity, going further than mere acts of banditry, isolated turmoil, sporadic terrorist attacks, has been reached. This is an indicative element that, as such, would not be compulsorily required in each and every circumstance. This explanation would allow to accommodate the Inter-American Commission on Human Rights’ decision in the case often referred to as *La Tablada*, in which the Commission considered that the conditions triggering the applicability of the law of NIAC were present, in a situation where governmental forces had repelled, through an intense military clash, the action of dissident armed forces, the fighting lasting less than two days.

However, in my view, the question of the role of prolongation of violence in case law is not definitively settled; in the ICTY’s jurisprudence there are other decisions and passages calling for an autonomous role of protraction. On the other side, some scholars believe that protraction of violence is a necessary element of any NIAC, organization and intensity aside. It would seem that the question needed further clarifications in case law. Nonetheless, I would claim that the dispute does not have a major impact, as, apart from exceptional circumstances such as those of *La Tablada*, ordinarily internal struggles do need a certain time before the

required levels of organization of armed groups and intensity of the fighting are reached.

Therefore, concluding on the identification of the threshold necessary for the existence of a NIAC and, consequently, for the applicability of CA 3, a NIAC begins if a certain level of violence, above that of internal disturbances or tensions, isolated or sporadic acts of violence, is reached in clashes opposing the State and organised armed groups or organised armed groups *inter se*. I leave the question mark over duration, with the above specifications.

As mentioned, it is universally agreed that AP II sets higher standards than those entailed by CA 3. Besides, Art. 1, AP II, is clear in specifying that it does not modify “the existing conditions of application” of CA 3. The result of the coexistence of the two thresholds, for NIACs arising in the territory of States parties to both instruments, is that CA 3 will apply in all cases, whereas the provisions of AP II, which merely supplement without substituting those of CA 3, will only apply to the restricted category of NIACs envisaged by the rules of Art. 1 defining its field of application. This definition contains two elements that are clearly not requested by CA 3, and which assimilate, or at least bring the conflicts considered by this instrument closer to proper civil wars: the first is control over territory; the second is the fact that only conflicts between the State and organized armed groups and not those only involving organized armed groups are regulated by the Protocol. Furthermore, and in connection with the above-mentioned requisites, the level of organization requested from the non-state armed groups, able to allow them to carry out “sustained and concerted military operations” and to apply the more exacting provisions of the Protocol, seems to be definitely higher than that allowed under CA 3. One needs to consider that a NIAC subject to AP II will not begin from scratch, but will rather result from a transformation of a NIAC previously only governed by CA 3, leading to the attainment of the additional requirements aforementioned.

The role played in this scenario by the ICC Statute is the subject of much controversy. Article 8(2) introduces two different lists of war crimes committed in NIAC: the first, under para. (2)(c), includes serious violations of CA 3; the second, under para. (2)(e), includes “other serious violations of the laws and customs applicable in conflicts not of an international character, within the established framework of international law”, mainly but not exclusively consisting of violations of AP II. The problem is due to the fact that while for both paragraphs it is specified, in para.s (d) and (f), respectively, that they do 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”, thus confirming that those situations do not belong to the concept of armed conflict; only for para. (2)(e) para. (2)(f) adds that

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”.

Now, apart from the substitution of “protracted armed violence” with “protracted armed conflict”, probably due to a mistake in the drafting of the provision, this is the *Tadic* formula.

A relevant number of scholars deem that, by means of para. (2)(f), the Statute is introducing a third category of NIAC, all be it only for the purpose of activating the jurisdiction of the Court in relation to certain war crimes. This third category would be intermediate between NIACs regulated by CA 3 and those governed by AP II. However, on the one hand, I deem that recent researches have demonstrated that both the letter of Art. 8 and the *travaux préparatoires* provide elements to sustain that the Statute envisages only one threshold for NIACs, on the other hand, what really counts is how the Court itself interprets these provisions.

The case law developed by the Court as of today may not yet be fully conclusive on this issue, as it has not specifically analysed the relationship between paras. (2)(d) and (2)(f). Nonetheless, the recent case law, in particular the *Katanga* judgment, provides some relevant indications. The TC proceeded to reclassify the conflict between organised armed groups in Ituri as a NIAC, whereas the PTC had qualified it as an IAC. On this basis, the charges for war crimes committed in IAC were modified into charges for war crimes committed in NIAC, under both paras. (2)(c) and (2)(e), as they included murder plus other crimes related to the conduct of hostilities. The Court then proceeded to verify whether a NIAC existed in Ituri at the time, and in doing so it referred to para. (2)(f), without questioning if the conditions posed by this paragraph were also necessary in order to assess serious violations of CA 3 under para. (2)(c). The Chamber could have specified that, if the conditions under para. (2)(f) were complied with, it did not need to enquire whether a NIAC existed under para. (2)(c), as para. (2)(f) was more restrictive than para. (2)(d). But it did not do so. The reasoning of the Chamber seemed to proceed on the basis of the assumption that there was only one notion of NIAC, and that para. (2)(f) was relevant for its definition.

It remains to be verified whether the Court’s reading of the text of para. (2)(f) matches with the notion of NIAC that has been previously identified. First, the Court interprets the concept of “protracted armed conflict” as equivalent to that of “protracted armed violence”. Second, the Court refers to the jurisprudence of the ICTY as an authoritative source in order to determine the concept of NIAC. Third, in conformity with this reference, the Court seems to be satisfied with the requirements of “some degree of organization” of the armed groups (while rejecting explicitly the need of a responsible command that was indeed retained in some ICTY’s case law),

and of a certain level of intensity of the struggle, according to the indicators developed by the ICTY. Fourth, the Court seems to view the “protracted” nature of the violence as an autonomous requirement, in addition to that of intensity. Thus, the ICC case law would seem to follow substantially the line traced by the ICTY, with only a possible divergence with regard to the requirement of “duration” of the violence, depending on the interpretation that is given to the ICTY’s case law on this point. If these trends are confirmed in the future case law of the Court, this will point to the unity of the concept of NIAC in the ICC Statute and to its substantial conformity (with some possible issues relating to duration) with the concept underlying CA 3.

Coming back to the issue of the beginning of a NIAC, it would thus seem that the ICC Statute does not add anything to the picture that has already been traced above, with only a caveat on the possible role of duration in determining the beginning of a NIAC, for the purpose of delimiting the Court’s jurisdiction.

5. The beginning of an armed conflict involving international peace-keeping forces: problems

The question of the identification of the beginning of applicability of IHL instruments or customary rules also concerns the possible participation of UN forces to a conflict. According to the prevailing view, UN forces are bound by IHL as soon as they become involved in the use of force against a State or an organised armed group. This would normally occur in the context of a previously existing conflict, but it cannot be excluded that the sole military operation of the UN forces could trigger the beginning of a new armed conflict. Commentators diverge in the qualification of the conflict that would ensue. According to some, the participation of UN forces *per se* would render the conflict an IAC, while according to others the conflict would qualify as an IAC or a NIAC in relation to the nature of the party against which the UN forces would be acting.

Be that as it may, the application of the law of IAC or the law of NIAC would be triggered by the beginning of the UN intervention, if this qualified as a peace enforcement operation, or in the moment in which the peace-keeping force already present on the field started military operations against one of the parties.

The end of IAC and NIAC for the purpose of the applicability of IHL

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Introduction

In order to clarify the presentation let me first reformulate the title in the interrogative form. The question posed is the following: what are the criteria allowing to say that an armed conflict has ended in order to conclude that at the very same time, International Humanitarian Law is no more a body of law applicable in a given situation? Or in other words, when does International Humanitarian Law cease to apply because of the end of an armed conflict?¹

If, as Professor Pedrazzi has just explained, the beginning of armed conflicts is surrounded by a lot of sub-questions, the end of applicability is often described as offering the most challenging debates about the temporal scope of International Humanitarian Law. In my opinion, some aspects linked with the beginning of applicability are as just as crucial, but it is true that considering today's physiognomy of armed conflicts, sometimes described as 'never-ending wars', to question oneself about the moment in time when International Humanitarian Law ceases to apply is of great importance.

Since the presentation I have been asked to give today is entitled "the end of international armed conflict and non-international armed conflict for the purpose of applicability of International Humanitarian Law", there are some aspects related, either only to the end of applicability of International Humanitarian Law, or only to the end of an armed conflict, with which I will not deal.

Among them I can quote three. First, the difficult question of the length of time during which International Humanitarian Law continues to apply after the end of hostilities: As long as people remain detained for example, or, as long as the fate of all the missing has not been elucidated. The second one, which I will not address, is the possibility for the High contracting parties to denounce the Geneva Conventions, which is another way to put an end to the applicability of International Humanitarian Law, but not to an

¹ Relevant references related to the end of armed conflicts can be found in Julia Grignon, *L'applicabilité temporelle du droit international humanitaire*, Schulthess, Collection genevoise, Zürich, 2014, 504 p.

armed conflict. In the same manner, since only facts matter in order to ascertain that an armed conflict, be it international or non-international, has ended and, therefore, that International Humanitarian Law has ceased to apply, I will not speak about formal instruments whose purpose it is to put an end to an armed conflict as a social fact. These instruments namely, for example, armistice or peace treaty agreements are irrelevant in order to ascertain that because of their conclusion International Humanitarian Law has ceased to apply.

Finally, there is another important topic that I will not raise today, that is, the end of occupation. Indeed, I will neither enumerate the factors that put an end to a situation of occupation nor will I present the functional way by which International Humanitarian Law may cease to apply when a situation of occupation disappears. I know that the challenges here are big and maybe because they are that big, I have the feeling that it is better not to deal with them at all: they would need an entire talk dedicated to them. Moreover, it will soon be easy to find literature about these questions in the Commentary of the GCs directed by Sassòli, Clapham and Gaeta, to be published this fall².

So, on what will I concentrate this afternoon? I will concentrate only on elements conclusive to the end of applicability of International Humanitarian Law because of the end of a situation of armed conflict. And for so doing my intention is first to give you a very brief overview of the elements that might allow the end of an armed conflict according to, in particular, Treaty provisions and international criminal law case law; and second, to discuss more deeply the meaning of two key notions when dealing with the end of International Humanitarian Law linked with the end of armed conflicts, namely: “the general clause of military operation” and the “end of active hostilities”.

What do treaty provisions and case-law say about the end of an armed conflict as the relevant moment at which International Humanitarian Law ceases to apply?

1. Treaty provisions

Regarding treaty provisions, the only codified regulation regarding the end of an armed confrontation may be found in the Hague Regulations of 1907. This text forecasts two possibilities: capitulation or armistice. And, as

² Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, 1760 p. See in particular Chapter 74: Julia Grignon, ‘The Geneva Conventions and the End of Occupation’.

I said previously, I will not examine these notions that are both linked with formal instruments.

On the other hand, the Geneva Conventions, as do their Additional Protocols or other relevant International Humanitarian Law treaties, mention the end of military operations or the end of armed conflict, but none of them says precisely what these notions cover.

The only two treaties that contain a provision specifically dedicated to their global, and I would like to put the emphasis on this word, on their global temporal scope, are Geneva Convention IV (hereafter ‘GC IV’) and Additional Protocol I (hereafter ‘AP I’). Article 6 of GC IV provides: “In the territory of Parties to the conflict the application of the present Convention shall cease on the general close of military operations.” Similarly, Article 3 of AP I provides: “The application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations [...]”. Therefore, it seems that a key notion is the ‘general close of military operations’ and I will come back to that notion in a minute.

It is by the way interesting to notice that the most relevant treaty provisions may be found in the law of international armed conflict. In the law of non-international armed conflict, we can only find the expression “until the end of armed conflict” but which is not that helpful.

2. What does the jurisprudence of international criminal tribunals say about the end of applicability of International Humanitarian Law?

There are three phases in the jurisprudence:

- a. First; Tadic, the ‘unavoidable’, stated in its famous paragraph 70 that International Humanitarian Law “extends beyond the cessation of hostilities until a general conclusion of peace is reached or, in the case of internal conflicts, a peaceful settlement is achieved”.
- b. Secondly; Haradinaj, has confirmed this theory stating that “since, according to the Tadic test, an [in that case] internal armed conflict continues until a peaceful settlement is achieved, [...] there is no need for the Trial Chamber to explore the oscillating intensity of the armed conflict”.
- c. Later on, in the Gotovina case, the judges had an occasion to say that, according to them, the defence was wrong in considering that the conflict was over because of a “drastically decreased level of intensity, and/or level of organization of one of its participants, resulting in the non-applicability of the law of armed conflict”. The judges affirmed further that “this position does not accurately reflect the law. As a rule, the fourth Geneva Convention [...] ceases to

apply at the general close of military operations”. An expression which is not new to our ears now.

Regarding non-international armed conflicts, this statement of the case law leads to, at least, one controversy. Indeed, according to this statement, that it is not the disappearance of the two relevant criteria for their classification that puts an end to a non-international armed conflict, but an achievement of peace, or the general close of military operations. It is true that it has been an appropriate move to refer in *Gotovina* to the expression ‘general close of military operations’ rather than to the achievement of peace, this latter expression echoing the necessity for a formal act. But, on the other hand, this means that in a situation where intensity and organization decrease under the threshold of classification, International Humanitarian Law will remain applicable. In other words, when looking at the situation at a very specific point in time, which would not classify as a non-international armed conflict, because intensity is too low or because organization is lacking, International Humanitarian Law will apply only because this situation has been classified as a non-international armed conflict beforehand. According to me, this is not only an academic controversy but an operational one. Is it relevant to ask armed groups to keep on respecting a body of law when it is clear that they are no longer in the capacity to do so? In my opinion, this only concurs to conclude that International Humanitarian Law is violated in situations in which it should not even be applicable.

And here, maybe obviously, but maybe worth being highlighted, we can notice that the relevant case law deals with non-international armed conflicts. Indeed, the international criminal justice has pronounced itself in these contexts since non-international armed conflicts have been the most prevalent pattern in the last years.

Anyway, it seems that there are concurring elements, both in International Humanitarian Law core treaty provisions and in international Criminal Courts decisions, and both for international armed conflict and for non-international armed conflict, in order to refer to the ‘general clause of military operation’ when looking for a point at which International Humanitarian Law ceases to apply because of the end of a situation of violence. I propose now to explore the meaning of this expression which is crucial.

Le sens de l’expression « fin générale des opérations militaires »

C’est la notion cruciale car c’est la notion qui permet de répondre à notre question qui est de savoir quand un conflit armé peut être considéré

comme terminé, aux fins de l'applicabilité du droit international humanitaire.

Une question préliminaire doit être traitée : pourquoi parler de « fin générale des opérations militaires » plutôt que de « fin des hostilités » ? À cet égard, il est intéressant de comparer les versions française et anglaise du programme de la table ronde. Il est en effet assez topique de relever que le titre « the end of international armed conflict and non-international armed conflict for the purpose of applicability of International Humanitarian Law » a été traduit par « la fin des hostilités en conflit armé international et conflit armé non international aux fins de l'applicabilité du droit international humanitaire » ; ce qui est très révélateur de la confusion constante qui existe entre les deux expressions « fin des hostilités actives » et « fin générale des opérations militaires », qui pourtant ne servent pas les mêmes intérêts et n'ont pas les mêmes incidences sur la fin de l'applicabilité du droit international humanitaire. Mais il est toutefois exact que l'on trouve l'expression « fin des hostilités » dans un grand nombre des dispositions des Conventions de Genève et des protocoles additionnels, alors pourquoi ne pas retenir cette expression ?

En réalité, les Conventions de Genève et leurs protocoles additionnels situent ces deux expressions sur deux plans diamétralement opposés. La « fin des hostilités actives » est une expression utilisée non pas pour matérialiser la fin de l'applicabilité du droit humanitaire mais pour marquer le point de départ de l'application de certaines dispositions spécifiques. En ce sens, elle n'a rien à voir avec la fin de l'applicabilité du droit international humanitaire de façon générale. Ce qu'on peut dire de la notion de « fin des hostilités actives » c'est que c'est une notion qui déclenche certaines obligations à l'égard des Etats pour ce qui concerne la fin des mesures privatives de liberté, la collecte des morts, le retour des blessés et l'élucidation du sort des disparus et, les effets que produisent certaines armes telles que les mines anti-personnel et les bombes à sous-munitions.

Par conséquent, la « fin des hostilités actives » est une expression très utile à beaucoup de choses en droit international humanitaire, et elle permet d'offrir des protections indispensables à certaines personnes, mais elle n'est en rien utile à déterminer quand un conflit a pris fin et quand il est par conséquent possible de constater que le droit humanitaire ne s'applique plus.

Venons-en donc maintenant à l'expression utilisée dans les traités et en jurisprudence et qui marque la fin des conflits armés aux fins de l'applicabilité du droit international humanitaire : « la fin générale des opérations militaires ». S'il est impossible de dégager un principe général et universel qui permettrait de dater avec exactitude le moment auquel se produit la fin générale des opérations militaires, on peut toutefois mettre en exergue un certain nombre d'indicateurs qui contribuent à déterminer

quand elle survient et avec elle la fin de l'applicabilité générale du droit internationale humanitaire. J'en évoquerai quatre.

Premièrement, il s'agit d'une notion propre à étirer considérablement dans le temps dans l'applicabilité du droit international humanitaire

L'étude de l'utilisation du concept d'« opérations militaires » en tant que tel, au travers les instruments de droit international humanitaire et au travers de certains manuels militaires, démontre que celles-ci englobent un très grand nombre d'activités. Elles couvrent un champ d'action extrêmement vaste. Or, même si un conflit est apparemment terminé entre deux belligérants, un certain nombre d'opérations militaires peuvent se poursuivre. Par exemple, faisant partie intégrantes des opérations militaires, des opérations dans lesquelles continuent d'être impliquées des forces armées, même alors lorsqu'elles ne font plus usage de leurs armes, sont couvertes par le droit international humanitaire.

Et à cet égard, une distinction peut être opérée en fonction du territoire sur lequel se produisent les opérations militaires à l'étude. Si tout mouvement de troupes se déroulant sur leur propre territoire était indifféremment couvert par le droit international humanitaire, celui-ci aurait une applicabilité sans fin. Aussi, pour pouvoir considérer que les opérations militaires ont pris fin, il faut se référer à un conflit en particulier, il doit y avoir un lien de connexité entre les opérations militaires observées et le conflit préexistant.

Deuxième indicateur : le mot « générale » agit comme un pivot dans l'expression « fin générale des opérations militaires »

Dans le contexte d'un conflit mondial, source d'inspiration majeure pour les participants à la Conférence diplomatique de 1949, ou dans des conflits armés impliquant un certain nombre de protagonistes comme c'est souvent le cas dans les conflits contemporains, il se peut que les hostilités cessent entre deux ou plusieurs acteurs du conflit mais perdurent entre l'un de ceux-là et plusieurs autres. Or, tant que les affrontements se poursuivent entre certains protagonistes, on ne peut pas considérer que les opérations militaires ont cessé de façon générale. C'est d'ailleurs ce que reflète le commentaire de l'article 6 de la quatrième Convention de Genève qui évoque « la fin complète de la lutte entre tous les intéressés ». Si les opérations militaires ont opposé plus de deux protagonistes, tant que celles-ci ne sont pas terminées entre quelques uns d'entre eux, le droit humanitaire doit continuer de s'appliquer dans sa globalité.

Troisième indicateur: la constatation que la « fin générale des opérations militaires» est intervenue est un constat progressif et nécessairement ex post.

Il sera toujours nécessaire qu'un minimum de temps s'écoule avant de pouvoir affirmer qu'un conflit armé a pris fin et par conséquent que le droit humanitaire ne s'applique plus. Une situation ne retourne pas à

la « normale » subitement mais progressivement. Il est donc incontournable de prendre un certain recul vis-à-vis de la situation afin de pouvoir dire que le droit international humanitaire ne s'applique plus. Non seulement le constat que « la fin générale des opérations militaires » est intervenue est inévitablement progressif, mais aucune règle de droit « ne dit combien de temps la cessation nécessite de durer pour qu'un conflit soit juridiquement considéré comme ayant pris fin»³.

C'est par conséquent un faisceau d'indices qu'il faut prendre en compte pour pouvoir arriver à la conclusion que les opérations militaires ont cessé. Parmi ces indices on peut mentionner par exemple le retrait d'une armée d'un territoire étranger, qui peut être l'élément le plus direct et le plus probant que des opérations militaires s'achèvent: si plus aucun acte d'hostilité n'est posé suite à ce retrait, il sera relativement rapide de conclure à la fin de l'applicabilité du droit international humanitaire. Un autre indice peut être la signature d'un accord prévoyant la fin des hostilités ou une déclaration unilatérale qui témoigne de la volonté de déposer les armes. Ces événements auront, quant à eux, pour effet de conduire à se poser la question de la fin du conflit armé et d'inciter à vérifier si ceux-ci sont suivis d'effets c'est-à-dire si la « fin générale des opérations militaires » est intervenue. Là encore ces événements peuvent intervenir rapidement et se dérouler sur un laps de temps relativement bref. Alternativement, il peut se produire que l'intensité de la violence baisse peu à peu pour finalement cesser complètement. Dans cette hypothèse, la « fin générale des opérations militaires » pourra être constatée ex-post, après qu'un certain temps se soit écoulé et qu'on ait pu constater que les manœuvres qui se poursuivaient éventuellement sont décontextualisées du conflit dont il était question. Il y a donc une variété de combinaisons d'éléments qui permettent d'aboutir à la conclusion que le droit international humanitaire a cessé ou au contraire continue de s'appliquer.

Quatrième indicateur: la mise en regard de l'expression avec l'expression « fin des hostilités actives »

Le quatrième et dernier indicateur est un élément qui contribue à fixer le moment où se produit la fin générale des opérations militaires en l'opposant à l'expression « la fin des hostilités actives » évoquée plus haut. Aujourd'hui on peut opposer les termes « fin des hostilités (actives) » et « fin générale des opérations militaires » de la même manière que l'on opposait autrefois armistice et traité de paix. L'armistice ne signifiait pas la fin de la guerre mais permettait de régler certains problèmes liés au conflit en voie d'achèvement et le traité de paix, lui, avait vocation à permettre un retour à des relations normalisées entre d'anciens belligérants et à mettre

³ Selon les termes de l'International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*, The Hague Conference, 2010, p. 31. Notre traduction.

fin à ce qu'on appelait « l'état de guerre ». La « fin des hostilités (actives) » ne signifie pas la fin du conflit armé mais permet de procéder à certaines démarches prévues dans des dispositions spécifiques. Les deux notions sont souvent associées. Au terme des Conventions de Genève et de leurs Protocoles, elles devraient tout au contraire être opposées lorsqu'on recherche à savoir si un conflit armé a pris fin. En résumé, il est possible de conclure que le terme « hostilités » renvoie par essence à l'usage de la force, alors que l'expression « opération militaire » renvoie plus généralement à tout ce qui concourt à l'usage de la force. Ainsi, contrairement à ce qui a pu être affirmé, la notion d'« hostilités » n'est pas employée là où on veut marquer la fin de la guerre, mais là où on veut marquer une spécificité temporelle.

Voilà ce qu'on peut dire brièvement de cette notion, « la fin générale des opérations militaires », qui est celle qu'il faut retenir pour déterminer quand un conflit a pris fin et donc quand a pris fin l'application du droit international humanitaire. Toutefois, pour satisfaisante qu'elle ait pu être dans un contexte précis, la formule « fin générale des opérations militaires » de l'article 6 de la quatrième Convention de Genève, reprise à l'article 3 du Protocole additionnel, et qui produit également ses effets dans le cadre des conflits armés non internationaux, bute aujourd'hui sur au moins deux considérations qui conduisent à s'interroger sur la pertinence de son opportunité.

En effet, premièrement si maintenir l'applicabilité du droit international humanitaire signifie effectivement continuer d'offrir une protection spécifique aux personnes qui en ont besoin, cela signifie également que l'on prolonge une situation d'exception dans laquelle les parties en cause vont continuer de justifier l'adoption de mesures dérogeant aux libertés individuelles à l'égard d'étrangers ennemis. Or, deuxièmement, depuis 1949 le droit international des droits de la personne s'est considérablement développé. Par conséquent, aujourd'hui admettre que la « fin générale des opérations militaires » est intervenue et que le droit humanitaire ne s'applique plus ne devrait plus créer un risque de lacunes dans la protection des personnes.

En guise de conclusion, et en faisant référence au sujet général de cette table ronde : la distinction entre les conflits armés internationaux et les conflits armés non-internationaux, on peut constater, au travers des présentations relatives à l'applicabilité temporelle, que si un conflit armé international peut être déclenché par un seul événement, la fin de celui-ci peut résulter de la combinaison d'un certain nombre de facteurs, et par conséquent être progressive. Au contraire, on a vu que pour qu'un conflit armé non-international soit constaté, il faudra souvent qu'une certaine période de temps s'écoule, notamment parce qu'afin d'être en mesure de constater que les groupes armés sont suffisamment organisés ou que le

niveau d'intensité de la violence est atteint, il faudra nécessairement attendre qu'un certain temps se soit écoulé. Or il peut arriver que, même si c'est rarement le cas, un seul évènement mette fin à un conflit armé non-international, celle-ci se produisant en un moment unique.

Ainsi, on constate en toute hypothèse qu'il n'y a pas de parallélisme des formes entre le début de l'application du droit humanitaire et la fin de son application du droit humanitaire.

The geographical reach of IHL: the law and current challenges¹

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What is at stake when we talk about the geographic reach of IHL? On the one hand, we have to think about the protective scope of IHL so those who are in need of its protection should be able to avail themselves of this protection; but, on the other hand, we have to bear in mind the more permissive aspects of IHL which, particularly in terms of the use of force, puts both the person targeted as well as the civilian population more at risk than a situation below the threshold of IHL.

In terms of the geographic reach of IHL, there are two main questions I think that are being debated at the moment and that I will address in turn, one is whether IHL applies in the entire territory of the party to the conflict or whether within the territory of the party to the conflict, it might be limited more to an area of hostilities or battlefield. The other question is the applicability of IHL in the territory of non-belligerents, so non parties to the conflicts be it IAC or NIAC. To turn to the first query, the question of the applicability within the territory of the parties, I think, in terms of international armed conflicts, the question is relatively easily answered. It is fairly obviously that IHL applies throughout the territory of the parties just by referring, for instance, to GC 4 and GC 3 where GC 4 has very clear subtitles or titles within it about the territory of the party and even GC 3 provides for the obligation to remove prisoners of war from the zone of combat – that is obviously not to say that once outside the zone of combat they will not be protected anymore. So clearly, IHL applies throughout those territories.

In terms of non-international armed conflict, I think the question is a bit more difficult because of the evolving nature of armed conflicts particularly the transnational non-international armed conflicts that Noam Lubell was talking about earlier. There are no clear treaty provisions about the geographic scope of the law of non-international armed conflict, so, the assumption would be, going by article 29 of the Vienna Convention of the Law of Treaties, that, unless the signatories otherwise intended, the treaties are applicable in the entire territory. However, this has been challenged because of the fact that you often have non-international armed conflict in which hostilities are really confined to one part of the country and another

¹ Text not revised by the author.

part of that same country is entirely peaceful and so the question arises as to whether IHL would be the appropriate framework to deal with all of the territory of the conflicts. For instance, regarding the conflicts in Sri Lanka, until 2009 there was a clear divide between the north of the country and the south of the country and if you lived in Colombo for many years, you didn't necessarily notice that there was an armed conflict going on. If you think as well about the wars in the Caucasuses and, for instance, the Chechen wars – why would IHL be applicable in Vladivostok when you have wars in Chechnya? The situation becomes even more complicated, of course, when you consider those transnational, non-international armed conflicts with foreign interventions. So, when States intervene in a conflict which is abroad but there are never any hostilities on their own territory, as for instance, the NATO States intervening in Afghanistan, namely Australia or the United States or New Zealand or wherever, State practice in this respect is not so clear. Why? Because in internal NIACs, I have called them internal NIACs, the States might sometimes use law enforcement means outside the zone of conflict or battlefield rather than the conduct of hostilities law. But it is not so clear whether that is because they think IHL only applies on the battlefield or whether they actually deny the existence of the conflict throughout the territory and, therefore, they deny the applicability of IHL all together. In terms of transnational, non-international armed conflicts I would say that we don't really see any State that would argue that on its territory IHL applies – maybe the United States – but certainly no other States we can see at this moment.

The jurisprudence of the International Criminal Tribunal in this respect is also not entirely clear. Tadic, the unavoidable as I shall call it from now on, says IHL continues to apply on the whole territory of the warring States or, in the case of internal conflict, the whole territory under the control of a party whether or not actual combat takes place there. That's a little bit obscure because there is no real reason why IHL of NIAC would only apply on territory which is under the control of a party. AP2 has a certain threshold capability which deals with the control but why would Common Article 3-type conflicts really have this criterion? The ICTR in the Akeyasu case talks about IHL being applicable in the whole territory of the State engaged in a conflict. The problem with that is you also have non-international armed conflicts between parties without involving any State. So, if you have a non-international armed conflict only between non-state actors then where does that take place?

In the Rutaganda case, the ICTR has a bit of a different formulation. It talks about the territory of the State where the hostilities are recurring but the entire State where the hostilities are recurring which seems more practicable. I would say that in any case when you look at the object of that jurisprudence, the idea behind that jurisprudence is to make clear that when

persons are in the hands of the party to the conflict, they are protected by IHL even if they are outside the battlefield zone. So, I think that makes sense, that's the better view, at least when it comes to protected persons. The question, then, I think, turns much more to the question as to whether all of IHL applies in the entire territory of the party or whether you slice it in terms of IHL that applies to persons in the hands of the enemy and the conduct of hostilities rules. I would say in terms of applying IHL, it would be difficult to slice it between those rules so you'd probably have to say IHL applies in the entire territory of all the States involved in a NIAC.

The malaise we have about these more peaceful zones is more a question that will be dealt with in the interplay between the conduct of hostilities rules and law enforcement rules rather than as a question of IHL applicability, geographical applicability of IHL. So, there's a bit of a question here and there are several arguments put for and against the prevalence of law enforcement rules or conduct of hostilities rules outside the immediate battlefield. The arguments for the application of the conduct of hostilities rules are parallel to IAC because, in an international armed conflict there is no such differentiation. Also there is the protective scope of IHL. If, for instance, there is an attack on civilians— imagine a non-state armed group going into the capital of a country particularly because they want to take hostilities to that capital – then why would the protective rules of conduct of hostilities not apply in that capital if they apply between the belligerents where most of the collective hostilities are taking place?

There is also the argument that IHL is the *lex specialis* in armed conflict for all of IHL. There's also an argument to say that there is no reason to treat fighters like civilians when they leave the combat area. There's an argument about the quality of belligerence as well. There's also an argument to say that even if IHL and the conduct of hostilities rules apply throughout the territory of the country that does not necessarily mean, of course, an unfettered right to kill wherever the hostilities occur. You always have the possibility to take into account the principles of precaution, proportionality, etc, but also the principles of military necessity and humanity which would probably restrict the possibility to use force although it becomes very controversial the further away you move from collective hostilities.

Against the application of the conduct of hostilities rules outside or in the entire territory of the conflict even in areas far afield from the zone of hostilities is again possibly the unavoidable Tadic case. Tadic says that some of the provisions are clearly bound by the hostilities and the geographical scope of those provisions should be so limited. However, in later jurisprudence, particularly Kunarac, the ICTY doesn't mention that particular sentence anymore so it is not completely clear whether the ICTY would stick to that position. There is also, I think, an argument about the

very object and purpose of the rules on the conduct of hostilities which are meant to regulate collective hostilities which assume in a way a situation which is not peaceful. The background to the rules of the conduct of hostilities is not MONUSCO with respect to the Chechen wars but it is really a battlefield situation. So, there is an argument to say: I have a situation where there is really no legitimacy, no real reason to deviate from the normal rules protecting the right to life in the end then that could be avoided.

There is also an argument against it because the *lex specialis* argument seems to become less and less clear. On the one hand, we can say that IHL is the *lex specialis* but on the other hand, in the Nicaragua case, the ICJ only stated this for hostilities so it wouldn't answer that particular question. Then later it stated it more broadly and later still it abandoned it altogether. So, it is not entirely clear whether the *lex specialis* argument really helps in this respect.

But to conclude on that part I would say it's difficult to deny the applicability of all the rules of IHL in the entire territory of the party to a conflict. The question that remains and is unresolved so far and for which there are many arguments for and against is really much more about the relationship between the conduct of hostilities rules and the law of enforcement rules in such a situation.

The second question is the one about the applicability and the geographic scope of IHL beyond the territory of the parties to the conflict, so, in non-belligerent States, but assuming that in that non-belligerent State the intensity between the belligerents that exists in some States is not fulfilled. So, going back to international armed conflict, I think, the rules of armed conflict apply throughout the territories and they also apply on the high seas and in air space. I don't think there is a clear answer from the law of neutrality about the geographic scope of IHL – that is not what the law of neutrality tries to do – but the law of neutrality allows the belligerents to intervene in the neutral State if the neutral State does not fulfil its neutrality obligations. And I would say that that then assumes that if one State pursues the armed forces of another State into the neutral State then the assumption is that that would be done according to the rules of IHL.

In terms of non-international armed conflict, there is a very important controversy here, and the reason for this question is extra-territorial targeting and capture of individual members of non-state armed groups in third States. So, the situation you could have where you have a non-international armed conflict in Afghanistan and one of the members of the coalition then pursues, say, a member of Al-Qaeda in a completely separate third State which is not the territory of a party to the conflict – so, I'm not talking about the territory of one of the intervening States where IHL, I would say arguably applies.

The starting point, I think, is that traditionally NIAC is conceived as taking place within the territory of a State – that’s the wording of Common Article 3 and also AP2. So there would have to be some evolving practice and *opinio iuris* to depart from this *prima facie* limitation. As was mentioned earlier by the chair, it is obvious that we have all sorts of spill over conflicts that happen all the time and there seems to be a fairly clear state practice when conflicts spill over into neighbouring territory, where non-state armed groups are being pursued into the neighbouring territories where they are trying to retreat – imagine Afghanistan, Pakistan, for instance – then IHL of that non-international armed conflict at least continues to apply to that spill over. And then, as Noam explained very well, there is also the separate question as to whether IHL of international armed conflict also applies or not but I won’t deal with this because I am just dealing now with NIAC extension.

It has also been accepted in the Statute of the ICTR, which I think is quite important in terms of the *opinio iuris* that this reflects because the ICTR Statute extends to persons responsible for committing serious violations of IHL in the neighbouring States. What the legal basis is for this is not entirely clear. I would argue that it has been subsequent State practice to interpret Common Article 3. I would say that the logical rationale is that you have a continuous area of hostilities and so it would be a bit arbitrary, as Noam has already said before, to sort of cut off the middle of the desert and this hostilities zone and say, well, from here on you can’t carry out the exact same military operation anymore under the same rules.

So, I think the question of spillover conflicts is fairly easily answered. The question is about the geographic scope of IHL beyond the neighbouring States. So, between my colleagues and me this question is referred to as: O.K. you can creep or can you also hop? And here again, I think there are so many arguments for and against this geographical extension of the law of non-international armed conflicts and almost every one of these arguments has a downside and a pretty good counterpart argument. Amongst the arguments listed for applying IHL beyond the territory, to further afield non-belligerent States, is, first of all, the fact that we define non-international armed conflict according to the actors involved – state or non-state parties – and so why would this not be the same for the geographic scope. So, in terms of non-international armed conflicts what would matter is only: is there a belligerent relationship between a State and one or more non-state armed groups or actually among those non-state armed groups, because we have those sorts of situations as well, and if you have this belligerent relationship then the geography doesn’t matter, what matters is whether the hostilities that are being carried out have a nexus to that conflict.

So, there is also an argument in terms of the wording of Common Article 3 because this article speaks about conflicts in the territory of one of the High Contracting Parties and the argument made there is to say: Well, the emphasis is basically not on territory but on one of the High Contracting Parties. And so what you need is a conflict that happens in a High Contracting Party but as long as it happens in one of the High Contracting Parties then you have this non-international armed conflict and it is not confined to that territory.

There is also the object and purpose of Common Article 3 and the fact that the violence in non-international armed conflict should not be confined to a territory and it should not be limited to those who are in need of its protection just because of the geographical argument. So it is a protective argument but belligerents should not be able to retreat and basically find a safe haven by crossing borders and then not be able to be attacked anymore under the same rules that are actually defining the relationship between the parties.

There is also an argument to say that the role of IHL is not to confine and to prevent the spreading of conflict. IHL is meant to regulate the conduct of conflicts wherever and whenever they are happening. The role to confine the spread of armed conflict is that of *jus ad bellum*, the UN Charter and the law of neutrality but not that of IHL itself.

Of course, there is an argument against that namely that international law, after all, is based on the Westphalian order so far and that basically assumes sovereign States and confines the treaties to within the States. It is a bit in the spirit of article 29 of the Vienna Convention of the Law of Treaties that I have just talked about and when we try to look at state practices or the *opinion juris* about this – we have the United States who have made an argument about the extra-territorial applicability of IHL, subject, however, to other limitations such as *jus ad bellum* etc., in terms of IHL, but we don't really have such clear *opinio iuris* by other States. It is not so evident whether States would accept as well the corollary of this which is the lesser protection of their own civilian population even though they are a non-belligerent State just because 2 other belligerent States are starting to fight on their territory and again without the intensity of that violence reaching the threshold of a non-international armed conflict.

We also have to think about the protective scope of IHL, and Prof. Grignon has referred to this as well. Being an ICRC delegate, the protective scope of IHL is, of course, an important argument but we also have to bear in mind that if we don't have IHL it doesn't mean there's no protection at all because then the protection of human rights law also protects persons so it isn't as if you then fall into a non-protective void.

And then there is the argument of those already within the territory of a State who argue that outside the battlefield you shouldn't use IHL but

probably human rights law should prevail over IHL and if you extend that even beyond the territory of States, so the further away you move from the battlefield, the more human rights law will prevail over the conduct of hostilities rules under IHL.

When I look at all these arguments and all the different ways of coming to conclusions about these questions, what I notice is that in fact when it comes to targeting individuals in non-belligerent States, most of the reasoning leads to the same result, namely, you cannot target individuals. So, this could be either because you are saying: IHL applies but, on the other hand, the principles of humanity and military necessity are very far afield when you have a single incident of targeting, you will likely prevent the targeting of that person in a shoot-to-kill type IHL targeting. If you say there are no restrictions on IHL but human rights law prevails the further afield you move from the battlefield you come to the same result. And you also come to the same result if you say IHL is geographically confined to the territory of the State Party to that conflict.

So, if you were a judge and you had to decide a specific case the only thing you would have to decide is whether you follow any of those positions which lead to the same result or whether you follow the position where you say IHL is geographically unlimited and the principle of military necessity and humanity would not restrict the use of force in a non-belligerent State and human rights law would play no role in such a situation. And then if you think as well about *jus ad bellum* and you think that *jus ad bellum* doesn't provide any further restriction on that use of force – in that case, you would come to the conclusion that you have a difference in terms of the use of force on that. So, I will let you be the judge in that particular case.

**IV. Selected issues: panel discussion
on HRL and IHL relationships in IAC and NIAC**

Panel discussion on HRL and IHL relationships in IAC and NIAC¹

Françoise Hampson

University of Essex; Member, IIHL

It is very easy to point to the similarities between two bodies of rules and even easier to point to the differences. In other words, it should be acknowledged that both similarities and differences are present. It should be remembered that a similar end result does not necessarily mean that there is a similar reason for the rule in the two areas. Niels asked me to identify the elements that I should address. The first is the origin of the rules. The law of armed conflict is a much older body of law, international law, than any other that I know of. It pre-dates the existence of States and the existence of something one could recognize as international law. Whatever the impression given in certain quarters, human rights law was not invented in 1948, at least in terms of substance. It is based on domestic civil liberties and/or constitutional law protections. But as international law, one can meaningfully speak of its birth in 1948 with the Universal Declaration, unless you include the minority rights provisions in post-World War I treaties and the ILO treaties.

As far as the purpose of the two bodies of rules is concerned, the purpose of human rights law is to set limits on the exercise of power and/or authority between those with power and those subject to the exercise of that power. So almost by definition it assumes an absence of equality between the one with power and the one subject to it. The purpose of the law of armed conflicts is to avoid unnecessary suffering and destruction and to balance military necessity and humanitarian considerations in the conduct of military operations. Addressees – human rights law binds the States, *un point c'est tout*. But the law of armed conflict binds the parties to the conflict including, but not limited to, States. In other words, it also binds armed groups in most circumstances. As for the scope of the application, human rights law applies in all circumstances, including war or other public emergency but what is meant by human rights law, the scope of the norms and the interpretation of the norms, will be affected by the situation and may be affected by derogation. The law of armed conflict only applies during armed conflict and belligerent occupation. One of the areas where there is a marked difference is implementation and enforcement. Human rights law is implemented through national legislation, policies and judicial decisions and it is enforced through the monitoring of compliance with obligations by treaty bodies and other mechanisms – don't forget the UN

¹ Text not revised by the author.

special procedures – through individual complaints under some human rights treaties and through the possibility of inter-State complaints. Whilst it hasn't been used at international level it has been used at the regional level. Most regional complaint mechanisms deliver binding legal judgments but the international mechanisms produce opinions. Obviously, the ICJ can also pronounce on human rights obligations whether in advisory opinions or in contentious cases. As far as the law of armed conflict is concerned, its implementation occurs through domestic instructions, training procedures and processes and legislation. It is enforced principally through domestic, civil and criminal proceedings under either ordinary or military criminal law.

International enforcement is in practice, I was going to say remarkably weak but it would be fairer to say a disaster area, and ineffective. It can, in theory, occur through the ICJ, the IHFFC, Commissions of enquiry and international criminal proceedings. It can also occur indirectly through human rights bodies. One reason why applicants are using human rights bodies, in effect, for the enforcement of IHL, is because there is nowhere else to go. If you want to stop us doing it, provide somewhere else to go. These similarities in differences I was asked to point to are well known and in my view of largely academic, in a pejorative sense, interest.

There is something else which is much more important in practice and likely to be a problem and I'm slightly troubled that it gets less commented on than those other elements I have just referred to. Different subject areas in international law develop their own legal subculture, their way of interpreting things and their way of handling provisions. That's also true of domestic law. The different stakeholders are so used to their own subculture that, understandably, they take it for granted and they are only half aware of it. The legal subculture affects how the law is interpreted and, therefore, how it is applied in practice. The human rights law and the law of armed conflicts subcultures are radically different. Human rights law has a presumption in favour of the right, limitations are to be interpreted restrictively, that means that human rights law treaties are treated as living instruments which favours an etiological approach to interpretation.

The law of armed conflict has no presumptions. The balance is achieved in the way in which the rule is expressed. There's no scope for favouring one side or the other. That favours an emphasis on textual interpretation.

There is a further difference within the law of armed conflict between norms on the conduct of hostilities and those on the protection of victims. The rules on the conduct of hostilities are addressed to the mind of the commander at the time of an attack. They are not tools designed to be applied for the benefit of hindsight. Those on the protection of victims on the other hand largely impose obligations to avoid a prohibited result. This difference in approach to the interpretation of the law is really important.

There is a risk that human rights bodies in good faith will interpret a law of armed conflict text in a human rights way. There is equally a risk that the armed forces will interpret a human rights treaty obligations in the law of armed conflict way. That I would submit is likely to lead to far more problems than the other issues I mentioned.

How can consensus be reached on what law applies in what situation?

We first have to identify who's going to be involved in building this consensus because it's not just a question for States and their armed forces, even though States are used to having a monopoly of influence on international law. It's also going to involve the treaty and non-treaty human rights mechanisms, other international courts and indeed national courts. The ICJ has made it clear that it isn't a matter of applying either one or the other body of rules; it's more complicated than that. Nor is it a matter of what applies in a particular situation, an international armed conflict or a non-international armed conflict. It's going to depend on the particular issue involved in that situation. So if Darren was saying in his answer of the previous question, that in international armed conflicts, state on state, there is no need to carry out an investigation, I think that's an over simplification. I think there is no need to carry out an investigation where it's absolutely clear that it was a lawful killing but that's not the same thing as saying a killing in an international armed conflict.

So I think it's a complicated question. We are still at the very early stage of establishing what applies when. And at the moment, the problem is that the human rights mechanisms are making most of the running with States playing either no role or an obstructive role, denying they have jurisdictions saying they can't do this, they can't do that instead of trying to help them find a way forward. If States and armed forces want to influence the process, they need to engage with it in a much more constructive way than at present and engage on a much broader front. It means not only engaging with treaty bodies but also with non-treaty bodies. That means responding to draft general comments, responding to draft basic principles or guidelines as well as making third party interventions, not just interventions in cases in which States are involved. I think it would be very useful for two reasons if States do this jointly. First of all, I think it would have more clout with the human rights bodies if a group of States made a joint representation. Secondly, it would seem to me that it would also reduce the effort for each individual State. So you get two benefits from it. There is a need for these bodies to identify specific sub-principles which can guide both judicial bodies and States and armed forces but these principles need to be plausible. In other words, they won't always be that which most suits

armed forces, they've got to be liveable with, because if they're not liveable with that's just bad law. But it may not always be something that is convenient for armed forces. I'm reasonably confident that in twenty years' time there will in fact be a consensus. I think getting there will be painful, I think it would be less difficult if States engaged in this process, particularly when you're getting draft general comments, that kind of thing, it's the architecture, it's affecting the attitude where human rights bodies come from.

Why does it matter? I think there is an awful lot at stake for all parties. Some of the human rights bodies deliver binding legal judgments. If you've got a problem with a judgment you nevertheless have to give legal effect to it.

Now, the views of human rights bodies, especially if they end up criticizing what the armed forces have done, tend to be perceived as having more legitimacy than the views of armed forces. It's vital to the armed forces that their operations are not de-legitimized as a result of some of these proceedings, so they've got to make sure the right test is applied so wherever they need to do something, they are, in fact, allowed to do it. So, it's important for the armed forces and the State that they are not losing cases they shouldn't lose.

I would suggest that human rights bodies should also pay attention because it's equally important to them not to deliver judgments and opinions that cannot be operationalized because in that case, the judgments are not going to be respected and what starts applying just in the area of the relationship between human rights and armed conflict will leak into other areas. So, there is a huge amount at stake for both parties but in that case it means you need to roll up your sleeves and get stuck in and work with them not against them.

What is the impact of IHRL on military operations carried out in IAC and NIAC?

First, I can understand the concern within armed forces – what's this strange human rights stuff that nobody can actually tell us what it is beyond the fact we may have a responsibility? I think it's the role of military lawyers and the role of officers in the armed forces to emphasise to the ordinary soldier that he has nothing to worry about under human rights law because anything that ought to be criminal is probably already criminal under national law or international criminal law, and in some cases under military law. So, distinguishing between the general human rights liability of the State and the issue of individual liability is important.

Second, I think the issue of the impact is going to be very, very different in international and non-international armed conflicts. In international armed conflicts, it is not that there is no role for human rights law, but generally speaking for anything related to the conflict, I think that it's likely that a human rights court will give the law of armed conflicts precedence, not a unique role, but precedence. So, that means, in fact, operationally there won't be a huge impact beyond things like due process before internment review bodies, things in that kind of area you may be required to take account of human rights law.

In non-international armed conflicts, I think the position is going to be much more difficult, especially if you include extraterritorial non-international armed conflicts. There, I think the only area where LOAC will have precedence will be when you are dealing with the conduct of active hostilities where there is a high intensity, for example, sustained and concerted operations, or in areas where the State has no control, a territorial control. In those areas, I suspect that the law of armed conflict will have precedence. In all other areas, I suspect human rights law will have precedence but this is human rights law taking account of the situation and taking account of derogation. So, there is flexibility in human rights law.

The next point I want to make is an important distinction that I'm not sure has been made. It's not simply that you need to go around investigating criminal behaviour. When you are looking at compliance with human rights law, and I could also suggest the law of armed conflict, you need to be monitoring the effects of your operations to see if what you expect to happen is happening. If routinely you find more civilian casualties than you expected then maybe there is something odd about your targeting process. Maybe there is something that needs to be looked at with regard to your assessment of proportionality. That isn't necessarily saying anyone has committed a crime. But there is something for which you'll be called to account under human rights law (see the decision in McCann and the killings in Gibraltar).

Now, that I think is implicit in the law of armed conflict but there needs to be some mechanism for reviewing not just criminal behaviour but also the national way of doing things, if you like, policy decisions, where they're having an impact you didn't expect.

I think one important bit of the impact of human rights law, to be terribly sordid here, is to make sure your armed forces keep a paper trail and you know where to find the documents when they're actually back home because one of the big Commissions of Enquiry in the UK seems to be caused simply because the MoD could never find the papers for a long time and as a result the Courts thought they were hiding them. So, knowing where the stuff with which you can justify yourself is will make a practical difference and it is relevant for accountability.

A last point to make concerns a group of people involved in a project at Chatham House under the chairmanship of Elizabeth Wilmshurst who are trying to produce a manual on human rights in armed conflict where all these questions will be answered.

If IHRL is applicable, what is the position of non-state actors?

Non-state actors under human rights law have no human rights treaty obligations. Before armed forces say this is unfair – what about the equality of belligerents? – do remember that under national law, the organized armed group is criminalized whatever it does and indeed its very existence as an organized armed group may be a crime. So it is not over all but there is an inequality. So don't bleat about that if you think there's an inequality. There are two situations where actually an organized armed group may find itself directly affected by human rights law: one is where, in cases like FARC in Colombia, Tamil Tigers in Sri Lanka, an organized armed group is in control of a territory and is running things. There may be then an expectation in some quarters that they respect human rights principles. They won't be subject to the mechanisms, the treaty mechanisms, because they are not a party to the treaties but you can invoke human rights in relation to them. And the second example is where in fact an organized armed group is under either direct control of another State or is basically a puppet government or even is under the decisive influence of another State. For example, the influence of Russia in south Caucasus and Transnistria, and in those cases, that other State will have human rights responsibilities rather than the armed group. The armed groups themselves generally have no legal obligations.

Panel discussion on HRL and IHL relationships in IAC and NIAC

Marten Zwanenburg

Legal Counsel, Ministry of Defence of the Netherlands

What is the relationship between IHL and HRL?

From the perspective of a European country having participated in various overseas involvements how do you deal with the potential inter-relation of IHL and Human Rights Law in these contexts?

Perhaps “to deal with” is not the correct verb, perhaps “to manage”, I would say, might be a better way of describing it, because it is a very complex issue and that, of course, in itself is a truism.

I thought because we are doing this by way of discussion, I might just highlight three general themes that I think are important for The Netherlands, and I would like to note that I am speaking in a personal capacity.

One is that when we are talking about the relationship between IHL and Human Rights that almost presupposes that both regimes apply and that, of course, is precisely the question. Certainly, for a legal advisor working for a State, who has to advise before armed forces do something, that would be quite difficult and much more difficult perhaps than for a court to do so after the fact with the benefit of everything that has happened with hindsight, with time for reflection, etc. Certainly I would say the European Court of Human Rights has not made our life easier in the sense that the boundaries of where the European Convention seems to apply, seem to be moving all the time. It is very difficult to pin it down and of course as a legal advisor to a government you have to point to the risks and so you have to be aware that perhaps there is this trend of the Court of extending the boundaries of the European Convention further and further and you have to take that into account.

The same goes for Humanitarian Law. Of course, we all know that whether or not it applies depends on the facts and not on what a government says. All the same at some point in planning for operations or undertaking military operations someone in government or advising the government has to say “ok, now this is where we think Humanitarian Law applies”. Of course, they have to look at the facts, but nevertheless that decision has to be made and I think the practice in ISAF in Afghanistan was a good example of how that can lead to different results where

different States at different times considered that IHL was or was not applicable. So that is not always easy.

At least for The Netherlands I think the starting point is that both IHL and Human Rights Law can apply in extra-territorial military operations, in certain circumstances of course. How they relate to each other and how that reflects on military operations in some cases can be planned for in capital before actual military operations are undertaken and then I would even go as far as to say that they sometimes have to. For example, when we are talking about detention, detention is very resource intensive. I think we heard that yesterday and you have to do some planning in advance so the relationship between IHL and Human Rights Law in that field will have to be addressed beforehand to the maximum extent possible. On the other hand, when we are talking about the use of force, for example, I think much more will depend on the actual situation in the field. Therefore, determination may come down to the determination of an actual commander in the field which again, from a State legal advisor's perspective, points in the direction of the importance of having legal advice available in the field. That is why The Netherlands deploys military legal advisors with its national contingents when they operate abroad. Of course, there is a certain minimum limit because for a very small unit, for small countries like The Netherlands that simply would not be possible. So that is another important theme from my perspective.

Perhaps the last theme is the fact that for a country like The Netherlands we almost as a rule operate together with partners in a multinational context which very much brings its own challenges and brings different States to the table that have different legal frameworks and have different interpretations of legal frameworks that may apply to different States. I think later this panel will go into how that may play out and how they can be reconciled, but just for now, I would like to point out that in a multinational context, very often the main documents guiding the operation will be the same for all States and to a certain extent legal obligations will have to be taken into account. However, where they cannot be reconciled within those documents there are certain ways of managing differences, for example, by using so-called national caveats where States say "I am not going to do X, even though under the operation plan I might be able to do that".

How can consensus be reached on what law applies in what situation?

When I thought about this question I have to admit that I was thinking very much from a State perspective and how we deal with this question in relation with other States so most of my points will go to that question but I will make a few other remarks. I think the starting point is, as I said before,

different States have different obligations and may have different interpretations of those obligations. That is a fact of life and so we have to deal with that particularly in multinational operations. I also think that there is a very important role for States in interpreting their obligations. At the end of the day it was their consent to be bound and I think that how they perceive how those obligations should be interpreted is a very important factor. In that sense, I suppose one good thing that came out of the recent Hassan judgment by the European Court of Human Rights was that subsequent practice by the States parties was taken into account. Please note that I do have some other bits and pieces of that judgment that I might not agree with.

Of course, from a State on State perspective, given those differences between obligations and potential differences in interpretation on the one hand, and the fact that we cooperate very closely with other States in military operations where lives are at stake on the other, it is very important to exchange views and try to at least be on the same page. There are a number of mechanisms that are available for that and I divide them into those that are somewhat more abstract or general where we exchange views, as do, for example, the legal advisors of Ministries of Foreign Affairs in COJUR (European Union Working Group on Public International Law). There is a number of other avenues for that in the context of Humanitarian Law. Specifically, we really only have the International Conference every four years at the moment to discuss IHL issues but as I am sure you are all aware, there is an ongoing process which might lead to a meeting of States parties every year or every other year and I think that would be a very important opportunity to talk about IHL and synchronize our views. Then there is the more specific level of specific military operations. From The Netherlands' perspective, we very much operate in a multinational context, in the context of the European Union or NATO. Within those organisations there is a whole process of planning operations in which legal considerations are taken into account, when, as many of you will be aware, the main documents are drafted for an operation. The operation plan and rules of engagement go through a whole process of drafting in which Member States, contributing States, have a role to play. At the very end of the process these documents have to be approved by the organs of the international organization in which the Member States have a seat. So, that whole process of drafting such documents provides an opportunity to agree where perhaps differences might exist. Where differences do remain, where they persist, there are a number of ways to manage such differences as I mentioned. One of them is the possibility of entering caveats but there are other ones too.

I have spoken very much from a State to State perspective and, as I said, I would just like to make a few remarks where other actors come into play.

I think, very rightly pointed out by Prof. Hampson, that particularly courts have an increasingly important role to play. I think Prof. Hampson was also right to point out that States should engage with courts and with human rights monitoring bodies and try to sensitize them to the military environment and what that entails, and try to at least make sure that they are aware of the environment in which their judgments will have to be applied. Thinking, for example, of The Netherlands, public prosecutors who deal with military cases are flown out to theatres of operations quite regularly so that they have what my military colleagues call situational awareness, that they are aware of the environment in which the military operates, in which the decisions are taken that will land on their desk for review. Perhaps, by way of example, it might also be useful for judges to go out to theatres of operations to have a sense of the operational environment that they are sometimes called on to deal with. I am not saying that will change their perspective entirely but I think it might be useful and, of course, also *vice versa* I do agree with Prof. Hampson that there is a very important role for the States to engage with Human Rights monitoring bodies. In that context perhaps Prof. Hampson also mentioned general comments. I understand that the Human Rights Committee is now going to work on updating its general comment on the right to life which of course is very important in the context we are talking about, so I invite all State legal advisors here to follow that process closely and to engage closely with that.

And then, finally, I would point out that there is a very interesting project that may have a role to play here as well. We will be hearing more about it later today. It is led by Professor Sarah Cleveland and Sir Daniel Bethlehem and is in short sometimes called the harmonization project and looks at how States could undertake to apply the rules of IAC in a NIAC as a matter of a unilateral declaration and how that would work out in practice. I think that would be very interesting. It certainly won't be *the* answer but it might be a piece of the puzzle that would be useful.

What is the impact of IHRL on military operations carried out in IAC and NIAC?

Did The Netherlands impose or enforce human rights standards under armed forces operating abroad explicitly?

I shall be very brief. The answer is yes. I will elaborate just a little bit. Yes, we impose and yes it is imposed on us. From my own experience I remember writing, for example, detention guidelines with IHL books and human rights books next to me, so that's a very practical example. Some of

you may be aware of the recent Jaloud judgment against The Netherlands by the European Court of Human Rights. This concerned the issue of the investigations in the context of article 2 of the European Convention and that judgment is now something that The Netherlands is working on implementing and that will impact the way our Royal Marechaussee, or military police, will investigate incidents involving the use of force. There is, thus, a very clear and direct impact. Do we enforce it? Yes, we do but I would say that the main instrument is criminal law. So, not directly human rights which is of course mostly addressed to the States but through criminal law. But again from my personal experience, I find it interesting that when I started working for the government, there used to be a standard clause in our soldier's cards, our rules of force instructions to soldiers that they should report any suspected violation of IHL and a few years ago, we started including human rights in that as well. So again, the short answer is, yes.

If IHRL is applicable, what is the position of non-state actors?

For the question whether States should respect human rights it doesn't matter whether or not non-State actors have human rights obligations because there is no reciprocity in human rights law. And for the individual soldier, I doubt that a Dutch soldier in Afghanistan when considering the possibility that he could be captured by the Taliban, the first thing in his mind would be whether his human rights would be respected by the Taliban. So again, I think it's a bit of a moot question.

Panel discussion on HRL and IHL relationships in IAC and NIAC

Ahmer Bilal Soofi

President, Supreme Court of Pakistan, Islamabad

The application and relationship of international humanitarian law (IHL) and international human rights law (IHRL) in situations of conflict and counter-terrorism operations is relatively easy to identify and demarcate from an academic point of view.

However, in my experience as a practitioner, this distinction is largely irrelevant from the perspective of domestic stakeholders who tend to perceive such situations mostly with reference to domestic law.

The question, therefore, is whether a statute is available in a state which authorises the state itself to determine the nature of conflict or the nature of the use of force? Whether it spells out the relationship or mechanism to distinguish law applicable to a conflict ongoing in part of the state and to a law enforcement operation that may be conducted in other parts? In countries which have detailed implementing legislation relating to IHL, it is relatively convenient to determine the nature of conflict as it is an executive function as provided by law and such a statute proves to be extremely helpful in analysis of the relationship between IHL and IHRL.

If, however, such a statute is not available, then there is hardly any temptation on behalf of the executive to engage in rather academic and largely viewed as distracting discussion regarding the application of IHL versus that of IHRL in a given situation. Often the States lack a sophisticated legislative structure relating to IHL and find it increasingly difficult to make a judgment call of IHL or IHRL in counter-terrorism or counter-insurgency operations.

This is one reason why Pakistan has not yet been able to make a clear determination of the nature of its conflict with the Tehreek-e-Taliban Pakistan (TTP) and its associates since it does not have a comprehensive implementing law for IHL. For example, the existing Geneva Convention Implementing Act of 1936 is rather obsolete. The lack of legislative clarity means that the question of the interplay between the conduct of hostilities and law enforcement paradigms remains largely a moot point and is interpreted by the courts and the executive differently at different stages and time frames.

It is always easier for any state to refer to its own domestic law and its provisions that regulate use of force by the functionaries of the state and handle its consequences.

This is what I call ‘domestic humanitarian law’ or the elements or scattered provisions of domestic law that regulate conflict and the use of force whenever it is carried out within the state. It is always easier for any decision maker in any state to recognize and accept the IHL principles once he is confronted with the similarities of the said principles with the domestic law of the state. This is an issue of approach and not precedence.

The basket of domestic humanitarian law of Pakistan in my assessment would include provisions from the Police Act that authorizes the use of force and any rules issued under the same. Likewise relevant provisions of the Army Act that define ‘enemy’ or provide for offences will also be part of domestic humanitarian law. Another example of this body of law can be the War Injuries Act, the Pakistan Names and Emblem Act, the law regulating compensation in case of damage to civilian property. Furthermore, penal provisions like ‘waging war on the state’ and ‘offences against the state’ should be viewed as part of domestic humanitarian law.

Given that non-international armed conflicts (“NIAC”) represent the majority of armed conflicts today, there is, in my assessment, scope for examining the potential of domestic humanitarian law frameworks which can further the global discourse on the interplay between IHL and IHRL.

Another important factor is the role of formal intimation or notifications in conveying the status of a conflict. As I see it the notification of a conflict by a state is merely a declaratory act and not a constitutive step. Still, it does play an important role in terms of public perception.

In the absence of such notifications, it is left to academics or those who analyse such situations to make a judgment call on the nature of the conflict, the extent of its territorial application and the application of IHL or IHRL as the case may be. But reliance by a state on certain provisions of its domestic law can provide a much clearer picture of the nature of the situation and the applicable legal framework. For example, reliance by a state on emergency provisions in its Constitution can be indicative of the nature of the situation, its duration and its territorial application. The imposition of a state of emergency under the Constitution enables the state to derogate from fundamental rights under the Constitution for the duration of the emergency which effectively means derogation from the IHRL paradigm.

Situations of lesser gravity not involving formal notifications of emergency can also be indicative in examining the relationship between IHL and IHRL. For example, a regime that calls the armed forces in aid of civil power may also be seen as a *de facto* emergency, as civilian law enforcement mechanisms fail and the armed forces are required to restore public order. The precedence of IHL over IHRL or otherwise becomes even more difficult to determine in such lesser threshold situations and the views adopted by academics frequently clash with those of state functionaries.

In the case of Pakistan, Article 245 of the Constitution enables the government to call in the armed forces in aid of civil power. The current military operations by the Pakistani Armed Forces in the Federally Administered Tribal Areas of the country are taking place under this constitutional mandate and it is within this legally permissible zone of Article 245 that Pakistan is undertaking its counter-terrorism/counter-insurgency measures. Nevertheless, there is an increasing impact of human rights on such operations as evidenced by recent legislation regulating the armed forces and civilian armed forces in such situations. The judiciary has been particularly active in favouring the enforcement of a human rights framework even in the context of what would otherwise be viewed as a NIAC. But again there is not sufficient clarity. Even if the judgements coming out of Peshawar High Court are examined, it will be less clear as to how the judiciary applies the IHL or IHRL framework to the given case in hand.

There remain, however, certain areas where there is still confusion as to which legal framework should apply. Three specific examples in the case of Pakistan come to mind.

Firstly, the legal status relating to tensions on the line of control between Pakistan and India which has seen increasing civilian casualties from firing and shelling incidents between the armed forces of the two countries as well as accusations of infiltration by non-state actors.

Given the state of readiness of the two armies, the status of the firing and the role of non-state actors can it be termed a limited IAC? After all, two state armies are eye ball to eye ball, shooting at one another from close range and leading to casualties both military and civilian. Not much thought has gone into this so far. Yet despite this territorially limited hostility, bilateral relationships, such as trade, travelling between both states continue.

On the Afghanistan front, we have a similar situation where we have non-state actors including the TTP and Al-Qaeda who are moving back and forth across the border and dealing with this requires collaboration between the military and the law enforcement agencies on a whole range of actions. However, if such militants are arrested by the police present in these areas, will the human rights paradigm apply or the detention framework of IHL?

Finally, in the context of US drone strikes inside Pakistan – what does that mean? There is a judgment coming out of Peshawar High Court declaring them to be against international law and directing several remedial mechanisms.

In summary, there is a need for collecting evidence of state practice in terms of how it applies domestic humanitarian law and human rights law to a certain situation, and how its judiciary interprets the same in the facts before it. This will enable the scholars to be in a better position to examine

state practice and infer how principles of IHL, being *lex specialis*, can be evolved more clearly and address issues such as the duration of such application even in NIAC.

Panel discussion on HRL and IHL relationships in IAC and NIAC¹

Darren Stewart

Assistant Director Administrative Law, British Army Headquarters, Andover; Member, IIHL

In the first instance, the practical effect of concurrent applicability of Human Rights and International Humanitarian Law (IHL) for the soldier in the tactical context, as Professor Hampson alluded to, is often not significant in that, as most extreme example, a war crime will also constitute a breach of Human Rights.

Therefore, it is necessary to seek conduct from soldiers that clearly did not amount to war crimes and, in doing so, generally speaking, soldiers will not be acting in a manner which is also inconsistent with Human Rights standards. I wish it were that simple, but sadly it is not. And I think in many respects, as Dr. Zwanenburg mentioned, the extent of the application of the Human Rights obligations is the factor which will add significant complexity to the way in which we go about planning operations and requiring the conduct of soldiers on the ground as a result of how we assess the extent to which Human Rights obligations apply.

Now, I come from a country which has a fine noble tradition of upholding the rule of law and with a very active judiciary and bar and those of you who are perhaps familiar with the debate in the United Kingdom over the last 10 years will know that the question of the applicability of Human Rights obligations in an extra-territorial context is something which is being subject to considerable litigation.

I will address specifically some thoughts in terms of the impact that this has had on military operations certainly from my perspective, but what I need to say from the outset is that, being in the armed forces of a democracy, it is incredibly important that you respect, as Professor Soofi suggested, your national law and your requirements in terms of the legal structures you have to operate within. I'll come back to the point Dr. Zwanenburg made earlier in relation to complexity and having to manage. Certainly, from my perspective and observing the last decade or so in relation to the British Army's involvement operations, that has meant that we've had to invest considerable amount of time and effort in thinking through a number of possible permutations without necessarily knowing what the answers were in terms of what courts would finally decide with respect to the application of Human Rights obligations. This is in one sense

¹ Text not revised by the author.

unhealthy, in that it adds friction in the sense of uncertainty. However, uncertainty is part and parcel of military life and war or armed conflict is certainly an uncertain place. So we just have to deal with that.

There are two areas where I think that concurrent applicability, depending upon the classification of the conflict, may have implications in terms of the way in which military operations are conducted and those are not surprisingly in relation to the use of force and in relation to detention operations. So, we have to consider questions with respect to the use of force whether or not, if we are in an international armed conflict scenario in terms of a conflict classified as an international armed conflict, we need to give consideration to, in our case because we are State parties to the European Commission of Human Rights, the extent to which those obligations and rights articulated in that treaty bite on our actions in conduct. So, for example, in relation to the conduct of investigations, if you have a combat scenario, that is, an action where two military forces opposing each other engage – is there a requirement after that to conduct article 2 compliant to investigation where deaths may have arisen as a result of that engagement? I think when you're talking on State on State, the position is: no, there isn't but then, of course, it becomes a sliding scale as you move into non-international armed conflict where the clarity with which one might say there is no obligation, I think, tends to become much greyer.

Similarly, in relation to the conduct of detention operations where traditionally in an international armed conflict prisoners of war are treated in accordance with the Geneva Conventions or the Third Geneva Convention particularly, and the treatment of civilians or security detainees is covered by the Fourth Geneva Convention, there may be some residual human rights obligations in terms of your interaction with the civilian population if you are not in a state of occupation. But generally speaking, it is provided for although I am falling into Prof. Hampson's legal sub-culture interpretive approach here I accept. But you tend to have a fairly clear rule set on which you can provide clear guidance to the commanders.

The scenario is very different in non-international armed conflict where the legal basis for your intervention is something which will be relevant to your consideration, for example, consent. If you are operating in a country with the consent of that government then there must be an arrangement between the sending State and the receiving State, as to what domestic laws of that country apply to the sending State forces and other matters that may include consideration of Human Rights obligations. In that context, the treatment of detainees in a non-international armed conflict becomes particularly challenging and complex because you have a scenario where the receiving State's domestic laws would tend to be the primary legal base or legal structure we would apply to these detainees. Yet, as a foreign force

operating in that country you are taking detainees where the legal basis for the taking of those detainees may not necessarily be founded or based on that country's laws as such. Recent litigation in the United Kingdom has considered this topic and in a manner where I think we still have some resolution to go with respect to the legal basis in a non-international armed conflict, to be able to take detainees whether it flows as a fundamental principle of IHL, past customary law, or whether the specific provision has to be based either in the sending State's law or in the law of the receiving States.

I think those are two areas where the concurrent applicability of IHL and Human Rights Law causes challenges for armed forces and where, as Dr. Zwanenburg said earlier very well, we are required to manage depending upon the type of conflict we are in – often we are not given much guidance in relation to what that conflict is and the classification of that conflict – and indeed, in very complex circumstances in order to give as clear guidance as possible to soldiers.

The military focus will generally be more on force cohesion and military accomplishment rather than necessarily agreeing on a common legal position, certainly at the operational level. This is largely because most of these decisions, it will be accepted by the commanders, have been made either in the forging of the alliance in the process of, as Dr. Zwanenburg mentioned, devising an operational plan or an overriding operational construct. Rules of engagement within their national capitals are also important to commanders of the sending State's troop contingence. All things considered, I think the problem left to the commander on the ground is trying to bring together disparate approaches and a manifestation of those different approaches, and occasionally fuzzy thinking I would suggest, from some capitals. This is entirely understandable because, and I would say this of course having been in a sub-culture focusing on context and textualizing the application of law, but I do think that in many respects you cannot think through every possible permutation in terms of how events on the ground may unfold. Because of that, the commanders are very much focused on understanding what the different bits of their force are prepared to do and that is very much the case in a multinational operation. In a single sending State operation it is much easier as the concept of a unified command of that commander is much more straightforward. In a multinational operation or, I would add because this is another facet and I think increasingly commonplace in operations, where you have multinational forces operating beside each other, for example, a NATO or a EU force or an AU force operating beside a UN force, there is an increasingly significant level of complexity particularly when you start to look at questions with respect to different legal approaches on basic issues such as the use of force or detaining operations or indeed just simply

the way in which operations are conducted – can you conduct offensive operations at all? Are you taking an entirely defensive posture? In such a scenario commanders have to understand what the caveats are of the States who are sending their forces that are part of or comprising his force. They are often declared if there has been a process such as in NATO where rules of engagement are designed at the NAC level with the contribution from all States presumably mindful of their obligations, their legal obligations in the field of IHL and Human Rights, that you would not see too many caveats or that those caveats would be well known because they are articulated as part of the debate that produced the unifying rules of engagement governing that forces' operation.

Unfortunately, this is not often the case, and it is a bit of trial and error on occasions, my experience has proven that you often have to get a commander to prod a particular nation to do something, to find out exactly if they are prepared to do that or if there are additional restrictions or caveats that will fall out. Of course, conflict is dynamic, things change and that will influence the reactions of States.

So, understanding what those restrictions are is the first priority for a commander. A caveat table is often produced to identify what States are willing to do or won't do based upon what their national positions are. Then based on that information the commander must effectively troop to task – he must make sure that he is able to achieve his overarching mission accomplishment which often includes the cohesion of the forces. So, not only has he to achieve x results but he also has to achieve x results bringing everyone with him on the way which is not always an easy outcome to achieve. He must, therefore, in order to achieve his mission, make sure he is up giving to the constituent parts of his force tasks which are going to fall within the restrictions they have articulated or which they articulate as we go along of what they believe the legal constraints are in terms of what they can do. It becomes an incredibly complex exercise in diplomacy often by the commander and many commanders feel quite frustrated by that but I think at the higher levels certainly what we in the military would call the operational theatre level command that is part and parcel of it.

In some senses you can say it is not a new phenomenon either. You can look back to the grand coalitions of the Napoleonic wars and perhaps even before that where, not necessarily due to a legal basis but to a political basis, there were certainly differences of approach that commanders had to take into account as part of forging a coherent force to achieve an objective. But really, it is understanding what the limitations nations feel they have from a legal perspective and what their respective obligations are that is the key factor in shaping how a commander will use them.

I think the final observation I would make is that it is good to have a unifying rule of engagement in relation to NATO where it is part of a

consensus process or even in the UN where it is imposed out of New York as a set of ROE that nations have to sign up to. But ultimately, most States will take the view that their obligations under IHL and increasingly and certainly their obligations under Human Rights law are their obligations, they are States' obligations and as a consequence ultimately they are the ones who will be held to account. There wouldn't be much success in trying to hold organisations like NATO, the EU or, heaven forbid, the UN to account in circumstances where, for example, there was a breach of Human Rights obligations; it will always be the State. So it follows as a result that States will always seek to articulate and limit their forces operations based upon what their understanding of the legal obligations is.

I will just add that in our experience in the UK, the fact that judges have not got a particularly detailed understanding or knowledge of the conduct of military operations is an inevitability of an aging population and the reference back to the Second World War where there was much wider civil population experiences, of course, fading. It is, therefore, incumbent on us to make sure in our pleadings before the courts, actions which are properly brought before courts, I certainly would not suggest that we have never considered that construct of a special court to deal with these sorts of matters, and in the United Kingdom's context, the crown immunities, the crown proceedings act removed certain combat immunities being one area possibly although there is litigation looking at the extent at which that immunity exists.

I think it is the responsibility of the parties, of the State, in its pleadings before the courts to make sure that it is able to articulate that context and bring evidence to assist the judges in understanding that context so when they do seek to then apply a domestic statute or domestic legal principles in the resolution of a taut action, perhaps in the UK context or some other action of Human Rights obligation bridge, they are able to do so in the correct manner and I think that is the key in terms of addressing the concerns which is certainly part of the wider debate in the UK.

**V. Selected issues:
the use of force in IAC and NIAC**

The possibility and the challenges raised by the importation in NIAC of the IAC conduct of hostility rules

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The good news is that we have one point on which we all agree, namely that the legal regime applicable to non-international armed conflict could benefit from a sounder structure and is in need at least of some improvement.

The regime for non-international armed conflict has always been a makeshift regime. It has remained incomplete, traditionally devised in the shadow of international armed conflict. We have never endeavoured to look at the particular specificities of non-international armed conflict. Certainly there is some room for improvement.

Talking about “the possibility of importing international armed conflict rules into the legal regime for non-international armed conflict”, I wondered what it is that the organizers want me to discuss. Quite clearly, this is what has happened all along. I would argue that today – especially in the area concerning the conduct of hostilities – we have reached 95 per cent congruence.

So, maybe we shouldn't be focusing on the “possibility” of importing IAC rules into the legal regime for NIACs but instead focus on the question whether it is wise, whether the rationale for convergence that has been applied in the past, is still applicable today. Does it still work in the same way? Should we continue on this path of convergence, of merging international armed conflict rules with non-international armed conflict rules in the future? I think that's the question we should be looking at, and this will be my main focus. To do so, I shall take two simple steps. I shall look into how this simulation project unfolded historically. What was the rationale? Who were the drivers for convergence, and where has that led us today? And then, more importantly, in my second step, I will turn to the remaining contemporary challenges: What are the challenges of this convergence specifically with regard to the conduct of hostility rules? How is it challenging if you bring international interstate war principles to bear in a non-international armed conflict setting?

Before I do this I would like to make just two brief preliminary remarks to set the stage and to remind us all of what it is that we are after because it is very easy, I find, to lose sight of the forest for the trees. Harmonization is

only one among different competing models of remedying deficiencies of non-international armed conflict law. Approaching this whole issue through the perspective of human rights law is the evident kind of counter trend. The gaps that we have in the law pertaining to non-international armed conflicts can be filled with IAC law, or you can turn to human rights law. There are arguably other trends in between but the point is, harmonization is only one among different trends and options, and, therefore, not an end in itself. And none of these trends are ideal, neither harmonization nor filling the gaps in human rights law. Why not? Because neither international armed conflict law nor human rights law was ever designed originally to regulate non-international armed conflict. Ideally, we would sit down, start a norm development project and ask ourselves a few very simple questions and address them from scratch. What are the humanitarian problems we face in contemporary conflicts? What are possible (factual) options to mitigate these problems? How can we turn these into law? In other words, we would be asking: what are the rules that are optimally tailored to govern modern non-international armed conflict? This is the issue we are after; not harmonization as an end in itself. This is what we should not lose sight of. We are not harmonizing for the sake of harmonization. We are not *lex specialis* IHL and human rights law because it's academically challenging. No, we are pursuing the question of what rules are optimally tailored to govern non-international armed conflicts. We are not taking the easy way because we are not living in an ideal world. We are not addressing this question head on and from scratch (as we should). Instead, we are making quite a detour. We are trying to find the optimal legal regime for non-international armed conflict through the prism of international human rights law and their relationship to humanitarian law, or through the importation of international humanitarian armed conflict law into non-international armed conflicts. That complicates the entire exercise and necessitates numerous adaptations as neither human rights law nor the law applicable to international armed conflicts were originally designed to regulate non-international armed conflicts.

It is like being asked to build a BMW, but to build it with the parts of a Mercedes and a Volkswagen. These are all great carmakers, but when you combine these parts, you will have constructed a Bmcedeswagen, and that might even look halfway decent but it's not going to be a BMW, and the engine is not going to run smoothly. And that is the problem we have with harmonization or human rights law, and with all the trends you have on the table currently to ameliorate the non-international armed conflict regime.

Let me turn to my first step, and I shall do this briefly. How did this project of convergence unfold historically? As you know, Common Article 3 has nothing to say about the conduct of hostilities, unless you believe humane treatment provides an inroad to conceptualize the conduct of

hostility rules also for Common Article 3. I don't. So, Common Article 3 has nothing to say on our point. AP2 has a limited set of rules on the conduct of hostilities, but really, until 1977, there wasn't much.

Since the Diplomatic Conference of 1977, the law has changed quite dramatically. The development of human rights law on the international level enhanced the protection of the individual and changed States' perception on how you can deal with individuals. In a structural way it, therefore, paved the way to also regulate non-international armed conflicts more densely.

Years later, the ICTY in Tadic seized the moment, and identified customary law points simulating, to some degree, non-international armed conflict law with international armed conflict law in the area of the conduct of hostilities. Since then this trend has been further consolidated in the ICRC Customary Law Study, in weapons treaties pertaining to non-international armed conflicts, the Rome Statute as well as in the Sanremo Institute's manual on non-international armed conflict. Against this backdrop it appears that the convergence project has been successful and by and large – notwithstanding critique of the Customary Law Study – uncontroversial.

At the time of Tadic the ICTY still said that they were only simulating the general essence of the rules, not a mechanical transplant. They were not importing and copy/pasting one-to-one, but only the general essence. Today, I think even that is an understatement. Take a look at the Customary Law Study, at the long and detailed list of conduct of hostilities rules applicable to non-international armed conflict. And if you still want to spot differences in the remaining 5%, you have to go to the micro level – never a good idea for an oral presentation, so I won't go into too many details. But there are of course remaining differences regarding the protection of military objects that contain dangerous forces, scorched earth tactics are allowed exceptionally in international armed conflicts but absolutely prohibited in non-international armed conflict.

I believe that, in many ways, the objectives and the intentions of the ICRC and the ICTY of humanizing the laws of war applicable to non-international armed conflicts have been achieved and quite considerably through the harmonization project. A number of normative gaps have been closed, for example, the prohibition of starvation has been extended to non-international armed conflicts, extending the prohibition of the misuse of the emblem, perfidy and so on. The harmonization project has also added to the obligations of non-state actors with regard to the conduct of hostilities in times of non-international armed conflict.

Last but not least, harmonization of the rules renders conflict qualification – which can be extremely difficult – less relevant. Again, I think that is a good thing. I personally find conflict qualification has a

certain degree of arbitrariness and complexity, even though if you read the academic literature on the subject you may get the impression that conflict qualification is a very precise exercise.

So much for the benefits, let me turn now to the challenges. If you bring international armed conflict law – a regime designed to apply to inter-state war - to bear in a non-international armed conflict setting, you are always at risk of not giving enough attention to the non-state actor dimension of non-international armed conflicts. The rules we are using were designed to regulate inter-state warfare – now we are applying them, to a setting where you have non-state actors and that can bring with it a host of different problems. States may “simply forget” about the non-state actor side – that happened in the Ottawa Protocol that is supposed to apply to non-international armed conflict but only speaks of state parties. Recall also that for a long time we had no regulation or common understanding of the status of armed groups in non-international armed conflicts. Members of armed groups prior to the DPH study were widely regarded as civilians, another area where you could say we didn’t really pay much attention to the specificities of non-international armed conflict. It is also quite likely that you could overburden the non-state actor side if you bring inter-state regulations to bear in their relationships. They may simply lack resources and the capacity to comply with some IAC rules or it may be strategically disadvantageous for them to abide by those rules.

Now, there are solutions, to a degree at least. You can attenuate some of these problems because with the feasibility caveats that many of the conduct of hostilities rules contain, you can take into account different capabilities and capacities. With duly diligent structured obligations, different capacities between different actors can be taken into account. Some have even suggested turning to international environmental law and bringing the concept of a common but differentiated responsibility to bear in a non-international armed conflict setting.

Either way, when we are speaking about the conduct of hostilities, this is not as much of a problem as it may be in other areas. The rules we are talking about, namely targeting, methods of warfare, and so forth, are prohibitory. The negative obligations, for example, don’t kill civilians, don’t starve the civilian population, are not capacity dependent. This is something that anyone can uphold.

Also this overburdening of the non-state actors side, whether you perceive this to be a big or a small challenge will depend on your stance on the principle of equality of belligerents. If you think that is a fiction in any case, if you think we should only be focusing on the state side, even in non-international armed conflict, then you will obviously not think that this is a major challenge.

Challenge number two is the obvious one, the elephant in the room, if you like: namely, the lack of a combatant privilege in non-international armed conflict settings. This discussion has been ongoing forever. Some authors think that the introduction of a combatant privilege would be a panacea that could solve most of our compliance problems in non-international armed conflicts. Others think that if you entrench immunity for murder at a domestic level, you would further undermine the right to life and are, therefore, very opposed to introducing a combatant privilege. More recently, Claus Kress has suggested that a combatant privilege in NIAC might have more plausibility if we harmonized all across the board, meaning, if we included the *ad bellum* level into the harmonization project. Thus, if we prohibited non-international armed conflicts at the *ad bellum* level, then it could make sense to introduce a combatant privilege at the level of the *ius in bello*. Criminal sanctioning, akin to the crime of aggression, also for non-international armed conflicts, rendering that those (leaders) who start a NIAC would be criminally liable for the crime of aggression. But then foot soldiers participating in that conflict should benefit from the combatant privilege. That's the idea. It's fascinating, certainly thought-provoking, but I think it is an academic exercise, and it will remain so for quite a while because prohibiting non-international armed conflict, as desirable as that is, requires a discussion about possible exceptions i.e. when non-state actors may resort to force in self-defence, for which, looking at the state of the world, the time is not ripe.

In any case, I find it difficult to take a stance on combatant privilege because I am not fully convinced. I have never seen an empirical study showing that the introduction of combatant privilege would indeed incentivize non-state actors to abide by the rules of IHL. And as Claus Kress has argued, unless we have proof, and convincing proof, that combatant privilege for non-state actors would indeed work as an incentive, we are working with the psychological assumptions of lay persons, as Frédéric Mégret aptly put it. As long as we do that, I find it difficult to take a stance on combatant privilege in non-international armed conflict.

The third challenge is the post 9/11 dynamic, a counter trend to the dynamic initiated by Tadic, which was driven by the primary motive to humanize the law applicable to NIAC. We have come to realize that with the IAC rules regarding the conduct of hostilities also comes a certain degree of permissiveness. In other words the importation project has also, in some aspects at least and especially with regard targeting and the right to life, lowered the protective threshold.

Permissiveness *per se* may not be the problem. One can certainly imagine non-international armed conflict scenarios where the level of violence is so high and the fighting is so protracted and sophisticated, that a rather low level of legal protection is still justified, because realistically in

these kinds of scenarios it is the only protective standard that can still be upheld and that has realistic prospects of being respected. The problem today, however, is that we are seeing such a broad spectrum of different situations that potentially fall within the ambit of non-international armed conflict. This can be very high-level fighting but it can also be low-level fighting where higher standards of legal protection would be required. Trying to regulate the entire spectrum of situations that may amount to non-international armed conflict with a catch-all clause is overly sweeping and categorical.

One of the main challenges of today, therefore, is the question how to make conduct of hostilities rules applicable to non-international armed conflicts more flexible so as to ensure an adequate balancing of interests in all of the various situations that may fall within the ambit of this type of armed conflicts.

And you could also say that we are trying to turn back the clock. It may well be that in our harmonization project we've gone one step too far; we are realizing that this inter-state conduct of hostilities regime is too static, too categorical, too sweeping, too status-based to deal with all of the various scenarios we are encountering in non-international armed conflicts. So, how can we turn back the clock? That proves very difficult. The ICRC has tried – chapter 9 of the DPH study is an attempt to make conduct of hostilities rules more flexible, but has been met with very fierce critique. I fully support the idea laid out in chapter 9. This is exactly what we need to do, but States have not gotten into it yet.

With a view to our next panel, which will focus on detention in non-international armed conflicts, it is important to note that – unlike in the area of the conduct of hostilities – in the area of detention we have not completed the importation project. In this area of the law the question is still open: should we turn to international armed conflict law to import its rules to non-international armed conflicts, should we turn to human rights law or should we adopt a different approach altogether? I think the lesson learned from conduct of hostilities is to be cautious about importation, because it is very difficult to turn back the clock.

Entre l'application du droit et les hostilités, cadre légal et règles d'engagement

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Nous évoquerons aujourd'hui beaucoup de choses, parfois très théoriques, mais nous devons avoir à l'esprit tant la finalité que les conséquences pratiques et éminemment pragmatiques des contraintes imposées par le cadre juridique.

Les forces armées françaises interviennent actuellement à l'extérieur du territoire national dans le cadre de conflits armés non internationaux (CANI). C'est le cas au Sahel, en Centrafrique et en Irak bien sûr. Comme cela a été évoqué par les intervenants précédents, le cadre juridique applicable à ces CANI diffère de celui en vigueur en situation de conflit armé international (CAI).

Je ne vais pas y revenir, mais plutôt concentrer mon propos sur la manière dont les forces françaises relèvent les défis posés par le droit international humanitaire dans les différentes opérations qu'elles mènent.

Ce que j'aimerais vous présenter, ce sont les moyens mis en œuvre par nos forces pour atteindre leur « effet final recherché » comme le disent les militaires, en utilisant les outils/les armes à leur disposition. Et le cadre juridique doit être considéré comme un système d'armes à part entière et non comme un frein à la réalisation de la mission fixée par le commandement stratégique et le décideur politique.

Je souhaiterais tout d'abord insister sur le fait que si les opérations que nous menons sont certes asymétriques, cela ne les empêche en rien de s'inscrire pleinement dans le droit international humanitaire et même de s'appuyer sur celui-ci pour accroître leur efficacité (I) ; j'aborderais ensuite le caractère évolutif, en situation de CANI, de nos modes opératoires qui sont tenus de s'adapter aux transformations de la réalité sur le terrain et par voie de conséquence de prendre en compte l'évolution du cadre juridique, qu'il s'agisse du DIH ou du DIDH (II).

I. Nos opérations asymétriques s'inscrivent pleinement dans le droit international humanitaire et s'appuient également sur ce corpus juridique pour atteindre leurs objectifs

Il me semble tout d'abord utile de revenir sur le contexte juridique de nos interventions (1.1.) avant d'évoquer la manière dont le DIH est pris en compte (1.2.).

1.1. Quel est le cadre juridique des opérations françaises ?

La France est actuellement engagée dans 3 opérations majeures (au Sahel, en RCA et en Irak). L'opération SANGARIS en RCA est sur le point de s'achever, ce sera le cas à la fin de l'année après 2 ans de présence. Elles ont toutes les trois été lancées après une sollicitation des autorités gouvernementales des Etats concernés.

Nous disposons donc d'une base juridique solide (accord des Etats-hôtes pour intervenir contre des groupes armés contrôlant une partie de leur territoire), que des Résolutions du Conseil de sécurité des Nations Unies sont venues par ailleurs conforter.

Nos interventions se déroulent toutes les trois en situation de conflit armé non- international (CANI). Mais cette qualification recouvre des réalités différentes selon les théâtres d'opération.

L'intervention française au Mali

Si l'on prend l'exemple du Mali, l'intervention des forces françaises en janvier 2013 s'est déroulée dans un contexte de CANI de haute intensité, dans la mesure où l'Etat malien était aux prises avec des acteurs non étatiques bien organisés, et que leur confrontation avait atteint un certain niveau de violence. Mais, grâce à l'action de nos troupes et de leurs alliés, la situation sur le terrain s'est ensuite stabilisée et a évolué en un CANI de basse intensité.

C'est à mes services qu'il appartient d'analyser les conditions initiales d'une situation et de caractériser le conflit auquel vont participer les forces françaises. Il s'agit de présenter au ministre de la défense et à l'état-major des armées, en liaison avec le ministère des affaires étrangères, le cadre juridique de l'action de nos forces sur un nouveau théâtre.

En l'occurrence, s'agissant d'un CANI de haute intensité au Mali, nous avons rappelé au ministre de la défense et à ses grands subordonnés les principes et les textes applicables, à savoir l'article 3 commun aux Conventions de Genève (CG) et le IIème protocole additionnel (PA II). Par ailleurs une coordination étroite a été mise en place avec les services du ministère des affaires étrangères, notamment pour la préparation et la négociation de l'accord sur le statut des forces françaises (SOFA) et les conditions de leur stationnement.

En parallèle, l'état-major des armées (l'échelon stratégique) a développé des projets de règles opérationnelles d'engagement (ROE) destinées aux forces françaises.

Avec le soutien de ses conseillers juridiques, l'état-major des armées a défini la nature et les conditions de frappes sur un certain nombre d'objectifs planifiés (centre de commandement, dépôts de munitions, chefs de groupes armés).

Dans toutes ces actions, le souci des juristes a été de vérifier que les ROE et les opérations de ciblage respectaient bien les principes du DIH (distinction entre objectifs militaires et biens civils, proportionnalité des frappes, nécessité militaire et principe d'humanité...).

L'opération SERVVAL au Mali a d'abord permis de stopper les groupes armés terroristes qui menaçaient la capitale malienne, puis de mettre fin à une forme de professionnalisation du terrorisme qui s'était implantée dans le désert au nord du Mali. Cette opération a mobilisé jusqu'à 4 500 militaires français sur le territoire malien. Elle a été transformée le 1er août 2014 pour s'étendre à l'ensemble des Etats du Sahel concerné par cette menace liée aux groupes armés terroristes (Burkina Faso, Niger, Mauritanie et Tchad).

L'opération BARKHANE, c'est désormais le nom de cette opération, vise à lutter contre les groupes armés terroristes (GAT), notamment en instituant un partenariat opérationnel avec les Etats alliés (Mauritanie, Mali, Niger et Tchad) de la bande sahélo-saharienne (BSS) et en empêchant la reconstitution d'un nouveau sanctuaire terroriste après la destruction des derniers refuges d'AQMI (Al-Qaeda in the Islamic Maghreb) au Nord-Mali.

C'est donc une réponse régionale à une menace djihadiste internationale, qui s'inscrit dans un cadre juridique robuste construit autour d'accords avec l'ensemble des Etats hôtes, ainsi que de la Résolution 2100 (2013) relative à la situation au Mali. Ces accords permettent notamment l'établissement de dispositifs militaires français et incluent l'autorisation de mener des opérations militaires offensives. Néanmoins, l'usage de la force létale au-delà de la légitime défense de soi-même (si des forces alliées sont attaquées) ou d'autrui (libération d'otages ou protection de victimes d'exaction par exemple) est proscrit en dehors des situations de conflit armé. Or, au Niger et au Tchad par exemple, nous ne sommes pas en situation de conflit armé, ce qui a pour conséquence que l'usage de la force est régi par le droit international des droits de l'homme (DIDH).

Pour analyser ces situations très particulières, la France s'est fondée sur ce qu'une partie de la doctrine et le CICR ont théorisé sous le vocable de « non-international armed conflicts spill over effect » ou de « conflits armés non internationaux exportés ».

Nous nous sommes appuyés sur ce concept en considérant que l'action militaire des groupes armés engagés dans un conflit armé préexistant, si elle est suffisamment significative dans les pays voisins, aboutit à étendre à ces Etats le conflit armé originel qui « s'exporte », avec les possibilités offertes par le DIH en termes d'action létale.

Cette conception n'est cependant acceptable qu'à trois conditions cumulatives :

1. les opérations ne peuvent intervenir qu'avec l'accord des « Etats hôtes »;
2. elles doivent viser des groupes armés qui participent à ce CANI originel;
3. et l'action de ces groupes doit s'inscrire dans un continuum opérationnel incontestable.

Ainsi, la France mène l'ensemble de ses actions coercitives en dehors du Mali et dans les pays voisins sur la base de ce concept.

L'intervention des forces françaises en RCA

Si l'on examine maintenant le cas de la RCA, nous sommes bien en présence d'un conflit armé non international mais cette qualification a mis un peu de temps à s'établir, les affrontements entre les Seleka et anti-Balaka ayant pu être considérés un temps comme des troubles et tensions internes. Il est en effet parfois difficile de réunir tous les critères des CANI dégagés par la jurisprudence internationale. Mais une majorité d'entre eux correspondait au cas d'espèce en RCA :

- une situation qui fait l'objet de plusieurs Résolutions du Conseil de sécurité des Nations Unies, qui la qualifient au demeurant de « conflit armé»,
- où s'affrontent régulièrement des groupes armés nombreux, structurés, avec des armes de guerre lourdes,
- et causant de nombreuses victimes (morts et blessés, mais aussi réfugiés, déplacés internes,...).

Cette qualification de CANI a donc entraîné l'application du DIH. Etant en l'occurrence un CANI de basse intensité, seul l'article 3 commun aux Conventions de Genève était applicable, mais nous avons également appliqué les stipulations du Protocole II.

Il a donc été possible de permettre à nos forces déployées de faire un usage de la force étendu contre les différents groupes armés organisés lorsque les nécessités militaires l'exigeaient, afin de rétablir la sécurité et d'arrêter les massacres.

L'usage de la force létale était donc autorisé au-delà de la légitime défense ou du maintien de l'ordre, mais encore une fois, uniquement si la nécessité militaire l'exigeait et dans un degré minimal afin de ne pas faire augmenter le niveau de violence général en RCA.

La participation de la France à la coalition contre Daesh en Irak

Enfin en Irak, nous sommes indiscutablement dans le cadre d'un conflit armé non international de haute intensité. La situation répond parfaitement à la définition de l'article 1 du protocole II, dans le sens où Daesh contrôle

un territoire et mène à partir de celui-ci des actions de grande ampleur. Cependant, la situation présente certaines particularités du fait de la structure quasi étatique de Daesh. Ses groupes armés sont, si l'on peut dire, « sur-organisés », Daesh dispose de sa propre administration, de ses propres ressources et exerce sur un territoire de nombreuses fonctions gouvernementales. A ce titre, l'usage de la force qui est actuellement exercé par la coalition dépasse par bien des aspects les limites habituelles de l'usage de la force en CANI, notamment telles que celles rencontrées en Afghanistan et au Mali. Il s'agit en effet de répondre de manière proportionnée à des actions de Daesh atteignant un très haut degré de violence et d'organisation.

L'application du DIH ne doit pas être vue à mon sens par les opérationnels comme un frein à leur action. Je dirais même, bien au contraire, qu'elle peut s'avérer bénéfique.

1.2. Un souci constant: respecter et s'appuyer sur le droit international humanitaire

Un impératif : préserver la légitimité de notre action

La liberté d'action du politique et du militaire passe par la légitimité de l'action. Cette légitimité, c'est le fait que l'opération apparaisse comme juste, guidée par des idéaux universels, et respectueuse de nos engagements juridiques internationaux.

Cela permet, indépendamment de critères moraux et éthiques également présents, de conserver d'une part la confiance de nos concitoyens, et d'autre part de mobiliser nos alliés.

Il convient d'être convaincu que pour atteindre cet objectif, nous devons souvent nous imposer davantage de contraintes que ce qui nous est imposé par les textes, en particulier pour protéger les populations civiles et les biens sensibles dans les territoires, théâtres de nos interventions

Tout usage excessif ou non conforme de la force, que ce soit de la part des troupes françaises ou de leurs alliés, peuvent miner la légitimité d'une opération, et amoindrir la portée et la durée des succès remportés sur le terrain. Cela impose de s'investir et de développer, jusqu'au plus bas niveau d'exécution, une pédagogie adaptée permettant d'expliquer et de faire comprendre les règles opérationnelles d'engagement (ROE). Le soldat déployé sur un théâtre doit savoir très concrètement quelles sont les limites de l'usage de la force quand il est confronté à une situation complexe. Et ces règles de comportement doivent être bien sûr étendues à tous les aspects des opérations (pas uniquement l'usage de la force létale).

Le rôle essentiel des LEGAD en la matière

Il appartient à nos conseillers juridiques opérationnels (LEGAD) de s'assurer de la bonne compréhension de ces ROE et de pourvoir à la formation, ou de fournir le complément de formation aux contingents déployés. Actuellement, deux officiers de mon service sont affectés sur un théâtre d'opération extérieure, l'un au Koweït (au sein de l'état-major de la coalition contre Daesh en Irak) et l'autre en RCA (auprès du commandant de la force SANGARIS). 5 autres conseillers juridiques français sont également déployés, l'un au Qatar, également dans le cadre de l'opération contre Daesh et 4 en zone sahélienne pour l'opération BARKHANE.

Cette légitimité qu'il faut rechercher, est présente dès la phase de planification : les principes cardinaux du droit international humanitaire sont pris en compte très en amont et nos LEGAD y veillent à tous les niveaux. Nos planificateurs disposent de directives claires encadrant l'usage de la force létale (en la limitant strictement aux personnes participant directement aux hostilités ou appartenant à des groupes armés organisés, en l'occurrence AQMI et Mujao au Mali, Seleka et anti-Balaka en RCA, Daesh en Irak).

Ce point est particulièrement important : dans les conflits dits asymétriques (ceux dans lesquels nous sommes engagés en ce moment), la distinction civil/combattant est évidemment très difficile. C'est donc un point sur lequel nous portons un effort tout particulier.

Pour des raisons évidentes d'éthique mais aussi de légitimité (j'y reviens toujours), il s'agit d'être extrêmement vigilant.

C'est la raison pour laquelle l'usage de la force strictement nécessaire est toujours prescrit aux unités combattantes. Cela signifie un usage de la force souvent minimal, même si le recours à la force létale est évidemment autorisé.

J'aimerais maintenant aborder le caractère évolutif de nos opérations qui doivent s'adapter en permanence à des situations complexes, surtout en situation de CANI.

II. Nos modes opératoires évoluent afin de prendre en compte les réalités du terrain et donc les transformations du cadre juridique

De nombreux paramètres peuvent venir brouiller la vision du soldat déployé en opération extérieure qui aura parfois l'obligation d'agir dans des cadres juridiques différents selon les cas de figure (2.1.). C'est la raison pour laquelle il convient de toujours pouvoir justifier a posteriori les actions que nous menons (2.2.).

2.1. Des cadres juridiques évolutifs

Nos forces déployées peuvent opérer à la frontière de situations de troubles et tensions internes et de CANI dans lesquelles les règles du DIDH peuvent s'appliquer le cas échéant. Il s'agira alors pour nos soldats de mettre en œuvre des règles et procédures différentes alors même qu'à leurs yeux la différence de situation pourrait ne pas apparaître manifeste ...

La mise en œuvre des ROE

Tout d'abord, comment sont mises en œuvre sur le terrain nos règles opérationnelles d'engagement (ROE)? Au regard de ce qui s'est passé au Mali, qui illustre le mieux mon propos, il a été nécessaire d'adapter nos ROE à la situation évolutive sur le terrain.

Ces « règles opérationnelles d'engagement » ont été élaborées par l'échelon stratégique (l'état-major des armées). Elles ont fait ensuite l'objet d'un dialogue étroit et d'un processus itératif entre Paris et le théâtre.

Et elles ont évolué à trois reprises :

- Le premier ensemble de règles, qui correspondait à la phase de « haute intensité » du conflit était très coercitif : nous étions en face d'un adversaire déterminé, bien organisé et équipé, et surtout parfaitement identifiable.
- Après la bataille des Adrar des Ifoghas, et la destruction du dernier sanctuaire des groupes armés, cet ensemble de règles a évolué afin de restreindre l'action et l'autonomie de l'aviation, pour empêcher notamment tout dommage collatéral.
- Enfin, un dernier état de ROE, dit de « basse intensité » a été adopté à la fin de l'été 2013 pour accompagner le début de la normalisation au Nord Mali. Les recours à des actions les plus coercitives, notamment pour les actions de ciblage, ont alors été remontées à un niveau de décision élevé.

Bien évidemment, en phase de stabilisation, des opérations de ciblage moins létales ont été mises en œuvre : il a été demandé aux éléments français de privilégier les captures, la neutralisation ne devant intervenir qu'à défaut, en cas d'impossibilité de capturer.

Par ailleurs, une directive de « tolérance zéro » vis-à-vis des dommages collatéraux a été édictée. Notre mission était principalement menée au profit de la population malienne et elle était donc incompatible avec des éventuelles pertes civiles. Et je dois dire que les forces françaises de SERVAL n'ont à aucun moment causé un décès parmi la population civile. Comme je l'ai déjà évoqué, nous avons un besoin impérieux de demeurer légitimes afin d'éviter d'alimenter l'hostilité des populations civiles.

La porosité entre les situations de conflit armé et de maintien de l'ordre

Cela étant dit, nos militaires peuvent se trouver en présence de situations moins claires, que la notion de basse ou haute intensité ne permet pas nécessairement de couvrir. En effet les principes qui régissent la conduite des hostilités et les opérations de maintien de l'ordre (« law enforcement » en anglais) sont de natures différentes. Ainsi, les principes de nécessité, de proportionnalité et de précaution ne répondent pas aux mêmes critères dans les deux corpus juridiques. Cela peut être une source de confusion pour les militaires sur le terrain.

Et ce ne sont pas des situations virtuelles : dans le cadre de l'opération BARKHANE, les forces françaises peuvent être amenées à agir sous l'emprise du DIH (à l'encontre de Gao liés au conflit malien, au Niger par exemple) et dans le même temps, ou presque, agir en soutien des forces locales en vertu d'accords de défense bilatéraux. C'est le cas notamment lorsqu'elles participent à l'interception d'un convoi d'hommes en armes : s'agit-il de membres d'un GAT en route pour le Mali ou s'agit-il de trafiquants, que nous savons nombreux et dangereux dans ce secteur de l'Afrique ? Dans le cas des GAT, l'usage de la force pourra être large (et même préemptif) si nous avons la « certitude raisonnable » (pour reprendre un terme de nos LEGAD) qu'il s'agit de GAT.

Dans ce cadre, nous autorisons nos soldats à les capturer ou à les neutraliser si c'est nécessaire. S'il s'agit de trafiquants dénués de liens avec les djihadistes, notre usage de la force est limité à de la légitime défense un peu élargie pour prendre en considération les contraintes de sécurité qui pèsent sur nos éléments.

En RCA également, nous avons été confrontés au même type de problème, notamment pour faire cesser des mouvements de foules ou des actions troublant simplement l'ordre public. L'indispensable frontière entre des opérations de maintien de l'ordre et celles liées à un conflit armé, a parfois pu apparaître ténue.

1. Si l'on considère tout d'abord le principe de nécessité en DIH, l'usage de la force militaire contre des objectifs légitimes est présumé. En d'autres termes, il est établi que des combattants peuvent être attaqués avec des moyens létaux, tout en assurant la protection des populations civiles (sauf si elle participe directement aux hostilités). En revanche, comme on le sait, dans le cadre du maintien de l'ordre, le principe « d'absolue nécessité » implique que la force soit utilisée en dernier recours. Et uniquement pour poursuivre un but légitime, comme la légitime défense, effectuer une arrestation régulière, ou réprimer une émeute.

2. Le principe de proportionnalité est également considéré différemment en DIH et en DIDH. Le principe de proportionnalité en DIH protège les civils et biens civils contre les dommages qui seraient excessifs par rapport à l'avantage militaire direct attendu d'une attaque. La cible légitime d'une

attaque (combattant ou civil participant directement aux hostilités) n'est donc pas couverte par le principe de proportionnalité en vertu du DIH.

En revanche, quand un agent de l'Etat utilise la force contre une personne en vertu du DIDH, le principe de proportionnalité exige la recherche d'un équilibre entre la menace représentée par l'individu et le risque potentiel pour cette personne ainsi que pour les tiers. Je ne reviens pas sur les règles de l'usage de la force dans ce type de contexte (usage de la force minimale, en veillant à éviter tout dommage ou décès de tiers).

Ainsi, la vie de l'individu posant une menace imminente est elle-même prise en compte, à la différence du DIH.

3. Je voudrais évoquer enfin le principe de précaution, qui revêt également une acception différente en situation de conflit armé et de maintien de l'ordre. En DIH, le principe de précaution exige que les belligérants veillent constamment à épargner la population civile et les biens civils. Au contraire, en DIDH, toutes les précautions doivent être prises pour éviter, autant que possible, l'usage de la force en tant que telle, et non la mort civile simplement accidentelle ou une blessure ou des dommages causés aux biens civils.

Il s'agit ici avant de respecter le « droit à la vie ». Ce qui est différent de ce que prévoit le DIH.

Cette porosité entre les situations n'est pas véritablement une problématique nouvelle. Elle est consubstantielle à toutes nos opérations en situation de CANI. C'était déjà le cas en Afghanistan, dès la chute des Talibans, sans évoquer des conflits encore plus anciens. Mais elle illustre, s'il en était besoin, la complexité de l'action militaire en opération extérieure en situation de CANI, qui comporte de nombreuses zones grises.

Nous devons en effet respecter nos obligations au regard du DIH, sous l'œil des Procureurs compétents – celui de l'Etat hôte, son homologue français ainsi que celui de la CPI, mais également respecter, entre autres instruments de DIDH, la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales dont la Cour européenne des droits de l'homme (CEDH) assure le respect y compris à l'étranger. La Cour internationale de justice (CIJ) s'est également prononcée sur l'articulation entre droit international des droits de l'homme et droit international humanitaire. Dans son avis de 1996 sur la Licéité des armes nucléaires, la CIJ a précisé qu'en principe, « la protection du Pacte international relatif aux droits civils et politiques (PIDCP) ne cesse pas en temps de guerre », mais que les garanties devront être interprétées à l'aune du droit des conflits armés.

Et la CIJ a approfondi son analyse dans l'Avis sur l'édification d'un mur en territoire palestinien de 2004, en expliquant que dans les rapports entre DIDH et DIH, trois situations pouvaient se présenter : les droits peuvent ainsi ne relever que du DIH, que du DIDH, ou alors des deux.

C'était tout l'objet du colloque que nous avons organisé à Paris le 22 octobre 2014 dont le thème était : « Les relations entre le DIH et le droit européen des droits de l'homme : quelles perspectives ? » (les professeurs Hampson et Sassòli nous avaient d'ailleurs fait l'honneur et l'amitié de venir exposer leur vision sur cette problématique). Car, en situation de conflit armé, les notions de « droit à la vie » ou de « droit à la liberté et à la sûreté » peuvent être difficiles à respecter. Mais cela a déjà été évoqué par le Professeur Hampson, je ne vais donc pas développer.

2.2. Un usage de la force prudent, toujours justifié et justifiable

Je voudrais terminer mon propos en précisant que les actions engagées par nos troupes doivent impérativement pouvoir être tracées. En effet, il ne suffit pas de dire que nous respectons nos engagements internationaux, que nous ne causons aucun dommage collatéral.

Etre en mesure de communiquer sur nos opérations le cas échéant

Il faut aussi être capable d'illustrer, voire de démontrer, que nos opérations sont en cohérence parfaite avec les éléments que nous diffusons.

Lorsque l'usage de la force létale a été rendu nécessaire sur des cibles humaines ou matérielles stratégiques (j'exclus de mon propos les usages de la force létale résultant d'une action directe de combat, comme par exemple la prise à partie de troupes françaises au sol par un groupe armé), le commandement s'assure que les actes restent licites tout au long du déroulement de l'opération, en supervisant celle-ci du début à la fin.

Cette supervision a pour objectif de prémunir toute mise en jeu de la responsabilité individuelle ou collective, notamment pour des violations du droit international humanitaire (accusations de violation du principe de distinction civils/combattants, ou de dommages collatéraux excessifs, avérés ou fictifs, montés de toutes pièces dans le but de manipuler l'opinion publique).

Ainsi, nous accordons une place particulière au recueil et à l'analyse du renseignement avant la frappe et nous établissons des comptes rendus immédiatement après.

L'importance du renseignement

Le renseignement, tout d'abord, est la pierre angulaire de toute action dans des zones d'opération extrêmement vastes. Il permet de vérifier que l'objectif ciblé est bien un objectif militaire, et pour ce qui concerne les individus, nous nous assurons qu'ils occupent une fonction stratégique dans les groupes armés organisés que nous combattons. Cette consolidation du renseignement, souvent « inter-agences », n'est pas aisée, et le doute profite

toujours à nos opposants. En cas de manque de fiabilité du renseignement, ou en cas de lacune d'information, nous nous abstenons de procéder à la frappe. Le renseignement nous permet également d'évaluer et d'estimer, avant la frappe, les probabilités d'occasionner des dommages collatéraux. L'identification positive est, à cet égard, une contrainte lourde mais qui a évité de nombreuses méprises.

Le « Battle Damage Assessment »

Ensuite, chaque opération de ciblage ou opération de combat fait l'objet d'un « Battle Damage Assessment » (BDA), que les militaires présents dans la salle connaissent bien. Il permet d'analyser à chaud l'ensemble des effets directs (sur la cible) des opérations menées (dégâts, analyse technique de l'usage des armements, nombre d'individus neutralisés, effets tactiques, etc.). Au-delà des effets directs obtenus, le BDA nous permet également de mesurer l'avantage militaire concret et direct réalisé sur le plus long terme, ce qui est utile pour certaines frappes, en particulier sur les objectifs duaux, dont la proportionnalité ne peut pas paraître immédiatement évidente.

C'est au prix du respect de cet ensemble de procédures que nous pourrions convaincre de la bonne application de nos engagements internationaux.

J'espère vous avoir quelque peu éclairé sur la manière dont les forces françaises font usage de la force et mettent en œuvre leurs obligations en matière de DIH et de DIDH dans le cadre des CANI auxquels elles participent. J'espère avoir été suffisamment concrète.

C'est la raison pour laquelle je n'ai pas évoqué les situations de CAI, les exemples récents d'implication de la France dans cette situation étant inexistant.

The legal challenges raised by conducting hostilities against organized non-state armed groups

Adebayo Kareem

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I shall restrict my observation and intervention to the African Union Mission in Somalia (AMISOM). So, concerning the challenges of dealing with Non-State Actors, I will consider AMISOM as a case study.

In underlining the challenges faced by AMISOM or faced in AMISOM, some of those challenges would be idiosyncratic to AMISOM alone. Of course, many of them will apply to most Non-International Armed Conflict (NIAC) but you have to bear with me as some of them will be very personal to AMISOM. The scope of my presentation will, therefore, be to briefly outline the issue of the mission to you, outline the challenges the mission faces and the solutions the mission is taking to address those challenges.

In terms of history, I think it is important to give a brief outline of the circumstances in Somalia before 2007 when AMISOM took over. You will recall that by 1991, law and order in Somalia broke down. There were no governmental authorities and there was a very terrible civil war. The international community attempted to intervene with the United Nations, having two separate missions in that country. Those missions were not particularly successful. The Americans intervened in Somalia and they left the country. After the American intervention, the international community appeared to have taken the decision: “let us leave the Somalis to mutually destroy themselves, maybe if they did or when they did common sense will prevail”. So there was a period of non-international intervention in Somalia. However, instead of sanity prevailing that didn’t happen. As a matter of fact, Piracy on the high seas of Somalia was exacerbated and the conflict in Somalia spilled over to the neighboring countries.

It was at that time that the African Union took the decision to intervene in the internal affairs of that country. And I want to mention a bit of background here. The African Union used to be known as the Organization of Africa Unity which was formed in 1963. One of the important rules of the OAU was the principle of Non-Intervention in the internal affairs of a Member State. I am giving this background for the benefit of those who don’t know because I would argue that the OAU would not have intervened in Somalia as the AU is doing. However, in 2002, the OAU transformed into the African Union and one of the important articles in the Constitutive Act of the African Union can be found in article 4 which provides for, and I

quote, “The right of the Union to intervene in a Member State pursuant to a decision of the Assembly, in respect of grave circumstances namely: war crimes, genocide and crimes against humanity.” And: “The right of Member States to request intervention from the Union in order to restore peace and security.” So, what this means is that the African Union can, using the instrumentality of its article 4, intervene in the internal affairs of a Member State if it appears to it that the Member State is either unwilling or unable to arrest the situation of war crime, genocide or crimes against humanity in that country. And it was, as a result of that article 4 that, in 2007, initially in 2006, the African Union evoked its Subsidiarity Principle and established IGASOM or IGAD, a sub-regional body in East Africa (because Somalia is geographically in East Africa we decided to use IGAD to intervene in Somalia). In January 2007, IGASOM was transformed into the African Union Mission in Somalia. However, whilst it was established by the African Union as you all know, the UN is the only organization that had the primary responsibility for maintaining law and order in the whole world. So the UN Resolution 1744 of February of 2007 endorsed the establishment of the African Union Mission in Somalia.

So, AMISOM is, therefore, a UN-mandated mission engaged in peace support operations in Somalia. Presently, AMISOM has 22,126 uniformed personnel in Somalia, I believe, making it the largest peacekeeping mission in the world. The current AMISOM mandate (UNSCR 2232) authorizes AMISOM to take all necessary measures in full compliance with its Member States obligations under IHL and International Human Rights Law to carry out its mandate. Therefore, clearly the conflict in Somalia is a NIAC. It involves multinational forces who are in Somalia, with the consent of the host country. As a matter of fact, we have six Troop-Contributing Countries (TCCs) in Somalia. We are authorized to use both defensive and preemptive force against the belligerents in Somalia, which is the Al-Shabaab. However, we must do so in full compliance with the applicable IHL rules and we must do so against an Al-Shabaab which is contemptuous of IHL but do so in situations where it is extremely difficult for our forces to comply with IHL, and I will give a practical example in due course.

Now, I am going to the challenges. I think Ms Landais has already mentioned some of the challenges that you will expect of missions similar to AMISOM. I would start with what I believe was the lacuna in the Security Council Resolution 1744 that established AMISOM, in that, for a mission that was expected to conduct the hostilities in a manner that was consistent with the applicable IHL rule, it is strange that AMISOM had no explicit Protection mandate. If we look at provisions of 1744, AMISOM clearly lacked a Protection of Civilian (PoC) mandate. Therefore, between 2007 and 2012, AMISOM initially engaged the Islamic Courts Union and

then later the Al-Shabaab, in very extensive urban warfare with no PoC mandate. Even when the level of troops increased from 8000 to 17731 in 2012 there was still no Protection mandate. I believe this was a mistake. Some experts have argued that the mission had no protection mandate because it was built on the recognition that “AMISOM essentially did not constitute a peacekeeping operation. Rather, it was acting as a peace enforcement operation engaged in military operations against unarmed insurgency. In this context, therefore, since AMISOM was a direct actor in the conflict, the mission could not be provided with the protection of civilian mandate. AMISOM could not be expected to provide protection to the civilian population at risk, while simultaneously engaging in ongoing offensive against Al-Shabaab” (Lotze and Kasumba, AMISOM Protection of Civilian Mandate, www.accord.org.za)

I must admit this is not an argument that actually finds favor with me. I actually would like to turn the arguments around and assert that AMISOM actually required a PoC mandate for exactly the reasons given by Lotze and Kasumba. AMISOM of course subsequently had a professional mandate but that came in 2012.

The second challenge we face on the ground is the difficulty of distinguishing between civilians and combatants in an asymmetric war, in an urban environment. I think Ms Landais made references to these. But even more worrying is the complicity of civilian population against the multinational forces. Since 2012, Al-Shabaab abandoned conventional confrontation with AMISOM, and resorted to asymmetric attacks. Al Shabab's *modus operandi* includes planting IEDs and VBIEDs in very highly populated areas. They shelled AMISOM's position from civilian houses, very heavily-populated civilian houses. We have been shelled from mosques, hospitals and schools, making it difficult to respond appropriately. And I would like to talk quickly about an incident that happened in July as an example. On 31st July, the AMISOM contingent in an area called Maka in Somalia was engaged in patrol when they ran into an IED which seriously injured one of our soldiers and damaged their vehicle. As they were responding to that IED attack, they were subjected to shootings from a particular house in the area. Military officers here will confirm that the instinctive reaction of any trained military is to respond to where the attack on them is coming from which they did. Unfortunately, because the place was heavily-civilian populated, we had a number of casualties from the civilian side which resonated poorly against AMISOM. These are the kinds of challenges we face when dealing with insurgency in such circumstances.

The next challenge I would like to mention, and this is particularly AMISOM-centric, is the challenge of dual sources of mandate. AMISOM is basically a mission of the African Union, authorized by the African

Union, but mandated by the UN Security Council. What that means is that, the AMISOM mandate is periodically reviewed. However, the practice is that the AU will renew the AMISOM mandate and forward the same to the UN Security Council for ratification. The UN will then draft its own mandate for AMISOM. The challenge there is that the mandate given by the AU is not often the same in all respect as the mandate given by the UN. That now leads to plausible ambivalence by players in the field as, for example, in 2012 the African Union communiqué mandated the mission to protect civilians but the UN Security Council that validated that African Union communiqué did not say anything about protection of civilians. So, when you speak to contingent commanders and operational commanders, they tell you they do not have a protection of civilian mandate because the UN has not endorsed it. On the other hand, if the UN provides something and the AU communiqué does not, they will go back to the AU communiqué and say we are not mandated by the AU. So that is a challenge which is, I think, an area of concern.

The next challenge is the issue of financial and logistical support. The agreement with the UN, with the international community, is that African countries would provide the military, the numbers, whilst the international community would provide the logistical support for the mission. However, this has not been happening as envisaged. AMISOM does not have a Naval Asset; no Air Asset, no dedicated fund for compensating civilians, and this has led to AMISOM having challenges complying with IHL provisions. Let me give an example: on Tuesday of this week, AMISOM, the Ugandan contingent, was attacked by Al-Shabaab in an area called Janale. That area is not easily accessible and when the Al-Shabaab attacked, they went there in numbers. I was told about 600 of them went there. The AMISOM contingent in that area was about 350 so they were basically overrun. Now, they requested for support from Mogadishu. However, because we did not have area capacity, no air asset, we could not go there by air. If we had air asset, it would have taken about 40 minutes for arms to be deployed to Janale. But because we had to go by road it took 8 hours and that meant we had to fight our way on the road leading to possible civilian casualties.

Finally, in the terms of challenges, there is the collapse of Somali institutions. The UN has mandated AMISOM to work together with the Somali National Army and the UN Security Council recognizes the sovereignty of Somalia. However, since 1991, the criminal justice system has collapsed, there is no correctional system, and the treatment of captured fighters, the principle of *non-refoulement*, we come across a number of fighters who may be subjected to inhuman and degrading treatment, even torture if we were to hand them over to the Somalis authorities. Yet we have no mandate or capacity to hold the ex-fighters indefinitely.

So, those are briefly some of the challenges we face. In the course of time, AMISOM has taken a number of decisions to mitigate those challenges. The first one – we now have an explicit protection mandate. Secondly, we have been conducting Capacity Building for the Somali justice system. Here the European Union, the United Nations, every agency in Somalia are involved. And in 2011, AMISOM issued what I consider to be a very important document namely the AMISOM Indirect Fire Policy and I would like to quickly read out some of its provisions. It says and I quote: “AMISOM will continue to avoid the use of indirect fire which can cause civilian casualties, unless the purpose of observed indirect fire is to achieve a military objective for extreme self-defence measures. Indirect fire will only be used to protect civilian population where a clear military objective is identified and where the military advantage gained is very superior to the potential risk of harm to the civilian population. Indiscriminate attacks are always forbidden. AMISOM use of indirect fire must satisfy this test”.

So, we ensure that, as much as practicably possible, we do not respond to fire especially in civilian environment. It is not always easy especially if you are under sustained attack, you naturally like to respond. In addition to that, we have been undertaking Pre-Deployment Training (PDT) for all our TCCs even before they are deployed into the mission area. We go to the TCCs and train them on IHL, Human Rights Law, Sexual Exploitation and Abuse (SEA) and all those important areas. So, theoretically, officers are reminded of the obligations under these rules. We also have standard Operating Procedure (SOP) on treatment of fighters which was actually designed with the help of the ICRC and since it was signed we’ve been training our officers on the obligations; on how to humanely treat fighters who voluntarily surrender to us or were captured by our force.

Additionally, because of the relationship we have with the UN, we are obliged to comply with the UN Secretary-General Human Rights Due Diligence Policy (HRDDP) and to do so there is a joint working group between AMISOM and the UN Mission in Somalia which from time to time appraise how we are complying with DDP. Another of our measures is the Force Commander’s Directives: anytime we want to go into an offensive mode, the Force Commander prepares a directive to all his operational commanders in which he reminds them of the applicable obligations under the IHL. Another thing we do is we have regular After Action Review (AAR). In 2014 we conducted three operations against Al-Shabaab. In between them we conducted AAR. In the AAR, we reviewed what went wrong in the previous engagement, what went right and how lessons could be learnt and how we can ensure that the mistakes made were not repeated in the incoming engagements.

The penultimate one is our board of enquiry regime. We have a Statute of Mission Agreement (SOMA) with the Government of Somalia in which the criminal jurisdiction of AMISOM military officers and troops remain with the sending State. The Government of Somalia has agreed that for any criminal act engaged by AMISOM soldiers in Somalia the sending State will have a jurisdiction. However, what we've been doing, with varying degrees of success, is to persuade the TCCs to send the Court Marshall into Somalia. So, for example, a Ugandan officer is accused of unlawfully killing a civilian in Somalia, instead of him being tried in Kampala, the capital of the sending State, the Government of Uganda routinely brings in a Court Martial into Somalia to try this case and the advantage of doing that is that it allows witnesses who are Somalis to give evidence to the Court Martial in their natural environment instead of having to travel to another country. However, only one of our TCC (Uganda) has cooperated with us in so doing, others continue to insist that they would try their officers in their capital.

Finally, we have the operationalization of the Civilian Casualties Tracking Analysis and Response Cell (CCTARC). The CCTARC is a UN mandated cell that AMISOM has to put in place. It is a civilian tracking mechanism within the mission. The mandate was initially given to us in 2013 by the UNSC but we could not operationalize it for a number of reasons. Hopefully we can learn some lessons from the Afghanistan experience and ensure that civilian casualties are tracked so that we continue to discharge of our obligations on that applicable IHL rule.

So, in conclusion, I would argue that the challenges of engaging Non-State Actors from the point of view of the African Union is that it is difficult to identify who exactly is a civilian in such conflict and yesterday it was argued that we do not need a new set of rules and that players only need to comply with the existing IHL rules. However, I think an implicit assumption in that argument is that all players are willing to abide by those rules but we all know that they are not. The Boko Haram of Nigeria does not want to abide by any rules, the ISIL, the Shabaab do not want to abide by the rule. So, I think it is time we start to think about perhaps another classification or, as Professor Geiss suggested yesterday, we should consider a kind of combatant privilege because we all know that wherever we have privileges they also come with responsibilities.

**VI. Selected issues:
the question of detention**

The ICRC work on strengthening the legal framework governing detention in armed conflicts¹

Ramin Mahnad

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Several weeks ago, the ICRC released a report that marked the culmination of a four-year consultation process. The process started in 2011, when the International Conference adopted Resolution 1, and asked the ICRC to consult with States and other actors on how to make sure IHL remained practical and relevant in protecting all persons deprived of their liberty for reasons related to armed conflict. That is a very long title but the issue at the heart of the process has been detention in non-international armed conflict. And over the last four years of consultations, we have gained tremendous insights from States, thanks in large part to their willingness to very candidly share their experiences and practice.

In a little over three months we will be at a crucial juncture as the International Conference will discuss the ICRC report on those consultations, consider our recommendations and discuss its proposal for a resolution to continue work on this important issue.

In light of the timing of this presentation, I thought it would be most interesting to step back and look at the problem that we identified, look at where we are right now in terms of our understanding of how we might try to solve it and explain where we hope to go next.

In terms of the problem: the first question that should leap to mind is: “Well, what’s wrong with IHL governing NIAC? What exactly needs to be fixed?” And in many important ways, not much is wrong at all. When we think about the greatest threats faced by a detainee we think of torture, cruel treatment, summary execution, outright murder and all of these things are clearly prohibited by existing IHL applicable to non-international armed conflict. In those cases the main problem is the lack of respect for some of the most fundamental rules.

But what about other issues that are not clearly addressed by existing IHL applicable in NIAC? And what if IHL could give more guidance than it currently does? What if the value it adds as a specialized body of law designed for armed conflict is not being fully taken advantage of? And what if this missed opportunity to make the most of IHL has damaging consequences for detainees?

¹ Text not revised by the author.

And that's the question that the ICRC reflected on in the lead-up to embarking on this process and here is what we saw:

If you look around the world today, non-international armed conflict is everywhere. It is the most prevalent form of armed conflict, and, as with any armed conflict, detention and the vulnerabilities that come with simply being detained are an inherent part of it.

If you look at international law today, when armed conflict of any kind breaks out, IHL is the first place we look for guidance. Its relevance is more than intact and the confidence we place in it to mitigate the human cost of conflict remains steady and that's good news.

But when you look specifically at IHL applicable to detention in non-international armed conflict, it is immediately apparent that its potential is not fully realized. In the law governing detention in international armed conflict, IHL provides clear answers to some of the most difficult questions. So the Geneva Conventions will essentially provide a blue print on how to detain members of enemy armed forces, on how to detain civilians who pose a certain threat on the rules protecting persons accompanying the armed forces, on the status and how to detain irregular forces and all of this in the unique circumstances generated by international armed conflict and occupation.

When it comes to non-international armed conflict, much of this detail is absent. And the absence is particularly felt in four areas. First, conditions of detention: everything from nutrition, hygiene, medical care to how a facility is administrated in terms of registration of detainees, notification of detention and family contact; second, particularly vulnerable groups of detainees that have specific needs: so that might include the educational needs of children, the specific health needs of women, and the physical security and human dignity of both; and third, grounds and procedures for internment: if non-criminal detention for security reasons in NIAC is going to occur, and it is going to occur, what is needed to ensure that it is not carried out arbitrarily? And finally, detainee transfers: how do we ensure that detainees are not handed over to authorities that will commit abuses against them? And in each of these areas, the circumstances generated by NIAC give rise to unique challenges and unique operational environments and those circumstances ask for specialized guidance.

But unlike IHL applicable in IAC, the law doesn't put its finger on these difficult issues and doesn't offer a useful solution that balances military necessity and humanity.

The consequence of the absence of clarity in the law in these areas, in a nutshell, has been an endless legal debate about where to look for applicable, workable, appropriate standards. So, does human rights law apply to all these circumstances, and does it provide all of the answers? Should domestic law be relied upon to govern detention? What exactly

does customary IHL say about detention in non-international armed conflict? And what about detention by non-state armed groups?

There are many more questions like these and whatever your views on the legal issues, and many of them have been highlighted in this conference, it seems pretty clear that legal debate and disagreement is not the most direct way to bring protection to detainees. And it seems equally clear that if there is a body of international law that can authoritatively bring some clarity to these questions, it is IHL.

Now, that is not to say that the substantive guidance provided by IHL in IAC and NIAC should be the same. And it is also not to say that the types of instruments that provide this guidance in IAC and NIAC have to be the same. There are very good reasons for States to treat IAC and NIAC differently. But, just because there are legitimate differences between these conflict types doesn't mean that uncertainty has to persist and that detainees have to pay the price. And so, with this in mind we embarked on a process of asking States how IHL might be strengthened to move us from a place of ambiguity and disagreement, to a place where NIAC-related detention in its various aspects can be planned for, trained for and carried out in a way that is guided by the body of law designed, created to guide it.

And here is what we have learned so far in this process, starting with where it all might lead. As you might imagine, from our perspective, a new treaty or an amendment to an existing one would have been the most authoritative form for strengthening the law that an outcome eventually to the process could take. It quickly became clear that there just isn't sufficient interest among States to embark on a treaty negotiation. On the other hand, there has been broad support for work aimed at a non-binding outcome of some kind, perhaps a set of principles and guidelines or practices that would get at some of these issues and would provide some clarity on ways to better protect detainees.

Now the timing, the modalities, the process for getting there is precisely what will be discussed in the lead-up to the next International Conference, and there are some challenges that we will have to work hard with States to address. So I will leave the procedural part there and now focus a bit on what we have learned about the substance that has to be tackled and realities on the ground, those NIAC-specific realities that will have to be accounted for in any work that follows. And each of these observations and many others that we have had and will continue to have certainly presents a challenge in terms of formulating some sort of guidance that would capture all the nuances of NIAC but also provide an opportunity for IHL to do exactly what it is good at and fulfill its role as a specialized body of law for armed conflict.

So, a first example of some of the nuances that have come out is that any outcome, any guidance on this issue will have to take into account the

fact that the detention environment and within a single non-international armed conflict can vary immensely. So what is possible, appropriate, workable at the point of capture of a detainee near the battlefield can be widely different from what is possible and workable in terms of protections provided at the purpose-built detention facility in a more stable area. So any outcome would have to be able to absorb those differences and take them into account and provide guidance that applies and takes into consideration that variant and possibilities.

We have also come to understand the constraints that forces on the ground often have to face and the importance of preparation for detention operations. So, for example, the gender composition of military units will have a significant bearing on their ability to provide certain protections to women detainees; detention infrastructure and the layout of detention facilities will affect the ease with which detainees can be granted access to the outdoors, the ease with which they will have access to hygiene facilities and exercise and other protections. So a useful outcome to the process will be one that helps forces anticipate and prepare for the humanitarian needs that are likely to arise and not one that imposes requirements that can't realistically be fulfilled.

We have also explored how parties to a NIAC can protect against arbitrary deprivation of liberty by limiting non-criminal detention to clearly established grounds, and by putting in place procedural safeguards to ensure that those grounds are met in each case. We have looked at review mechanisms for internment and we have explored a number of possibilities ranging from ordinary courts to administrative boards within a military to civilian administrative boards. And going forward, the main challenge will be to ensure that States have enough flexibility in the mechanisms they use so that different operational environments can be taken into account while at the same time ensuring that those mechanisms have the decision-making power, the authority and the impartiality to act as a true check against arbitrary detention.

And finally, we have seen the role that pre-transfer risk assessments and post-transfer monitoring can play in ensuring that detainees are not ill-treated following hand over to another authority. And we've been particularly interested to hear of the safeguards States have put in place when operating extraterritorially and transferring detainees to a host State. Working towards an outcome, we will have to look to a number of issues like the grounds precluding a transfer from going forward, what goes into the assessment of whether those grounds exist, what would be both a realistic but also a meaningful assessment of the risks faced by a particular detainee and this is of particular relevance when there are a large number of detainees being handed over in quick succession in a NIAC as well as a post-transfer monitoring and the role that that might play again weighing

what is realistic against what is also meaningful and some possibilities for that to be an added protection against ill-treatment following transfer.

These issues are all complex and nothing has been decided on any of them. What we have taken away so far is the important considerations that we will have to bear in mind going forward. But the NIAC-related challenges that have come to light through these discussions actually heighten the relevance of IHL. It is precisely because NIAC is so complicated and the circumstances so varied that IHL has such an important role to play.

So, as a next step, the ICRC will propose a draft resolution for the upcoming International Conference. And its core component will be a shift of attention from exploring what might be possible to working towards a concrete outcome in 2016 and beyond. Discussions with States on the format of the outcome and the process for getting there will be the first item on the agenda. And the idea would be to move sequentially through the various topics of conditions of detention, vulnerable groups, grounds and procedures for internment and transfers, calibrating the process as necessary to taking into account the differing complexities and differing challenges that might arise.

Until then, we hope to have continued support of States for the process and, for our part, we will continue to facilitate this important work with the care and the transparency it deserves.

Can the legal framework applicable to internment in IAC be replicated in NIAC?

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1. The policy issues behind the legal question

The question: can the legal framework applicable to internment in IAC be replicated in NIAC? is a very sophisticated one from a legal point of view, has genuine practical implications and is part of larger debate in international humanitarian law (IHL) regarding whether and to what extent the distinction between the two categories of armed conflicts still exists and should be maintained (which are, in my view, two distinct debates). It is interesting to note that the humanitarians were the first to defend the general idea of promoting an analogy between the two sets of norms. They did so because the Geneva Conventions and Protocol Additional I contain plenty of humanitarian rules, while Article 3 common to the Geneva Conventions and Protocol Additional II are very general and provide fewer details.

More recently, States also adopted this same idea of resorting to analogy. They were interested in applying, in non-international armed conflicts (NIACs), the IHL of international armed conflicts (IACs), i.e. the “right” (or, rather, absence of prohibition) to deliberately kill people without even trying to arrest them (which exists concerning combatants in IACs) and to detain people without any procedure for an indefinite time (which exists for prisoners of war in IACs). According to me, this attraction for analogy really came up recently with the appearance of so-called transnational non-international armed conflicts. Indeed, in traditional internal armed conflicts, States may provide a legal basis for internment in their domestic law and do not need to claim that it is offered by IHL of NIACs. For instance, Sri Lanka has, to the best of my knowledge, never claimed to intern LTTE members

based on international law. It interned them based upon its national security legislation.

¹ I would like to thank Ms. Djemila Carron, PhD, for having transcribed my oral presentation, and Ms. Yvette Issar, LL.M., for having revised the English. Both are assistants at the University of Geneva.

2. General arguments in favour of an analogy between IHL of NIAC and IHL of IAC

As such, the idea of analogy between the IHL of NIACs and the IHL of IACs is a good idea since humanitarian problems are, to a very large extent, similar in those two situations.

Another important reason in favor of analogy is that it is often controversial whether a conflict is international or non-international, and in some contexts it is even delicate to enter into the qualification exercise. For example, if you are today in eastern Ukraine and you want to obtain better treatment for people detained there, you had better not start either by saying that under the Tadic test² this is an IAC because Russia has overall control over the insurgents, or by claiming that it is not an IAC but a genuine insurrection by Ukrainian patriots who want to have another government and fight fascism. You would instead want to leave this question open. However, this would only be possible if the rules applicable to the two types of armed conflicts were the same. In addition, there are many armed conflicts today which are mixed. Though it is nice for us lawyers to pretend that in these cases we have to split the conflict into its different components and apply the IHL of IAC to one set of actors and the IHL of NIAC to another, for practitioners on the ground, this solution is not very practical.

One argument in favor of an analogy between IACs and NIACs is offered by the Geneva Conventions. Indeed, Article 3 common to the Conventions encourages analogy since it states that: “[t]he parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention”. Thus, one cannot say that humanitarian law is opposed to analogy or that such analogy would deprive people of their protection.

This said, the most significant argument against analogy is that States still refuse to apply the same legal regime when they fight rebels and when they fight armed forces of another sovereign State. Another crucial point is the one of practicability for armed groups (that constitutes at least one party of a NIAC). Are armed groups able to comply with the much more sophisticated rules of IHL of IACs? If this is not the case, we had better not claim that they are bound by those rules, as unrealistic rules do not protect anyone and, if anything, undermine the willingness of armed groups to comply even with the realistic rules of IHL.

² ICTY, *The Prosecutor v Duško Tadić*, IT-94-1, Appeals Chamber, Judgment, 15 July 1999, para.s 98-162.

3. Analogy concerning the rules on the treatment of internees

In my view, in this analogy debate, we have to distinguish between the rules on the treatment of detainees on the one hand, and the rules on the necessary legal basis for an internment, the admissible reasons and procedural safeguards on the other. I will deal first with the treatment of internees. In this respect, an additional argument in favor of analogy exists, because the rules on the treatment of prisoners of war and the rules on the treatment of civilian internees are mostly the same. Therefore, when applying the rules of IHL of IACs by analogy, we avoid the difficult question of needing to determine in a NIAC whether someone is a fighter or a genuine civilian because anyway, as far as their treatment is concerned, the rules are more or less the same.

The main argument against analogy concerning treatment involves non-state armed groups. Indeed, under IHL of NIACs, if you make an analogy, then it applies to both parties to the conflict. The problem is that, most of the time, armed groups are simply not able to comply with the very sophisticated rules of the Third or the Fourth Geneva Convention. Once again, unrealistic rules do not protect anyone and could even undermine the willingness of armed groups to respect IHL in general.

4. Analogy concerning the legal basis, admissible reasons and procedural guarantees for internment

In my view, the analogy question is even more difficult regarding the legal basis for detention, the grounds and procedure for internment and the possibility to challenge internment. As a reminder, in IAC, prisoners of war may be detained without any procedure for the simple reason that they are members of the armed forces. The famous Article 5 of the Third Geneva Convention does detail a procedure, but it only applies in the specific case of an individual claiming to be a prisoner of war and not being recognized as such by the detaining State. It does not deal with the reverse situation of a person denying prisoner of war status. As for civilians, they can be interned in IAC for imperative security reasons. This internment must be based on an individual decision. Internees have the right to appeal against that decision, which must furthermore be subject to periodic review.

Here, the analogy debate raises a preliminary question that is, in my view, the crux of the matter. Does IHL only prohibit and prescribe conduct or does it also authorize conduct? Theoretically, this question leads us back

to the Lotus³ interrogation: is everything which is not prohibited by international law permitted by international law? I am one of those very old-fashioned lawyers who still believe in the Lotus principle. According to me, if there is no rule in international law which prohibits something, then it is not prohibited, and thus it is permitted. But this does not mean that there is authorization. For example, to the best of my knowledge, there is no rule in international law prohibiting States from painting universities in red. Therefore, this practice is permitted by international law. This said, I have some doubt that a State could tell a university's private-owner that there is a legal basis in international law for obliging him or her to paint his or her university in red only because international law "authorizes" this practice. The theoretical question of whether everything that is not prohibited by international law is authorized has practical relevance only because of human rights law (HRL). Indeed, HRL requires a legal basis for detention.

4.1. Analogy with the regime of the Third Geneva Convention?

If we come back to the question of whether an analogy can be made with IHL of international armed conflicts, we still need to answer the question of analogy with what? When we deal with a member of an armed group, the most obvious idea is to make an analogy with soldiers in international armed conflicts and to apply the Third Geneva Convention. The argument against this analogy is that fighters join an armed group in a much more informal way than soldiers. In addition, soldiers wear uniforms, which simplifies the classification of the person as a member of the armed forces and thus as a prisoner of war when captured. In a NIAC, because armed groups are by definition illegal, fighters try to hide that they are members of the armed group. Also, under the strict law, they do not have an obligation to wear a uniform or a distinctive sign. Therefore, there is a risk if you apply the Third Geneva Convention by analogy in NIAC to intern persons, as all manner of people who are not members of the armed forces risk being detained and detained without any possibility to challenge their detention because this is not possible for prisoners of war under the Third Geneva Convention. Such application of Geneva Convention III by analogy will then be claimed to constitute the *lex specialis* that prevails over the right to *habeas corpus* foreseen in HRL. The right to *habeas corpus*, however, is not an idea of some militant Human Rights lawyers, but a centuries old guarantee, probably the greatest contribution of Anglo-

³ Permanent Court of International Justice, S.S. Lotus (France v. Turkey), Judgment (7 September 1927), para. 53.

Saxon law to modern legal civilization. In addition, if you are a prisoner of war, you will be released at the end of hostilities while in the IHL of NIAC there is no such obligation. Furthermore, in such conflicts it is often much more difficult than in international armed conflicts to determine when active hostilities have ended. You cannot have analogies working only one way. For all these reasons, I am very skeptical about this idea of analogy with the Third Geneva Convention. Nevertheless, there is the argument of Article 3, paragraph 3 of the Third Geneva Convention, which encourages parties to bring into force all of that Convention. A full analogy with the regime of POWs is therefore encouraged in IHL of NIACs and it cannot constitute a violation of international law. However, such an agreement between parties to a NIAC must inevitably clarify who benefits from an application of the Third and who from the Fourth Geneva Convention and there must be a procedure to determine this in doubtful cases. Articles 4 of the Third and the Fourth Convention, which define who is protected by those Conventions, cannot possibly be applied according to their letter in a NIAC.

4.2. Analogy with the regime of the Fourth Geneva Convention?

The alternative idea is to apply by analogy the procedures foreseen by the Fourth Geneva Convention for civilian internees. This idea was considered favourably by a majority of States in consultations that the ICRC is holding with States to strengthen legal protection for persons deprived of their liberty in NIACs⁴. Similarly, the ICRC itself seems to consider that internment decisions in NIACs should be taken on an individual basis, using the ‘imperative reasons of security’ standard contained in the Fourth Geneva Convention by analogy⁵. The first question

⁴ ICRC, ‘Thematic Consultation of Government Experts on Grounds and Procedures for Internment and Detainee Transfers’, Montreux, Switzerland, 20-22 October 2014, www.icrc.org/eng/assets/files/2015/consultation-internment-detainee-transfers-apr-2015.pdf (11 September 2015), para. 18. The ICRC received a mandate to hold such consultations by Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent (1 Dec 2011). The preparations for and summaries of these consultations as well as related ICRC documents are publicly available, and can be accessed through the ICRC’s website (www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm).

⁵ See ICRC, ‘Internment in Armed Conflict: Basic Rules and Challenges’, Opinion Paper, November 2014, pp. 8-9; ICRC, ‘Strengthening Legal Protection for Persons deprived of their Liberty in relation to Non-International Armed Conflict’, Background Paper, Regional Consultations 2012-13, p. 13; Jelena Pejic ‘Procedural Principles and Safeguards for Internment: Administrative Detention in Armed Conflicts and Other Situations of Violence’ (2005) 87 *IRRC* pp. 375-91, later published as ICRC Guidelines, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’,

we have to tackle when opting for this solution is whether or not the Fourth Geneva Convention authorizes internment. The majority responds positively to this question and the European Court of Human Rights has confirmed in the Hassan case that the Fourth Geneva Convention provides a sufficient legal basis for internment⁶. Personally, I still have some doubts that this is the case, because the Fourth Geneva Convention states in Article 78 that “[d]ecisions regarding such [...] internment shall be made according to a regular procedure to be prescribed by the Occupying Power”, which means that the Convention alone is not sufficient and that the occupying power must legislate (through military orders). Many States involved in IACs, such as Israel, have a legal basis for internment of enemy civilians in their domestic law for their own territory and in military orders for occupied territories.

But let us assume that there is a legal basis in the Fourth Geneva Convention for internment in IACs. Is this legal basis applied by analogy sufficient to detain people in a NIAC? The problem is again HRL. It seems doubtful to me that under HRL, you could limit the rights of a person because of a *lex specialis* derived from reasoning by analogy⁷. And I doubt that a human rights court would accept to interpret clear and hard rules of HRL in light of an analogy with a rule that actually applies in a different situation. This is also confirmed by the UK Court of Appeals in the Serdar Mohammed case⁸. I doubt that any police officer would dare to answer a person he or she has arrested that the legal basis for their arrest is drawn by analogy from legislation that clearly does not apply to the person concerned.

Another way of applying the whole of the Geneva Conventions in NIACs is through customary law. I doubt that it is a solution because many States involved in NIACs have actually created domestic law providing for a legal basis to intern (and they have foreseen procedures to decide upon such internment). Therefore, there is no general practice, and therefore no customary law. Some would object that the practice is different in transnational NIACs (such as Afghanistan), in which outside intervening States cannot apply their domestic law. Even in such conflicts, however,

30IC/07/8.4, Annex 1 to the ICRC's report, International humanitarian law and the challenges of contemporary armed conflicts, 30th International Conference of the Red Cross and Red Crescent, Geneva (October 2007).

⁶ European Court of Human Rights (ECHR), Hassan v. the United Kingdom, [2014] ECHR 29750/09, para.s 104-107.

⁷ See for a clearly negative answer UN Working Group on Arbitrary Detention, 'Report: United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court' (6 July 2015), UN Doc A/HRC/30/37, para.s 27-32, in particular 31.

⁸ Serdar Mohammed v Secretary of State for Defence, UK Court of Appeal (Civil Division) (30 June 2015), [2015] EWCA Civ 843, para. 251.

there is no general practice. First, there are only 50 States, as a maximum, involved in transnational NIACs. And second, out of those 50, to the best of my knowledge, the great majority do not detain, or in case they do, they release/transfer people within 3-4 days. They, therefore, do not even claim that there is customary basis allowing them to intern enemies.

5. Conclusion

In conclusion, I hope that the ICRC process clarifies these things because *habeas corpus* is a crucial guarantee to avoid unjustified deprivation of liberty, of life and torture and inhuman and degrading treatment. However, it may well be that not all procedural guarantees human rights law treaty bodies want to offer in *habeas corpus* proceedings in peacetime are fully realistic in NIACs⁹, at least for people who are arrested on the battlefield. I would also say that in this process, States cannot have it both ways. First, they cannot tell the ICRC that they do not want a treaty but only soft non-binding best practices and then hope that a human rights court will ever accept that these soft best practices constitute the *lex specialis* compared with hard law – and *habeas corpus* is very hard law in HRL. Second, States cannot claim that IHL of NIACs offers a legal basis for detention, but only for States, not for armed groups. If such a legal basis exists in IHL, it must be the same for all, as IHL is always the same for both parties of an armed conflict.

⁹ See for a very nuanced study of such guarantees to be offered in times of armed conflict: International Commission of Jurists, ‘Legal Commentary on the right to challenge the lawfulness of detention in armed conflict’ (September 2015), <http://icj.wppengine.netdna-cdn.com/wp-content/uploads/2015/09/Universal-Commentary-WGAD-PrincGuideArmedConflict-Advocacy-2015-ENG.pdf> (20 September 2015).

The transfer of detainees: multinational operations¹

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Introduction

Before addressing the issues that are specific to multinational operations in relation to the transfer of detainees, I will first briefly address two points that relate to the transfer of detainees more generally. The first one is the question why we have recourse to the transfer of detainees. The second question is why it is problematic. Many in the audience will know the answers to these two questions but I think there are a few points worth making. After that, I will jump to what is specific to multinational operations and give a few examples of how the EU has dealt with this question in its operations.

The reasons for transferring detainees

Why do we have recourse to the transfer of detainees? The answer is relatively simple. There are essentially three options to deal with detainees. First, if the person continues to pose a security threat or is suspected of having committed a serious criminal offence, then release is not really a desirable option. It creates insecurity and impunity. A second option is for the force/operation/mission itself to exercise prolonged detention. However, then it needs to put in place detention facilities, review procedures, etc. This requires a certain amount of resources. It is not the venue that has generally been followed. There may be several reasons for this. Perhaps the mandate does not cover it; perhaps there are concerns about the sovereignty of the host State; there may well be resource questions too. But perhaps the most convincing reason is that most of the operations are temporary – they may take place for one year or a few years, maybe ten years, but at some point they stop. And, therefore, at that point, the question of what to do with people who still need to be detained is still there. So, one could ask whether this track should be further explored but in many cases it does not really seem to offer the solution, at least not in the

¹ The views expressed are solely those of the author and do not bind the Council or its Legal Service.

long term. So what does that leave as the third option? The option of transferring the person to someone else who is capable of putting in place all the necessary elements for secure detention, prosecution and trial, etc., in respect of the applicable obligations under human rights law and IHL.

One point which I will not address here is the question of transfer between troop-contributing nations – that is a separate issue. The main reason is probably that it makes little sense for 20 or 30 or more participating States each to set up a detention system in the same operation – there is clearly an economy of scale advantage to have a single or fewer detention systems.

The reasons why transfer of detainees raises problems

So, if the transfer of detainees is necessary, why is it a problem? Obviously, detainees have certain rights under human rights law and, where applicable, IHL. The specific extent of those rights will differ depending on whether there is an IAC or NIAC and on the human rights obligations of the States in question. But in all cases, these rights will include that the detainee cannot be transferred to a State or organization if there are reasons to believe that he/she would be mistreated or that certain other fundamental rights would not be respected.

The problem in practice, especially in relation to host States where operations take place, is that in many cases there are doubts about whether these States are actually capable and in a position to ensure these rights and to ensure secure detention. There may be many reasons for this. The main one would probably be an issue of capacity. In the case of failed States, they simply may not have a functioning judiciary, a functioning penitentiary, etc. There may also be inadequate standards of human rights protection and/or records of human rights violations.

In order to address such a situation, in most cases a dual track approach has been pursued. The first track is capacity building efforts in the area of the rule of law, penitentiary, police, judiciary, etc., to reinforce the capacity of the receiving State to properly treat detainees in accordance with the applicable human rights and/or IHL standards. The second track is to conclude transfer agreements or arrangements in which the receiving State commits itself to respect a number of elementary rules and in which there are follow-up mechanisms to ensure that these commitments are actually complied with. In many cases these two tracks have gone hand in hand precisely because when there are doubts about the capacity, one wants to reinforce it to make sure that the receiving State is then actually able to implement and respect the agreement/arrangement that is concluded. Of course, and the case law in human rights bodies, etc. makes this clear, the

mere existence of such an agreement/arrangement in and of itself, is not a sufficient guarantee. What really matters is whether there is a legitimate reasonable expectation that the receiving State would actually implement the agreement/arrangement and how it has been applied.

Specificities of detainee transfers in multinational operations

First, one needs to make a distinction between coalitions and operations led by international organizations. In case of coalitions, it essentially remains a question of the responsibility of each participating State. They may exercise that responsibility collectively or they may do so individually but in both cases the state responsibility of the individual States will be at issue. Furthermore, in coalitions the whole conduct of the operation, including in relation to detention issues and particularly in relation to transfer of detainees, is less likely to be centralized or likely to be centralized to a lesser extent than it is in the framework of international organizations.

In case of an international organization, there is an additional level of complexity, namely the question of the responsibility of the States participating in the operations and/or the responsibility of the organizations as such. Organizations like the UN, African Union, European Union and NATO have their own legal personality. Therefore, they are capable of having their own rights and obligations under international law². It is well known that the issue of where that responsibility lies in such a case of multinational operations led by an international organization is far from settled. When exactly is it the responsibility of the organization? When is it the responsibility of the Member States? It may well be that in many cases it is both.

Even in the EU context there is no unanimous view on this between EU Member States. For instance, in the framework of the envisaged EU accession to the European Convention on Human Rights, EU Member States have taken very different views on this. Some have said that when their forces operate under EU command, their conduct engages the EU's responsibility. Others have said that it always remains an issue of member State responsibility.

My personal view is that if there is a unified chain of command, a commander appointed by (an organ of) the international organization,

² In relation to the EU, see e.g. F. Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Antwerp, Intersentia, 2010), especially Chapters 7-9 (based on a PhD thesis available at https://lirias.kuleuven.be/bitstream/1979/1986/1/Doctoraatsthesis_Frederik_Naert_08-09-2008_final.pdf).

operation plans and rules of engagement adopted by an organ of the international organization and this common chain of command is effective and is respected in practice, then, at least in principle, actions of such an operation are attributable to the organization. For example, in the case of the EU counter-piracy operation ATALANTA, the final decision on transfer of suspected pirates to States in the region is made by the operation commander, who does not act in his capacity as originating from one or the other member States but in his capacity of EU operation commander who is responsible to EU bodies at the political level³. However, this doesn't mean that member State responsibility is excluded⁴, in particular, in the case of transfers. Member States would always be in a position to exercise a veto if their forces were the ones who captured the person. If an envisaged transfer were contrary to their obligations, be it under domestic law or international law, they would not be able to accept a transfer and could veto a transfer decision. The possibility of such a veto may engage the responsibility of the individual Member State.

These are just a few observations to show that an additional element in the context of international organizations is the uncertainty as to where responsibility lies.

A related question which is often overlooked, as to where responsibility lies, at least in part, is what are the substantive rules to which the organization is bound? International organizations are not a party to any IHL treaty and they are not a party to any human rights treaty. By way of exception, the EU is a party to one human rights treaty (the UN disabilities Convention) and is in the process of acceding to the European Convention on Human Rights⁵. The EU also has treaty-based commitments to respect human rights, in particular under Article 6 EU Treaty and its own charter of

³ For a general discussion of responsibility in relation to EU operations, see e.g. F. Naert, 'The International Responsibility of the Union in the Context of its CSDP Operations', in P. Koutrakos & M. Evans (eds.), *The International Responsibility of the European Union*, Hart, Oxford, 2013, pp. 313-338 and F. Naert, 'Shared Responsibility in the Framework of the EU's CSDP Operations', forthcoming in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law*, Cambridge University Press, 2015, Vol. III.

⁴ See generally F. Naert, 'Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations', in J. Wouters, E. Brems, S. Smis and P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations* (Antwerp: Intersentia, 2010), pp. 155-168.

⁵ See Article 6 EU Treaty and Article 59 ECHR, as amended by Protocol 14 to the ECHR. However, this accession has run into difficulties following the EU Court of Justice's Opinion 2/13, in which it ruled that the draft accession agreement which had been negotiated (Council of Europe Doc. 47+1(2013)008 of 5 April 2013, available at www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents_en.asp) was not compatible with the EU Treaties.

fundamental rights. So, in the case of EU, there is a body of written laws binding on the Union in relation to human rights⁶. However, other organizations are not in the same position and one will need to look primarily at customary law to see what obligations those organizations as such have under international law.

It should also be noted that the responsibility question may have an impact on the chain of command. If responsibility continues to lie with the Member States, there is a risk that Member States would then accordingly want to make sure that they have and retain control over any decisions in relation to detention or transfer of detainees and that may complicate the unity of command.

Examples of EU practice⁷

The first example, which is discussed only briefly, is the counter piracy operation Atalanta. In the framework of this Operation, the EU concluded its first transfer agreements with countries in the region around Somalia to ensure that pirates who were captured, and whom none of the Member States wished to prosecute, could nevertheless be prosecuted and would not have to be released. They were accompanied by capacity building efforts for States in the region who were receiving those pirates. Furthermore, they were accompanied by very detailed standard operating procedures on evidence handling to make sure that everything possible was done to ensure that prosecution could take place as successfully as possible in the countries

⁶ See also F. Naert, 'Applicability/Application of Human Rights Law to International Organisations Involved in Peace Operations – a European/EU Perspective', in S. Kolanowski *et al.* (eds.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility. 12th Bruges Colloquium, 20-21 October 2011 / ...*, ICRC & College of Europe, Bruges, 2012, pp. 45-56, www.coleurope.eu/sites/default/files/uploads/page/collegium_42_0.pdf and F. Naert, 'The Application of International Humanitarian Law and Human Rights Law in CSDP Operations', in E. Cannizzaro, P. Palchetti & R. Wessel (eds.), *International Law as Law of the European Union*, Martinus Nijhoff, Leiden, 2011, pp. 189-212.

⁷ See generally F. Naert, 'Setting the Scene: Transfers and Humanitarian Concerns - An EU Perspective' and 'Ways Forward. How to Operationalise the Legal Obligations?', in H. Sagon *et al.* (eds.), *Transfers of Persons in Situations of Armed Conflict. 9th Bruges Colloquium, 16-17 October 2008 / ...*, Bruges, 2009, respectively pp. 18-26 and pp. 107-112 (<https://www.coleurope.eu/content/publications/pdf/Collegium39.pdf>) and E. Chaboureau, 'Les accords de transfert de personnes détenues dans le cadre des opérations de gestion de crise de l'Union européenne' ('Transfer Agreements: the EU Experience'), in T. Braibant and S. Kolanowski (eds.), *Detention in Armed Conflict. Proceedings of the 15th Bruges Colloquium, 16-17 October 2014 / ...*, Bruges, 2015, pp. 131-141, www.coleurope.eu/sites/default/files/uploads/page/collegium_45_lowres.pdf.

concerned. These agreements are relatively well-known by now so they are not further discussed here.

The second example, which I will discuss a bit more extensively, is the transfer agreement for EUFOR RCA with the Central African Republic (CAR)⁸. The EU conducted an operation in this country for slightly over one year⁹ and the assessment of the applicable law was that there was an armed conflict going on in the Central African Republic but that the EU operation as such was not (going to be) a party to the conflict. At least the latter was not the intent or the expectation, although there was an awareness that there was a risk that the operation could be drawn into the conflict and, therefore, might become a party to the conflict. In terms of applicable law that meant the starting point was human rights law, with the possibility that IHL would also become applicable

The way this was reflected in the transfer agreement was that there was an acknowledgement of the initial short duration detention authority which was based on the UN Security Council mandate, followed by the possibility of the ‘traditional’ transfer to the CAR, consistent with other similar transfer agreements, or to the International Criminal Court (because the ICC has an on-going investigation which was already open in relation to CAR and it was desired to cover that situation as well). Beyond this, there were two particular features of this transfer agreement.

The first one was an acknowledgement in the recital of the agreement that it might also be possible for the force to continue to detain a person under the law of armed conflict. The reason for this was that there was a possibility that IHL would become applicable to the operation and it was desired to preserve the possibility to invoke detention authority under IHL in that case. This was done knowing that there is a question as to whether IHL in NIACs constitutes that authority or not, but by acknowledging this possibility in an agreement, it could reinforce or possibly even create the legal basis for such a detention.

⁸ Agreement between the European Union and the Central African Republic concerning detailed arrangements for the transfer to the Central African Republic of persons detained by the European Union military operation (EUFOR RCA) in the course of carrying out its mandate, and concerning the guarantees applicable to such persons, EU *Official Journal* L 251, 23 August 2014, p. 3. See more extensively F. Naert, ‘The Interplay between International Humanitarian Law and Human Rights Law when Detaining in EUFOR RCA’, in T. Braibant and S. Kolanowski (eds.), *supra* note 7, pp. 173-180, www.coleurope.eu/sites/default/files/uploads/page/collegium_45_lowres.pdf.

⁹ See Council Decision 2014/73/CFSP of 10 February 2014, EU *Official Journal* L 40, 11 February 2014, p. 59; Council Decision 2014/183/CFSP of 1 April 2014, EU *Official Journal* L 100, 3 April 2014, p. 12; and Council Decision 2014/775/CFSP of 7 November 2014, *Official Journal* 325, 8 November 2014, p. 17; as well as UN Security Council Resolution 2134 of 28 January 2014 and UN Security Council Resolution 2181 of 21 October 2014.

The second particular feature is the possibility of prolonged detention by the operation in case the competent judicial authorities of the Central African Republic authorized EUFOR RCA to do so. This was a new mechanism. The reasoning behind it was that for transfers to take place right away, the Central African Republic had to have in place police, judiciary, penitentiary, etc. – essentially the whole chain to deal with detainees. That was not the case at the time the operation started and it was going to take time to establish. By contrast, it would be easier to create only the investigative branch, especially an investigating magistrate with the authority to authorize detention under the local law. Thus, only a more limited part of the detention chain had to be functioning correctly to implement this mechanism. Another advantage would be that local authorities would be involved early on. This was useful because ultimately the operation was going to leave after one year and at that point hopefully conditions would be there to transfer the people fully to the local authorities. That would presumably go smoother if they had already been involved from the beginning.

Final remarks

I will conclude with three final remarks. First, transfer in multinational operations is complicated because the issue of transfer as such, even in the national context, is already difficult, and on top of this the uncertainty about where responsibility lies in a multinational operation is added.

Second, it will remain a challenge for some time to come and each organization will probably adopt its own approach to this. In the EU framework a fairly centralized system with EU level transfer agreements has been put in place. By contrast, in ISAF, each individual troop-contributing nation (or at least a number of them, and not NATO as such) concluded transfer agreements with the Afghan authorities. Nevertheless, there will obviously be a number of common elements.

Finally, while the EU has adopted a fairly common approach, this has not been without challenges or without difficulties. For instance, there is clear disagreement among EU Member States as to whether responsibility lies with the Union or with the Member States or with both. There is also a German judgment at the level of the Court of Appeal which raises some questions about the nature and legal effect of these transfer agreements, which are concluded under the common foreign and security policy of the Union¹⁰. Such questions as to the competence to conclude such agreements

¹⁰ See the judgment of the Cologne administrative court of 11 November 2011 (available in German at www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2011/25_K_4280_09urteil20111111.html) and the appeals judgment of the Oberverwaltungsgericht Nordrhein-

and the nature of those agreements as well as their legal effects are specific questions of EU law that are not further discussed here¹¹.

Westfalen of 18 September 2014 (available in German at <http://openjur.de/u/731026.html>). The judgments relate to the situation prior to the entry into force of the Lisbon Treaty and the latter treaty has introduced important changes, so the findings of the judgments may no longer apply (fully).

¹¹ See further F. Naert & G.-J. Van Hegelsom, 'Of Green Grass and Blue Waters: A Few Words on the Legal Instruments in the EU's Counter-Piracy Operation Atalanta', Issue 25 *NATO Legal Gazette*, 5 May 2011, pp. 2-10 (available at www.ismlw.org/Nato%20Legal%20Gazette.php and as KU Leuven Institute for International Law Working Paper No 149 at www.law.kuleuven.be/iir/eng/research/wp.html) and the response thereto by J.-P. Pierini in Issue 26 *NATO Legal Gazette*, 29 September 2011, pp. 19-25 (available at www.ismlw.org/Nato%20Legal%20Gazette.php).

**VII. Panel discussion on convergence
in the law governing IAC and NIAC**

Panel discussion on convergence in the law governing IAC and NIAC¹

Sarah Cleveland

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The Project on Harmonizing Standards in Armed Conflict is a joint project co-directed by Sir Daniel Bethlehem, the former Legal Adviser of the UK Foreign and Commonwealth Office, and me, and is sponsored by the Human Rights Institute at Columbia Law School.

The project seeks to grapple with the disparity in IHL treaty rules between IAC and NIAC by exploring whether, and to what extent, the existing treaty rules applicable in IAC can be applied comprehensively, as a practical matter, by individual States or groups of States in NIACs. This project was inspired by Sir Daniel's experience in the UK Foreign Office and my own experience as a lawyer in the US State Department, where we were confronted with addressing operational questions on a daily basis that required us ultimately, for various reasons, to look to IAC rules to try to address legal questions arising in NIAC.

My starting premise here is that there is a problem in the disparity between treaty protections in IAC and NIAC. I am not going to belabor that issue; it has been fully vetted at this point. But I think the issue was underscored quite poignantly by the example of Afghanistan in 2002. When President Karzai was sworn in in Afghanistan in the early months of 2002, he invited the coalition States into Afghanistan. By this single act, he switched that conflict from an IAC to a NIAC, without any change in the level of violence, the functional parties involved, or the number of foreign States that were implicated, which at its peak reached 150,000 foreign military personnel from 50 countries. With Karzai's election and invitation, we thereby switched from the application of the four Geneva Conventions and Additional Protocol I (to States that are parties to it), to a sparse treaty regime governed by Common Article 3 and the few substantive articles of Additional Protocol II (again, for States parties). The result was a variable geometry in which different States participating in the conflict looked to different treaty rules, other bodies of law, policy directives and so forth to determine the specific set of rules they would comply with, all while everyone was trying to coordinate their coalition activities.

¹ The views expressed are solely those of the author.

A number of States responded to this situation by declaring that they would apply IAC rules in NIAC as a matter of policy. Through the Harmonization Project, we are trying to take seriously the idea that IAC rules can be applied in NIAC, and to explore what it would really mean to apply the IAC rules in NIAC in whole cloth. It is an effort to apply, or to develop, workable rules for NIACs based on rules that were developed for situations of armed conflict, that States have already adhered to, and which they are used to applying in situations of armed conflict. The Project anticipates that individual States or groups of States could commit to adhering to IAC rules as a baseline of protection, either in a particular non-international armed conflict or in all armed conflicts across the board. We contemplate that States would adhere to the regime by registering a unilateral declaration of intent with an appropriate body, perhaps the Swiss Federal Council, but stated something like we will apply our existing obligations under the Geneva Conventions and the Additional Protocol I in this conflict or in all conflicts, subject to reservations that are in fact necessary in order to apply the four Geneva Conventions and API to conflicts with a non-state armed group on the other side. We have had the privilege of vetting this with various government representatives, with NATO, with Human Rights groups, other people in civil society. Our report is due out shortly but we do have time to revise, so I greatly look forward to the reactions that we get.

I will offer a few quick points to clarify the project and then discuss a few of the conclusions that we have reached.

First, we definitely do not consider this a permanent solution to the problems we have been discussing the last two days. We consider it complementary to other efforts, including the important efforts of the ICRC and the Customary Law Study and the current detention project. It has been noted that developing a multilateral treaty in this area could take decades. States need solutions in the meantime that are operable, and we are seeking to address the collective action problem by allowing States to reach to rules that are already on the shelf rules and apply them unilaterally. The hope is that this will help both harmonize the rules applicable in both types of conflicts and catalyze movement toward a single body of rules that would reduce the significance of categorizing conflicts. Applying IAC rules in NIAC in the near term would promote interoperability, enhance legitimacy, close perceived gaps in law and also secure higher standards of protection.

Second, we see a provenance for this project historically in the *Lieber* Code, which was a code developed for the Union forces in the American Civil War. So the *Lieber* Code was a historical example of a unilateral, one-sided code for the Union forces in that conflict. Other antecedents include Common Article Three, which contemplates special agreements to establish

additional rules in NIAC, as well as API's application of IAC rules to national liberation movements and conflicts.

Third, the critical conceptual move here, and one that owes some intellectual debt to Marco Sassòli, is that we are breaking with the principle of equality of belligerents. NIAC law has been bedeviled for a long time by the principle that all parties to a conflict must undertake equivalent legal obligations. Because there often is a significant disparity in capacity between the State, on the one side, and the non-state armed group on the other, this requirement of equality of legal undertakings can result in a race to the bottom with respect to the applicable legal standards. Here we are saying consciously this is a for-one-side-only set of rules. We do not expect that non-state actors would take on these responsibilities, although we are sensitive to the need to try to help incentivize their compliance with IHL.

Fourth, relation to other bodies of law, this project is modest in that it is focused specifically on the extent to which IAC treaty rules are applicable in NIAC. We do not purport to conduct a complete review of all international rules that could be applicable in NIAC, including the applicability of customary international humanitarian law, domestic law, human rights law, international criminal law, weapons conventions, international environmental law and so forth. There is obviously room for other work in this area.

Finally, we recommend that States undertake the application of IAC rules in NIAC as a matter of legal obligation. We think, in particular, that achievement of the goals of the Project, including enhancing State legitimacy in the conduct of non-international armed conflicts, will be greatest if a State adheres to the regime as a matter of *law*. But even if IAC rules are applied in NIAC as a matter of policy, if you are going to take seriously the representation of States that they apply IAC rules in NIAC, this project reflects an effort to think through comprehensively and systematically what it would look like to do that as a matter of policy, and to avoid cherry picking by States among the IAC rules that they choose to apply in NIAC.

The Project on Harmonizing Standards in Armed Conflict is a practical, operational project. We appreciate that there is a significant challenge regarding the political will to get States to do this. Our question, however, is: can the project be done as a practical matter and what would it look like? So, we have put together a steering committee of leading IHL experts and scholars with particular expertise in the interpretation and application of NIAC and IAC rules in operational context who have worked with us for several years now, literally going through the Geneva Conventions and the Additional Protocol, article by article, to try to think through how those provisions would apply in NIAC. I should note that the members of our steering committee are not in any way being asked to endorse the final

product. Responsibility for the final product belongs to Sir Daniel Bethlehem and me. Our steering committee participants may be motivated by a shared interest in or appreciation of the problem, but they are not asked to commit the solution. Their assistance, however, has been invaluable. Many of them are here, so, I just wanted to note them and thank them for their assistance: Brigadier General Rich Gross of the Legal Counsel to the US Joint Chiefs of Staff; Ms Elizabeth Wilmshurst from Chatham House, Dr. Marten Zwanenburg, now with The Netherlands Foreign Ministry; Prof. Françoise Hampson from the University of Essex and Major General Blaise Cathcart, Judge Advocate General of the Canadian Armed Forces. Others include Sir Adam Roberts from Oxford, Mike Schmitt, Bruce Oswald and Jelena Pejic. Again, we are very grateful for their contributions.

Turning to substantive, interpretive and conceptual challenges: as it turns out, many of the conceptual challenges that would be confronted in applying the Geneva Conventions to non-state armed groups in NIAC are actually already confronted in IACs, particularly in the context of dealing with irregular forces and opposing States with limited capacity. There is a good deal of flexibility within the Geneva Conventions for addressing such situations and developing work-around if necessary. I think we tend to think in these conversations about IACs as involving classic international conflicts between two States with regular uniformed militaries on the one hand, and NIACs as involving people out of uniform hiding in bushes, jumping out and shooting at people and otherwise being indistinguishable from the civilian population on the other. But both types of conflicts obviously run a spectrum from NIACs that can end up looking a great deal like an IAC, and *vice versa*.

So, for a number of issues, from the methods and means of warfare, to treatment of the wounded and sick and medical and religious personnel, we have concluded that the issues raised by application of the rules to NIACs can be addressed in the same manner as States currently address them in IAC. Now, obviously, there are significant challenges with respect to status, detention and related issues. With respect to treatment and detention frameworks, we take the position that the Third and Fourth Geneva Convention regimes for detention should be applied in NIAC as faithfully as possible consistent with their terms. But it is our conclusion that there are not that many armed groups that would actually qualify for detention within the terms of, for example, article 4(A)(2) of the Third Geneva Convention. It is also our view, at least preliminarily, that combat immunity is integrally tied to the concept of detention until the end of the conflict for POWs under the Third Convention. The two go hand in hand.

So, at least for now, the approach that we are recommending to detention is that States would generally apply the Fourth Convention

framework as a presumptive regime for individuals affected by the conflict including fighters. Application of the Third Convention POW regime would be discretionary, just as recognition of belligerency was historically, and would be dependent on satisfaction of its terms – in other words, compliance by the organized armed group with the requirements of the Third Convention or API and the corresponding bestowal of combatant status and immunity. Again, a State would not have to recognize combatant immunity for the armed group, but doing so would be part and parcel of the ability to detain until the end of the conflict. Otherwise, consistent with the issues Marco Sassòli raised in the last panel, detainees would all be subject to the greater procedures and periodic review of the Fourth Convention.

Detention conditions, rank, personal affects and security can essentially be applied as they are in NIAC. There would need to be a reservation so that the Fourth Convention would apply to the nationals of the territorial State. There are some issues with respect to release, repatriation, transfer and humane treatment that I can go into if people are interested. And in general there is a package of administrative matters that usually a State is expected to carry out in an IAC, but it turns out that the ICRC often fills these responsibilities already in IAC and it, or some other similar actor, potentially could serve that function in NIAC.

I am advised that my time is up but I hope I have said enough to tease out a provocative conversation, so thank you.

I appreciate the recognition that thinking through this project even on behalf of States only, could contribute to the development of mutual frameworks for all parties to a non-international armed conflict. In that respect, I would note that asymmetric legal obligations of a State are not a unique idea even in armed conflict situations. A major alternative approach to this one is application of human rights law in NIAC, and human rights law, of course, is applicable to States and not to the armed groups.

With respect to authorization of detention, I would want to consider the issue further, but it seems to me at least conceivable that a unilateral declaration of this form could constitute domestic legal authorization for detention, if that is in fact required by international law in a NIAC context. This is an issue that is obviously live in the Mohammad case.

With respect to conduct of hostilities, which I am going to assume is perhaps implicit in your question, we have looked at this issue a good bit, and I am sympathetic to the remarks that Robin gave earlier. In the end, there may not be a great deal of daylight between the way that States interpret their ability to use force under the Geneva Conventions, in particular under API, and the way that they interpret their ability to use force against persons who directly participating in hostilities or through application of a continuous combat function in NIAC. There are already disagreements among States in IAC about the scope of that authority and I

expect that those will continue. But I think that the actual distance between conduct of hostilities in IAC and NIAC is probably less than some people assume.

I would just like to go back to where we started yesterday, which is the question: is there a problem? We spent the last two days discussing the fact that lawyers, States and interpreters repeatedly get twisted into trying to unravel the legal frameworks in situations where IACs and NIACs overlap, where States are acting extraterritorially with multiple other States and with non-state armed groups, or where there are multiple different NIACs in the same State, between different actors. We are also told that soldiers are soldiers; they need clear rules without caveats. So how do you square those two problems? The Harmonization Project is an effort to try to help square those two problems. There are indeed other efforts out there. For example, there is the ICRC Customary Law Study. It is not uncontroversial. Divining what customary law is in a particular context can be extremely difficult, and I can say from having been a government legal advisor that I many times went to the customary international law study and just found no answer, because it was addressed at a level of generality that did not produce a solution to the problem that I was looking for.

So then we are advised that we should develop clearer standards for NIAC. How do you develop such standards? You could have a drafting process to produce a new multilateral convention. I have not heard any appetite for such a process, or any expectation that it would be likely to produce fruitful results in the near or mid-term. Early in this project, we tried to go through the Geneva Conventions and extract “fundamental principles” that might be applied in NIAC. When you actually engage in that exercise, it proves to be very difficult, in part because a lot of the Geneva Conventions provisions are really important, and very integrated, and you do not want to come out with a suggestion that some of it is more important than others. Conversely, some aspects of the Geneva Conventions are not relied upon at all in practice by States in modern international armed conflicts. Some of it would not be at all relevant to NIAC including probably the law of occupation.

So, the challenge for this group is who is going to develop the standards to govern State conduct in NIAC? What are the standards going to be, and who is going to develop and control them? Darren Stewart tells us that right now in the UK, the courts are developing the standards and controlling them. I am certainly for educating Human Rights bodies about International Humanitarian Law rules. I think they increasingly recognize the importance of being aware of them, but what that means is that the reality in many situations, even if you are applying Human Rights law, you are going to end up looking to the IHL rules for a solution, because those are in fact the rules developed for armed conflict and they speak to situations like: can

you censor a detainee's mail? Can you detain someone on board a ship? Can you hold someone in close confinement? These are just a few examples of issues that other bodies of law just do not address. So, I do not think the "Harmonization Project" is a perfect or long term permanent solution. But it is more of a cast for the problem than a band aid. States in the near term need answers to questions for which they do not currently have an answer, and they are going to have to develop the answers somehow. States can develop them based on rules that are intended for armed conflict and that are likely to be compatible with the rules that other States are applying, or everyone can just improvise on their own and likely exacerbate interoperability problems rather than reduce them.

With respect to a few of the particular issues, I do think that some of the concern that is articulated reflects a view of the relationship between IHL and Human Rights Law that I do not share, and which is actually one of hard displacement. Under that view, if a State takes the position that it is applying IAC rules in NIAC, that would be the final word, and regardless of the form of the NIAC or the level of the threshold, no one would ever question whether or not the IAC rules, such as the procedures for detention under the Fourth Geneva Convention, were adequate. That is not the world I live in, and this is not our view. We think that the application of IAC rules in NIAC would create a minimum base line of protection, but those rules might well get elaborated upon further, including based on the rules of human rights law, depending on the nature of the conflict. So I think there is great room for flexibility both within IHL rules and based on resort to other bodies of law.

We are not purporting to address thresholds for triggering an armed conflict in this project. The project assumes the thresholds are what they are. I am not sure that I share the assumptions of some in the room about what the rules are that are applicable to Common Article three NIACs, or that our approach would actually reduce protection in that context, because this depends on your understanding of what the customary international law rules are in relation to Human Rights Law and so on and so forth. But I do think it is an important intellectual exercise to go through, particularly since States already contend they are applying IAC rules in NIAC as a matter of policy, and as a matter of fact, they end up invariably having to do so, because they do not have other rules that provide clear guidance in many contexts that arise on a daily basis.

Panel discussion on convergence in the law governing IAC and NIAC

Robin Geiss

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My first word is one of caution – not in relation to Prof. Cleveland’s project, but to any norm development/norm clarification project. It is ironic that this should come from a German lawyer, particularly in the presence of so many distinguished common law lawyers. Nonetheless, it gives me great joy to make this comment in front of you: “Less regulation may be more”. It seems, and it is becoming quite worrying, that in the case of the laws of armed conflict, we are seeing a trend of over-regulation and over-specification. We have another expert “clarification” process every other year; we have (explanatory) manuals on nearly everything, including detention (the Copenhagen principles), cyber warfare (the Tallinn Manual), naval warfare (the San Remo Manual) or air and missile warfare (the HPCR Manual). But how successful are these projects in clarifying the law (What the law is, what the law’s content is)?

My impression is that with many of these projects we are seeking a degree of clarity that is unobtainable in the area of the laws of armed conflict. If we are making all of the Geneva Conventions applicable to non-international armed conflicts, then we are saying these are situations where we are expected to abide by more than 600 rules. But war was (and should be) conceived as an extreme crisis that can never be regulated fully. The laws of armed conflict try to uphold a minimum of protection and regulation. War should not exist but if it does we have a rudimentary legal regime in place as a fallback option. By definition, with this regime we cannot achieve perfect regulation. And still, here we are looking for more rules and more in-depth regulation. I believe, we have to be cautious with the application of ever more rules that go into ever more details.

There is another problem, I think. In any regular parliament, you have people with different professional backgrounds. They will spot a problem, they will have a political debate and then they will task their lawyers to turn all of this into a legal framework. In international law – especially in the norm clarification / harmonization projects we are discussing here today, we have lawyers identifying the problem, lawyers discussing the policy and possible solutions and lawyers devising the rules. As a consequence, there is an inflation of rules and I am not necessarily sure that it is a good thing. We are craving more clarity in armed conflicts, but I am not sure we are actually getting it with ever more and more detailed rules. In spite of all the

manuals that are currently on the market, many of the long-standing open issues of LOAC remain as open, ambiguous and controversial as ever.

I have one more point on Germany and then I am done with Germany – I am teaching in Scotland, anyway. It is really just sharing a piece of information – the German joint service regulation was recently revised and will come into force in (I think) 2016. Now, the previous version of the German joint service regulation still had this policy declaration that you also mentioned, Sarah Cleveland, in your block intervention, whereby Germany was saying: if we are engaged in a non-international armed conflict, we will abide by the laws of international armed conflict, as the US and, I think, the UK stated so also. The revised version of the German joint service regulation no longer includes this paragraph; instead, there is more emphasis on the dichotomy between NIAC and IAC. I thought it helpful to share this piece of information on relevant State practice because it is evidence that not all States are in favour of further harmonization of the legal regimes applicable to IAC and NIAC.

I am not opposed to improvement of the laws applicable to NIAC – not at all – I share Prof. Cleveland's view that the laws of non-international armed conflict are certainly in need of improvement, maybe even revision. And I agree that we should use the legal regime applicable to IAC as a source of inspiration. However, I think it would be nonsensical to think that we could do a copy and paste one-to-one assimilation of the two. I understand that this is not what you are doing in this project; but just as a general base line, I think that a copy and paste is certainly not realistic. We need a measured project of harmonization. There are, of course, some areas where the argument is compelling that you should have further convergence, for example, for the wounded and sick. And in an area like the wounded and sick we need not be scared of over-burdening non-state actors; these are due diligence obligations that allow different capacities to be taken into account. I am not sure that States would see an incentive to engage and bind themselves to all of these quite detailed and sophisticated regulations but if they are up for it, all the better. It would certainly be good to have wounded and sick protections in NIAC enhanced to the level of international armed conflict. There is, however, a considerable economic dimension to all of this. Rendering applicable all of the rules pertaining to the protection of the wounded and sick in NIAC constellations will cost money. Humane treatment is another evident example, as are war crimes – examples for areas where harmonization and simulation would seem conducive.

There are, however, also some areas where further harmonization could be dangerous and these are areas where we are lowering protective standards, for example, detention, conduct of hostilities, which we talked about it this morning. We are still at pains, those of us who believe in it

(not everyone believes in it), to turn back the clock, because we have gone too far in assimilating conduct of hostilities rules and we should not be making that same mistake with regard to detention.

And my final point for now. I would also share the concerns of those, and this is now more specifically tailored to your project, leaving out human rights and other laws as I am not so sure that can work. I mean the Hassan judgment, this is very Euro-centric I realize, but the Hassan judgment has just shown us that international armed conflict is not necessarily the benchmark. Rather, we should not perceive these rules as ideal standards – they are quite old and rudimentary, and they have a number of protective loopholes and so on. What the Hassan judgment did at the European Court of Human Rights in Strasbourg was to add, to merge human rights protections on top of what we have in international armed conflict. So, obviously the Strasbourg Court thought, well, international armed conflict is not ideal – these are different times in 2015 – there is something to add on top of this. Now, if that's what the Strasbourg Court is thinking, why not engage in this kind of more creative project also for purposes of non-international armed conflicts?

Also, there is only one cup that you can fill with law. If you fill it with humanitarian law, it is full and there is nothing else. So what I am saying is that you are displacing, in non-international armed conflict in particular, a thick web of other regulations, potentially more protective regulations. That may be okay, in certain instances, but you need a justification as to why you are doing this, and the more you add into your cup of IHL and the more you displace, the better the justifications need to be. Now, Prof. Cleveland, when you say that an assimilation convergence project will do away with the necessity to qualify conflicts, I wonder which of the standards will apply. Is it the high threshold of non-international armed conflict or are we going to apply everything at the very low standard of international armed conflict? If we do that, then I do not think that is sufficient as a justification to displace all the many more protective rules that we would otherwise have.

Last point goes to what Marco already said and I want to tease you a little more on that. It is the unilateral declaration which you suggest as a mechanism to bring all of this to bear in a way and I share Marco's point that in international law, it is unheard of that you, by virtue of a unilateral declaration, create rights or an authorization for yourself. So, I am still wondering how you get around that point. I mean a binding unilateral declaration was when France declared to stop nuclear testing in the atmosphere – they did this unilaterally, that was binding, that is also what the ILC understands by a unilateral declaration. Creating rights for you, however, is not really envisaged.

The charm of Prof. Cleveland's project is that it is arguably realistic, perceived as realistic by States and that is certainly something to take into account. I think the problem of the moment if you ask about the legal landscape is that all these loopholes and the gap-filling that is taking place is happening in a very uncoordinated way, driven by different interests, sometimes competing, sometimes overlapping, but certainly not coordinated. The courts apply human rights law, in the view of some – not in my view – but regarding the Hassan judgement, the European Court of Human Rights has introduced a whole new approach of how to merge human rights and humanitarian law. And you can say it went beyond its competence: this is norm development, no longer the kind of norm interpretation that the court should engage in. But the Hassan judgement is just the first word, not the last. There will be much more human rights law and the same with all the purely IHL-focused projects, and Prof. Cleveland's is one of them. They are all going side by side, so this is creating a patchwork, of course, and we will just have to learn to live with that patchwork for quite a while. So, with all the various current harmonization projects that are going on at the moment, what we will be seeing in the end might well be diversification.

Panel discussion on convergence in the law governing IAC and NIAC

Jann K. Kleffner

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It has been mentioned several times that the Harmonization Project is solely about States. Obviously, if we think about non-international armed conflicts, we also have to address the other party to non-international armed conflicts, namely organised armed groups.

One of the issues in that regard that the Harmonization Project brings to the fore is belligerent equality. I actually think that the very fact that States seem to be prepared to apply certain parts or even the entire law of international armed conflicts in non-international armed conflicts, even though it may be by way of policy, already speaks to the fact that maybe equality of belligerents is to be taken with a pinch of salt. But, nevertheless, we obviously have to think about organized armed groups and how to address them in a more effective way, as a matter of law. I don't think that a similar such project where we try to extend as much as possible the obligations under the Geneva Conventions and First Additional Protocol to them is the right solution. In fact, my suggestion would be to look the other way and look away from harmonization to more differentiation. What I mean with that is that we should take more into account the very significant differences between organized armed groups.

While States are quite similar in many respects to one another, organized armed groups are not. Organized armed groups differ as far as control over territory and persons is concerned, as far as their organizational set-up, their tactics and strategies are concerned, to name just a few differentiating factors. However, the law of non-international armed conflict seems to move away from distinguishing between different types of organized armed groups towards an increasing uniformity, such that it applies a single set of rules to organized armed groups. The rudimentary distinction between groups that satisfy the requirements for Additional Protocol II to apply, on the one hand, and other groups that fall under Common Article 3, on the other hand, seems to have given way to such uniformity. The ICRC Customary Law Study and recent treaties such as the provisions on war crimes in non-international armed conflicts in the ICC Statute and the 1999 Second Hague Protocol epitomize that development.

One may very well wonder whether this move away from basic distinctions leads us in the right direction and whether one should not

instead start thinking about applying the law of non-international armed conflict more differentially and tailor the law more to this specific group in question.

While it may be suitable to develop a uniform set of rules for States, we have to ask the question, on the one hand, whether falling back into the habitual dogma of belligerent equality and trying to extend ever more demanding rules to any and all organized armed groups actually serves a purpose and, on the other hand, what it would mean to abandon belligerent equality and allow for a more differentiated application of the law of non-international armed conflict *vis-à-vis* organized armed groups. It is commonly asserted that belligerent equality is exerting an important pull towards compliance with the law and hence abandoning what would undermine compliance. At the same time, that assertion seems to never have been tested in empirical studies that are addressing non-international armed conflicts specifically. One may also ask whether and to what extent any compliance pull generated by belligerent equality may be counterbalanced or absorbed by a pull towards non-compliance that is exerted by ever-more demanding rules that are unrealistic to be complied with by an organized armed group.

So I think that if we turn our attention to the other side of non-international armed conflicts, we can learn from the Harmonization Project in the sense that we can start thinking along unilateral lines and tailor LOAC obligations more sophisticatedly to the specifics of organized armed groups.

Trying to secure the consent of the organized armed group and its making unilateral declarations to bring into force all or part of Geneva Conventions could be a way to induce compliance. But there are also other ways that do not make the applicability of a given rule dependent on a group's consent. One such way may be a more differentiated approach to organized armed groups that considers the specifics of the organized group in question when identifying its obligations and by imposing those obligations upon it that it can realistically comply with.

Not to consider such a differentiated approach towards organized armed groups bears the risk of an ever-increasing normative overreach which has negative consequences for compliance with the law.

I think we have to be very careful in distinguishing between interpreting the norms to fill gaps and setting new norms or engaging in *de lege ferenda* projects. If it is an interpretive exercise, for instance, it has to remain grounded in the *lex lata* norms that are to be interpreted – and not, as has occasionally been the case, a process that purportedly involved norm interpretation that ended up in the creation of new norms or in such a radical diversion from broadly-accepted interpretations that it effectively

amounted to such a creation of new norms. And in both realms – norm interpretation and norm creation – it cannot be done without States.

Attention must be paid to how States interpret the norms as much as they have to be consulted in any project to clarify how a given rule or principle has to be interpreted. This is even truer on the level of norm creation. We have to pay due attention to those who ultimately own these rules.

Panel discussion on convergence in the law governing IAC and NIAC

Nils Melzer

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I think the project that explores the potential of treaty harmonization is certainly a great idea and immediately brings to mind various difficulties and challenges. However, I cannot really evaluate this project in more detail without having read the forthcoming report. So, many of the things I am going to say here you will probably have addressed already, so that these will be non-issues for you.

"Convergence" of IHL applicable in IAC and NIAC can mean very different things to different people. For example, if to you convergence is about reaffirming that IACs and NIACs are governed by the same fundamental principles while taking into account the factual legal differences, then that in my view is a good way of looking at it. However, if you say convergence should mean full and formal applicability of the IAC treaties in all situations of NIAC, then I see a host of problems.

I see problems because IAC treaties have been drafted for States to be applied among equals. If I say "equals" I mean equals not necessarily in terms of military power, but in legal terms, namely in terms of status and rights under international law. This can be seen throughout the provisions of these treaties. Now if we should try to apply the Fourth Geneva Convention in a NIAC, this immediately brings to my mind questions such as the following: what does "belligerent occupation" mean in NIAC? If it's a transnational NIAC and the State crosses the border then you have a classical IAC occupation. A NIAC spilling over into neighbouring territory and leading to the establishment of extra-territorial occupation could no longer be regarded as a NIAC, except where the territorial authority consents to the incursion – but then again the established territorial control would not be regarded as a belligerent occupation governed by the Fourth Geneva Convention.

And what about the application in situations of NIAC of the other part of the Fourth Geneva Convention, which essentially protects enemy nationals within the territory of a State? Do the criteria of nationality still make sense in NIAC? You said that the scope of protection of the Convention might in this case have to be extended to nationals, and that only the State Party to the NIAC would be bound to apply the Convention, not the non-State Party. But this one-sided approach is contrary to the very

logic of IHL, so I see this as a problem. This whole logic corresponds much better to the rationale of a human rights regime. International Humanitarian Law is a classic two-sided regime and I have difficulties in imagining that the fighting forces, particularly those belonging to states, would be happy with this one-sided regime, which even you yourself have described as one of the main problems already in the existing NIAC regime. So, it goes into law-enforcement type logic where the state has obligations which the non-state actors they are confronted with have not.

If you then move from the Fourth Convention to the Third Convention, I admit that part of its provisions can easily be transposed to NIAC situations, namely those that set minimum standards of humane treatment. But the content of those provisions has already been codified for NIACs in Common Article 3 and AP II, so there is no need to refer to IAC treaties here. A more difficult issue, of course, are the status-based rights enshrined in the Third Convention, namely those based on POW status and combatant privilege, neither of which exists in situations of NIAC. Similarly, as far as Geneva Conventions I and II are concerned, I don't think we have a real gap in treaty law as far as the protection of the wounded and sick, the medical personnel and units is concerned. All of this is already provided for in treaty law applicable in NIAC. I don't think we have to get into hospital ships here but I just don't see the added value of taking the existing IAC treaties and trying to apply them as a whole in NIAC – this simply raises more exceptions in my mind than it provides perceptible added value.

Another very practical problem immediately comes up if you want to apply IAC treaties to both sides involved in a NIAC. IAC treaties often imply the existence of institutional procedural capacities that many non-state groups don't have in terms of ensuring adequate conditions of detention, judicial guarantees, treatment of wounded and sick and so on. I don't think this is a new observation but it needs to be stated clearly again here.

So I tend to favour taking another approach, which is to apply the same fundamental principles and values in both IACs and NIACs, while duly taking into account the factual and legal differences on both sides. This is different from directly applying IAC treaties to NIAC. Instead, it is about trying to apply the content and substance of IAC treaties and the shared values and goals also in NIACs. Then you are focusing on principles of humanity, military necessity, distinction, proportionality, precaution, the prohibition of perfidy, weapons law, humane treatment, and so on. But admittedly, most of this is already reflected in NIAC treaty law or what is clearly recognized as customary law in NIACs.

In my view, the most important factual and legal differences are that states are territorial entities and that they are legal entities in international law, whereas non-State Parties to armed conflicts generally are not. They

are not recognized in international law, they don't have any particular status, they don't have a recognized territory that belongs to them, and all of this creates tension. It already means that there needs to be a different threshold of violence and organization simply to trigger a NIAC than would be the case for IAC. Contrary to the logic applying in IAC, not every use of force between authorities and their population or outside their country immediately triggers a NIAC – and rightly so.

There is a need for this blurriness and you cannot really solve that. What is really important in my view, and this has been mentioned already in a previous panel, is that IHL does not stand alone to regulate what happens in an armed conflict. In IAC, IHL is complemented by the *jus ad bellum* and some of the characteristics and concepts of IHL fully depend on the existence of the *jus ad bellum*. For example, the combatant privilege is possible only because there is a *jus ad bellum* that prohibits the use of force between states. Given that there is no *jus ad bellum* (or *contra bellum*) in NIAC, providing all fighters with a combatant privilege would simply mean that non-state actors can lawfully with impunity stage an armed rebellion against the government and use force as long as they respect IHL. Clearly, that would not work in practice.

So, there is a need for a separate legal regime complementing IHL and prohibiting rebellion: In today's reality, it is national criminal law that takes this function with regard to non-state actors. On the state side you have human rights law, which limits the lawfulness of the resort to force by the authorities against citizens. So as we can see, one of the problems with directly applying IAC treaties in NIAC is that international law puts parties to IACs on an equal footing in terms of status and rights, and that this is not – and probably never will be – the case in situations of NIAC.

The legal landscape we have today is in a bit of disorder, and this is partly due to the fact that it has grown historically and not systematically. Personally, I am quite happy with the way things go today, because I can see that there is a development. There are projects that aim to develop the law in the areas where there really are gaps; the detention project for example. But if we were to start from scratch, if we imagine a situation where we have no international treaty law and it would be up to us to codify it – we probably would not come up with the Geneva Conventions and the Hague regulations, but we would do it differently, more systematically. We might come up with a legal framework for all collective confrontations, a kind of core framework and then have specific provisions that apply when it is an interstate confrontation, and we have different specific provisions when in case of intra-state NIACs, extraterritorial NIAC, etc. Admittedly, such a systematic approach might appear to be more elegant. The existing legal patchwork regime we apply to the real-world situations we are confronted with now is perhaps not as elegant, and

it may need fixes here and there, but it does work by and large. Many of us here in the room and out of the room are doing a magnificent job in making it work in practice, and in my view this is probably the best we can do right now – personally I do not think we will be starting from scratch any time soon.

**VIII. Selected issues:
humanitarian assistance**

IHL and humanitarian access: the ICRC perspective

Tristan Ferraro

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The ICRC has not updated its position on this very important issue for a long time and this is explained by three main reasons.

First of all, this is due to the existence of well-established treaty law rules of IHL dealing with humanitarian access, for instance, Article 70 of Additional Protocol I. Secondly, because, most of the time, we do not negotiate humanitarian access with the Geneva Conventions and the Additional Protocols in our hands. Negotiating access is more a political process informed by humanitarian considerations and, to a far less extent, by legal considerations.

Eventually we, at the ICRC, have probably relied too much on rule 55 of our Customary Law Study stating that “the parties to the armed conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for the civilians in need, which is impartial in character and conducted without any adverse distinction, subject to the right of control”. When I say that we have relied too much on this rule 55, you do understand that I am not a great fan of this rule. Not because it does not serve useful purposes but because, from a legal point of view, it does not do justice to the niceties of IHL rules governing humanitarian access. In particular, it does not reflect the thin line existing in IHL between the still limited right of the civilian population in need to receive assistance and the absence under this body of law of any unrestricted right of access given to humanitarian actors.

However, last year, we had an occasion to update our legal position on the occasion of the legal discussions that surrounded the negotiation of the Security Council Resolution regarding humanitarian access in Syria. During this period, the ICRC was solicited by various States in order to have its legal take on various legal issues raised by this question of humanitarian access in Syria, in particular, the lawfulness of cross-border relief operations, the determination of whose consent is required for relief schemes, on the so-called notion of arbitrary denial of consent and its consequences in IHL. In light of these demands, we seized this opportunity in order to adjust and make our legal position on humanitarian access known. We did so with a Q&A and a legal Lexicon on humanitarian access that we put on the ICRC website. The main arguments contained therein will also be found in the 2015 ICRC Report on “IHL and challenges of contemporary armed conflicts”, a report that we will submit at the

forthcoming International Conference of the Red Cross and Red Crescent next December.

When it comes to the substance, although the relevant rules vary slightly depending on the nature of the conflict (IAC other than occupation, occupation, NIAC), the IHL framework governing humanitarian access may be said to be generally constituted of four interdependent “layers.” Pursuant to the first, each party to an armed conflict bears the primary obligation to meet the basic needs of the population under its control. The second provides that impartial humanitarian organizations have the right to offer their services in order to carry out humanitarian activities, in particular when the needs of the population affected by an armed conflict are not fulfilled. The third posits that impartial humanitarian activities undertaken in situations of armed conflict are generally subject to the consent of the parties to the conflict concerned. According to the fourth, once impartial humanitarian relief schemes have been agreed to, the parties to the armed conflict, as well as all States that are not a party thereto, are expected to allow and facilitate the rapid and unimpeded passage of the relief schemes, subject to their right of control. The ICRC considers that these layers apply to all forms of humanitarian relief operations, including “cross-line” or “cross-border” operations.

This morning, I would just like to share some reflections of each of these layers.

On the first one: the obligation of the parties to the armed conflict to ensure that the basic needs of the population under their control are met it can be argued that such obligation is a corollary of State sovereignty and that it can also be derived from human rights law. However, it is much more difficult to locate this obligation under IHL, because, except for occupation law, there is no specific treaty rule under IHL in which such obligation can be found. But does this mean that this obligation to ensure that the basic needs of the population are met does not exist outside occupation law? This is not our view. We think that this obligation can be inferred from the object and purpose of IHL. It can also be argued that this obligation derived also from the broader obligation to treat humanely persons in your power in a situation of armed conflict (Articles 3 and 27 of the Fourth Geneva Convention of 1949). Some may find difficult to determine the link between humanitarian access and this obligation to ensure that the basic needs of the population under the parties’ control are met. For the ICRC, the link does exist and plays an important role. Why? Because the ability of a party to the conflict to fulfil its obligation to ensure the basic needs of the population under its control will condition the way in which the notion of consent for the purposes of humanitarian access must be interpreted for the purposes of IHL.

Regarding the second layer, the right given by IHL to humanitarian actors to offer their services to the parties to an armed conflict, its legal basis can be found in Common Article 3 to the Geneva Conventions for non-international armed conflicts and in Article 9 of the First, Second and Third Geneva Conventions and in Article 10 in the Fourth Geneva Convention for international armed conflict. These articles spell out the so-called “right of initiative”. This right of initiative is the legal entitlement given to impartial humanitarian organizations to propose their humanitarian activities to a party to the armed conflict. The right of initiative as foreseen under IHL only belongs to organizations that qualify as “impartial humanitarian organizations” under IHL. Therefore, an offer of services will be valid only if it emanates from an organization that qualifies as impartial and is humanitarian in nature. This is an element of the humanitarian access equation under IHL as it has direct consequences on how to assess the notion of consent which is central to issue under scrutiny this morning. It also has a very practical/operational dimension. We all know that there is a variety of actors involved in relief operations in contemporary armed conflicts: States through the armed forces may be involved in relief operations; intergovernmental organizations, private charities, for-profit NGOs etc. And the key question is: are all entitled to this so-called “right of initiative”? In our view the answer is no. Of course, under IHL there is nothing preventing them from offering their services but IHL only grants the “right of initiative” to an organization that qualifies as impartial and humanitarian in nature. In this regard, an offer of services emanating from an actor that does not qualify as an impartial humanitarian organization under IHL meaning could be lawfully turned down simply because of the quality of its author.

Still on this second layer, I would like to underline that there is nothing in IHL that restrains the rights of impartial humanitarian organizations to offer their services. It has been recently argued that the impartial humanitarian organization’s right to propose humanitarian activities to the parties to an armed conflict would be conditioned by the fact that the civilian population would actually not be provided with supplies essential for its survival. Let’s be clear on this issue, we at the ICRC consider that, there is no legal basis for such arguments under IHL.

The third layer can be considered as constituting the cornerstone of the rules governing humanitarian access, addressing the issue of consent. In this regard, the ICRC has a clear stance: the so-called right of initiative addressed above does not translate into an unrestrictive right of access given to humanitarian actors. It is pretty clear from our perspective, that humanitarian actors in order to carry out their humanitarian activities in a situation of armed conflict must seek and obtain the consent of the parties

concerned. This is a prerequisite. The key question in this respect is who qualifies as the party concerned for the purposes of IHL?

In international armed conflicts, the relevant IHL provisions specify that consent only needs to be obtained from the States that are a party to the conflict and are “concerned” by virtue of the fact that the proposed humanitarian activities are to be undertaken in their territory. It is understood that the opposing party does not need to be asked to consent to relief operations that take place in the adversary’s territory or in territory controlled by the adversary.

Common Article 3 is silent on who should consent to humanitarian relief operations in non-international armed conflicts. It has been argued – in relation to some recent NIACs – that humanitarian action undertaken in areas controlled by non-State armed groups requires only their consent, and not that of the government of the State in whose territory that action is to take place. However, the ICRC considers that the question of whose consent is necessary in NIACs governed by Common Article 3 should be answered based on the guidance provided in Article 18(2) of Additional Protocol II, which expressly requires the consent of the High Contracting Party concerned. Thus, consent should be sought from the State in whose territory a NIAC is taking place, including for relief activities to be undertaken in areas over which the State has lost control. In any case, for practical reasons, the ICRC would also seek the consent of all parties to the NIAC concerned (including non-State armed groups party to it) before carrying out its humanitarian activities.

Still on the notion of consent, it is important to understand that the ICRC is making a dichotomy between what we call in our jargon “general consent” and “operational consent”. This dichotomy can be found in the division operated by Article 70 of Additional Protocol I. For us, the general consent is the broad decision made by that party according to which an impartial humanitarian organization can be present and operate in its territory under its control following a valid offer of services. In other words, it is the positive answer to the offer of services. General consent is not a blank cheque to criss-cross the country unrestrained.

On the other hand, the “operational consent”, is the implementation of the general consent. In other words, it constitutes the subsequent green lights to carry out specific and targeted relief operations within the framework of the general consent. From our perspective, it corresponds to the obligation to allow and facilitate relief schemes that you can find, for instance, in Article 70, paragraph 2 of Additional Protocol I. Such distinction between general and operational consent is crucial in order to determine the grounds permitting to turn down an offer of services submitted by impartial humanitarian organizations to the parties to an armed conflict.

In our view, in relation to the notion of general consent, there are only two grounds that can be used to turn down an offer of services. First of all, that the offer of services comes from an organization that does not qualify as impartial and is not humanitarian in nature. Second, when there are simply no needs to meet in the area in question, because, for instance, the party to an armed conflict has the capacity and is willing to fulfill its primary obligation to meet the needs of the population under its control. IHL does not foresee other grounds justifying a negative answer to an offer of services.

At this point, I would like to underline that for the ICRC the military necessity argument is not a valid ground to turn down definitively an offer of services. The military necessity argument can only be invoked to regulate humanitarian access, not to prohibit definitely the possibility for an impartial humanitarian organization to operate in a specific territory. Therefore, the ICRC considers that the military necessity argument is only valid in relation to what we defined as “operational consent”. Consequently, this means that military necessity must be restricted geographically and temporally.

While access for, and the implementation of, humanitarian activities depend on the consent of the parties to an armed conflict, their decision to consent to relief operations is not discretionary. As always, IHL strikes a careful balance between parties’ interests and humanitarian imperatives, and is not entirely deferential to State sovereignty when it comes to relief operations.

The question of whether a party to an armed conflict can lawfully turn down an offer of humanitarian services is intrinsically linked to its ability to fulfil its primary obligation to meet the basic needs of the population under its control. When the relevant party is unable or unwilling to fulfil this obligation and when an offer of services has been made by an impartial humanitarian organization, there would appear to be no valid/lawful grounds for withholding or denying consent. There may thus be circumstances under which, as a matter of IHL, a party to a conflict may be considered to be obliged to accept an offer of services (see for example Article 59 of the Fourth Geneva Convention: “... the Occupying Power shall agree...”).

Under IHL, imperative military necessity is not lawful grounds to turn down valid offers of services. Imperative military necessity may only be invoked to geographically and temporarily limit activities or to restrict the movement of relief personnel in situations where relief operations have been approved (see below). An offer of services may be declined when there are no needs to be met and/or when the activities proposed in the offer of services are not humanitarian in nature or the offer does not emanate from an organization that is impartial and humanitarian in character. IHL

does not provide for other grounds that would justify a refusal of consent to relief operations as such.

Recently, the expression “arbitrary denial/withholding of consent to relief operations” has been used to describe a situation in which a party to an armed conflict unlawfully rejects a valid offer of humanitarian services. The expression “arbitrary denial/withholding of consent” is not found in any IHL treaty. It may, however, be argued that a refusal to grant consent resulting in a violation of the party’s own IHL obligations may constitute an unlawful denial of access for the purposes of IHL. This would be the case, for instance, when a party’s refusal results in the starvation of civilians as prohibited by Article 54 of Additional Protocol I or when the party is incapable of providing humanitarian assistance to a population under its control as required by the relevant rules of international law, including IHL.

IHL does not regulate the consequences of a denial of consent and does not spell out a general right of access that can be derived from an “arbitrary denial/withholding of consent.” Thus, the argument according to which an arbitrary denial/withholding of consent could justify unconsented cross-line/border operations as a matter of IHL does not reflect current IHL.

Eventually, concerning the fourth layer, it is important to underline the distinction made in IHL between the requirement to obtain consent from a party to a conflict following an offer of services on the one hand, and the obligation to allow and facilitate relief schemes, which serves to implement the acceptance of the offer, on the other hand.

Once relief actions are accepted in principle, the States/parties to an armed conflict are under an obligation to cooperate, and to take positive action to facilitate humanitarian operations. The parties must facilitate the tasks of relief personnel. This may include simplifying administrative formalities as much as possible to facilitate visas or other immigration issues, financial/taxation requirements, import/export regulations, field-trip approvals, and possibly privileges and immunities necessary for the organization’s work. In short, the parties must enable “all facilities” needed for an organization to carry out its agreed humanitarian functions appropriately. Measures should also be taken to enable the overall efficacy of the operation (e.g. time, cost, safety, appropriateness).

Under IHL governing IACs, the obligation to allow and facilitate relief operations applies not only to the parties to an armed conflict but to all States concerned. This means that States not party to the conflict through whose territory impartial humanitarian organizations may need to pass in order to reach conflict zones must authorize such transit.

IHL governing NIACs does not expressly contain a similar obligation for third States. There is, nevertheless, an expectation that States not party to the NIAC will not oppose transit through their territory of impartial

humanitarian organizations seeking to reach the victims of a NIAC. The humanitarian spirit underpinning IHL should encourage non-belligerent States to facilitate humanitarian action that has already been accepted by the parties to a NIAC.

Finally, under IHL, the obligation to allow and facilitate relief schemes is without prejudice to the entitlement of the relevant actors to control them through measures such as: verifying the humanitarian and impartial nature of the assistance provided, prescribing technical arrangements for its delivery or, as mentioned above, limiting/restricting the activities of relief personnel in case of imperative military necessity.

The protection of humanitarian personnel in IAC/NIAC: the law and current challenges

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1. Introduction

The protection of humanitarian personnel is one of the most pressing issues in both IAC and NIAC. Some of the news from Afghanistan, Syria, South Sudan and the Central African Republic that have made headlines in the past few months remind us of the challenges they face in fulfilling their pivotal role in relieving at least some of the suffering of the civilian population experiencing undue hardship during armed conflicts.

The deliberate attack on and killing of nine Afghan employees of the Czech NGO People in Need by unidentified gunmen in northern Afghanistan in June of this year is a recent example. The abduction of British aid worker David Haines in 2013 and his subsequent beheading by Islamic State in September 2014 is another. In the course of a single day, on 30 March of this year alone, a volunteer with the Syria branch of the Palestine Red Crescent Society was shot and killed in Yarmouk camp near Damascus; in Yemen, a Red Crescent worker was shot and killed while coming to the aid of people who had been wounded in fighting; and in Mali, an attack on an ICRC aid truck near Gao left an ICRC staff member dead and a member of the Mali Red Cross injured. And the list of such attacks is much longer.

Indeed, a glance at the figures of the 2015 Aid Worker Security Report reveals that 190 major attacks against aid operations occurred in 2014, affecting 329 aid workers in 27 countries. The report concludes that '[t]his represents a decrease of roughly 30 percent from last year's [ie 2013] all-time high. However, numbers of attacks remained higher than in previous years.' These figures confirm the extent of the problem and the need for protection of humanitarian personnel.

States have taken account of the need for protection of humanitarian personnel in the law of armed conflict and related fields to some extent. However, they have done so in a multi-layered fashion and with significant differences in the level of protection of different categories of humanitarian personnel. A typology of the different legal categories hence constitutes a first part of my remarks, before I will dissect the different levels of protections that are bestowed upon these categories in IAC and in NIAC.

Before starting, let me stress the following delimitations: first, in my remarks, I will limit my focus on humanitarian personnel and will not specifically address objects used for humanitarian relief operations. The latter raise questions on their own – not the least the definitional question of what are to be considered ‘objects used for’ or, in the words of the Rome Statute ‘objects involved in a humanitarian assistance mission’. Secondly, my remarks will be limited to those rules that pertain to humanitarian relief personnel specifically. In other words, I will not address the general protections that are bestowed upon such personnel by virtue of the fact that they fall into the general category of civilians.

2. Different categories of humanitarian personnel

For the purpose of my remarks, I understand the term ‘humanitarian personnel’ broadly to include all personnel that are involved in relief actions which are humanitarian and impartial in character and conducted on a non-discriminatory basis to the civilian population. Such ‘humanitarian personnel’ fall into different categories.

A first such category consists of humanitarian personnel who are entitled to the protective use of the distinctive emblems. First and foremost, these include medical and religious personnel. Especially the former may very well be, and often are, forming part of relief actions. I will limit myself to medical personnel as a first category in the following.

A second category consists of humanitarian personnel to whom the UN Safety Convention and its 2005 Optional Protocol apply. Under the Convention, these include personnel delivering humanitarian assistance who are engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation (as defined in Article 1 (c) of the Convention) (UN humanitarian personnel) and persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency, to carry out activities in support of the fulfilment of the mandate of a United Nations operation (again as defined in Article 1 (c) of the Convention) on the safety of United Nations and associated humanitarian personnel. The 2005 Optional Protocol extends the applicability of the Convention to all other UN operations as well as those defined in Article 1 (c) of the Convention, provided such an operation is ‘established by a competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control for the purposes of: (a) Delivering humanitarian, political or development assistance or peacebuilding or (b) delivering emergency humanitarian

assistance. It is by virtue of these additions in accordance with the Protocol that humanitarian personnel are brought squarely within the ambit of the protective regime as provided for by the Convention.

A third remaining category consists of all other humanitarian personnel that fall neither into the first nor the second category.

3. Different protective layers in IAC and NIAC

As far as the medical personnel is concerned, a first noticeable difference between IAC and NIAC is the definitional issue of medical personnel. The definition in GC I is expanded by Article 8 (c) of AP I. Much indicates that customary law of IAC provides for identical definitions. Accordingly, medical personnel include persons assigned, by a Party to the IAC, exclusively to the medical purposes of search for, collection, transportation, diagnosis or treatment of the wounded, sick and shipwrecked, or for the prevention of disease. In IAC, the term includes:

- i. medical personnel of a party to the conflict, whether military or civilian, including those described in the First and Second Geneva Conventions, and those assigned to civil defence organizations;
- ii. medical personnel of National Red Cross or Red Crescent Societies and other voluntary aid societies duly recognised and authorised by a party to the conflict, including the ICRC;
- iii. medical personnel made available to a party to the conflict for humanitarian purposes by a neutral or other State which is not a party to the conflict; by a recognised and authorised aid society of such a State; or by an impartial international humanitarian organization.

While we do not have a definition in the conventional law of NIAC, the essence of this definition, namely that the personnel concerned be assigned exclusively to the enumerated medical purposes would seem to be generally accepted as part of the customary definition under the law of non-international armed conflict. However, some elements of the examples that the law provides for IAC cannot be transposed easily to the law of NIAC and need to be modified owing to the specific nature of NIACs. Accordingly, it has been suggested that the term medical personnel in NIAC includes:

- i. medical personnel of a party to the conflict, whether military or civilian, including those assigned to medical tasks of civil defence;
- ii. medical personnel of Red Cross or Red Crescent organizations recognised and authorised by a party to the conflict;

- iii. medical personnel of other aid societies recognised and authorised by a party to the conflict and located within the territory of the State where the armed conflict is taking place.

As the ICRC Customary Law Study points out, the examples ‘differ in two respects from those listed for international armed conflicts. First, the term “Red Cross or Red Crescent organisations” was used in order “to cover not only assistance provided on the Government side but also already existing Red Cross groups or branches on the side opposing the Government and even improvised organizations which had come into existence only during the conflict”. [...] Secondly, [...] aid societies other than Red Cross organisations must be located within the territory of the State where the armed conflict is taking place “in order to avoid the situation of an obscure private group from outside the country establishing itself as an aid society within the territory and being recognized by the rebels’.

Accordingly, the suggestion seems to be that the examples of medical personnel in NIAC should include those that originally featured in Draft Additional Protocol II but which were subsequently dropped together with a definition at the last moment as part of a package aimed at the adoption of a simplified text.

Besides the definitional question, there are also differences in substance in the protective regimes applicable in IAC and NIAC. The differences are most noticeable in treaty law. If one compares CA 3 and Article 9 of AP II with the regime established under GC I and II and AP I (especially Article 15 on the protection of civilian medical personnel) it becomes readily apparent that these differences are not only in the level of detail, or are owed to the conceptual differences between IAC and NIAC (e.g. the fact that the notion of ‘occupation’ does not exist in the latter, cf art. 15 (3)). Rather, there are real differences in the level of protection owed to medical personnel in IAC vs in NIAC. The right for civilian medical personnel to have access to any place where their services are essential (subject to such supervisory and safety measures as the relevant Party to the conflict may deem necessary), provided for in Article 15 (4) AP I, is not mirrored in AP II, for example. In view of the ICRC, as expressed in its Customary Law Study, these differences are less pronounced in customary law. However, it is to be observed that the approximation of the law of IAC and NIAC on the protection of medical personnel suggested by the Study is at least in considerable part owed to the fact that the two pertinent rules (Rule 25 on respect and protection and loss of protection; and Rule 26 geared towards ensuring respect for medical ethics) are quite generic and broad. As so often, the devil lies in the details.

Turning to humanitarian personnel who fall into the ambit of the UN Safety Convention and its Additional Protocol, matters are more straightforward in as much as the Convention or the Protocol does not distinguish between IAC and NIAC. Accordingly, the conditions for and extent of the protection of such personnel is identical in both types of armed conflict. In other words, the right of transit (Art. 5), the duty to ensure the safety and security of United Nations and associated personnel (Art. 7), to release or return captured or detained such personnel (Art. 8), the criminalizations set forth in Art. 9 and the jurisdictional, prosecutorial and extradition regime applicable to such crimes (Art.s 10-18), apply irrespective of whether or not the overall situation in the context of which such personnel operates is an IAC or a NIAC or, indeed, falls below the threshold of an armed conflict. As far as the criminalizations are concerned, this is confirmed by the pertinent war crimes provisions in the Rome Statute, which include intentionally directing attacks against such personnel for both IAC and NIAC, as long as they are entitled to the protection given to civilians.

However, it is clear from the wording of the UN Safety Convention that some of its provisions are exclusively addressed to states parties to the Convention. In situations of non-international armed conflicts, the non-state party to the armed conflict – one or several organized armed groups, in other words – is hence not bound directly by these provisions. Examples are the right of transit, the obligation to take appropriate measures to ensure the safety and security of UN and associated personnel, the duty to cooperate in the implementation of the Convention and the prosecutorial regime for crimes against such personnel are examples. In contrast, other provisions, such as the duty to release or return of captured or detained UN and Associated personnel (Art. 8) and the criminalizations provided in Art. 9 lend themselves to application *vis-à-vis* both states and organized armed groups.

Finally, as far as treaty and customary law pertaining to the third category of humanitarian relief personnel in general is concerned the following situation presents itself.

In IAC, Article 70 para. 2 AP I provides that Parties to the armed conflict and each High Contracting Party ‘shall allow and facilitate rapid and unimpeded passage of all relief [...] personnel’. Article 71 (2) AP I further provides that personnel participating in relief actions ‘shall be respected and protected.’ Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel in carrying out their relief mission and only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted (para. 3). But the role as relief personnel also comes with certain responsibilities, namely that they do not exceed the terms of their mission under the Protocol, centrally that relief actions be

humanitarian and impartial in character and conducted on a non-discriminatory basis, but also the security requirements of the Party in whose territory they are carrying out their duties. Herein included are the technical requirements which the authorities could impose (route, schedule, curfews etc.). Disrespect of these conditions may entail the consequence that the mission of the personnel in question be terminated (cf para. 4).

The centre-piece of the aforementioned rules – the respect for and protection of humanitarian relief personnel – has been confirmed by criminalizing intentionally directed attacks against such personnel as a war crime in the Rome Statute (Art. 8(2)(b)(iii)).

As far as customary law applicable in IAC is concerned, the ICRC Customary Law Study interprets state practice and *opinio juris* to be distilled into Rule 31, according to which ‘Humanitarian relief personnel must be respected and protected.’ In other words, according to that view, the fairly nuanced and detailed regime as set forth in AP I is not replicated in customary law. However, it should not go unnoticed that Rule 31 was singled out as one of the rules that exemplify the criticisms of some states, most notably the US. In the view of the US, Rule 31 (and I quote) ‘does not reflect the important element of State consent or the fact that States’ obligations in this area extend only to humanitarian relief personnel who are acting within the terms of their mission – that is, providing humanitarian relief. To the extent that the authors intended to imply a “terms of mission” requirement in the rule, the authors illustrated the difficulty of proposing rules of customary international law that have been simplified as compared to the corresponding treaty rules.’¹

In NIAC, no conventional rule exists, which would govern humanitarian relief personnel specifically, except the criminalization of intentional attacks against them in Article 8. In addition, Article 18 para. 2 AP II addresses relief actions. Such actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted on a non-discriminatory basis shall be undertaken subject to the consent of the State concerned. This latter provision has been used as an argument, in addition to some other supporting material, in the ICRC Customary Law Study to proclaim that Rule 31 is applicable also in NIAC. However, the extension of Rule 31 to NIACs has been criticized, again most vocally by the US, as being based on “very thin practice” and with little discussion of actual operational practice. Indeed, the US has concluded that “the Study offers almost no evidence that Rule 31 as such properly describes the customary international law applicable in [NIACs]”.²

¹ Bellinger & Haynes, 89 IRRC 866 (2007) at 454.

² Id at 454.

This is not the place to enter into a discussion of whether or not the criticism directed against the Customary Law Study in general, or the formulation of Rule 31 and the applicability of the latter in both IAC and NIAC in particular, bears merit. Indeed, much of such a discussion will depend largely on the methodological perspective one takes. However, what is important for the purpose of the discussions in the context of the theme of the Roundtable is that – even if we were to accept Rule 31 as an accurate expression of customary LOAC – we are left with divergent legal rules pertaining to the protection of humanitarian relief personnel in general: one fairly detailed regime under the conventional law of IAC as provided for in AP I and another legal regime that consists of the very broad and generic Rule 31 applicable in both IAC and NIAC.

4. Conclusion

An answer whether and to what extent the law of IAC and the law of NIAC differ in the regulation of humanitarian personnel depends on the precise category of such personnel. Especially in relation to medical personnel and in relation to humanitarian relief personnel who do not enjoy the status of medical personnel or of UN and associated personnel, certain differences or areas of legal uncertainty persist. An intuitive reaction may be that any such difference between categories of humanitarian personnel and between IAC and NIAC are unjustified. However, some of the differences may be grounded in the conceptual differences between IAC and NIAC (e.g. the differences in the examples for medical personnel referred to above). Another good reason for such differences would be if different categories of humanitarian personnel had different needs of protection. Yet, one may wonder whether the current differences in the level of protection really are based in differences in needs of protection. Indeed, it has been suggested that the existing legal framework overlooks ‘disparities in the risks faced by different groups of humanitarian professionals based on their status as national or international staff, gender, and organizational affiliation.’³ It is submitted that any possible further development of the law of IAC and NIAC in this area needs to start from the risks faced by humanitarian personnel.

³ J. Brooks, *Humanitarians Under Attack: Tensions, Disparities, and Legal Gaps in Protection*, www.atha.se/thematicbrief/humanitarians-under-attack-tensions-disparities-and-legal-gaps-protection.

The protection of wounded and sick in IAC and NIAC

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Introduction

The principle of the protection of the sick and wounded lies at the very core of IHL. One only has to recall *A Memory of Solferino* by Henry Dunant, to grasp the importance of this area of IHL. Indeed this principle became an international legal obligation in the 1864 Geneva Convention. According to art. 1 of the Convention, ‘Ambulances and military hospitals shall be recognized as neutral, and as such, protected and respected by the belligerents as long as they accommodate wounded and sick’.

The principle of protection for the wounded and sick, initially referred only to military personnel that was wounded and sick. In 1907 the protection was extended as to cover also civilian wounded and sick. A similar extension of protection occurred with medical buildings, so that under contemporary IHL medical units are protected both if they are of a military or a civilian nature.

As it is well known, the rationale behind the legal protection accorded to medical personnel and units lies in the *neutrality* of the medical function. This means that the medical function is deemed as not interfering with the war effort of the parties to the conflict. Importantly, this principle holds strong also if the medical function is carried out to the benefit of the enemy. This logic has a necessary consequence: if the protection is accorded because the medical function does not interfere with the military activities, this protection ceases as soon as the neutrality of the function is exceeded.

It is on the very issue of the loss of protection due to the medical function in time of armed conflict that this paper is devoted to. More specifically, the focus will be on the loss of protection of the *medical facilities*, e.g. hospitals, with a view to checking whether IHL sets out different rules in IAC and NIAC. In this respect, the memory of all of us immediately goes to the recurrent attacks to medical care in Syria or to the abuse of the medical facilities that have been carried out in a number of conflicts relating to the Gaza strip. Indeed, ‘there are few violent incidents that shock the conscience more than a deliberate attack on a hospital’.

In the first place, the normative framework concerning the hypothesis in which the protection due to a medical facility may be discontinued will be set out by referring to treaty law. This analysis will highlight that IHL rules

concerning the discontinuance of protection of medical units in IAC are more detailed than the corresponding ones applicable to NIAC. In particular, a rule on loss of protection is contained in the 1977 Additional Protocol II concerning NIAC that is almost *verbatim* the same as the one contained in Geneva Convention I and IV applicable to IACs. By contrast, art. 3 common to the four Geneva Conventions of 1949, that as it is well known has a wider application than Additional Protocol II, makes no explicit reference to the question of the loss of protection.

As a consequence of the silence of Common Art. 3, the question arises as to whether in a NIAC not reaching the threshold for the application of Additional Protocol II, a rule on the loss of protection of health facilities may be said to exist. And similarly, is a state not party to Additional Protocol II subject to a rule on loss of protection corresponding to the one contained in the Protocol? In other words, I shall try to answer the question whether the rules on the loss of protection of medical facilities are the same in IAC and NIAC, with special reference to those NIACs not reaching the threshold for the applicability of Additional Protocol II or for the states not parties to Additional Protocol II. In the second part of the paper, I shall briefly offer some elements of practice on loss of protection of medical facilities coming from a state not party to Additional Protocol II, namely Syria, whose war offers a wealth of examples of attacks against medical facilities.

1. The treaty framework

1.1. International Armed Conflict

Treaty rules on loss of protection of medical facilities applicable in IAC are quite detailed. In particular, art. 21 of Geneva Convention I, art. 19, para. 1 of Geneva Convention IV and art. 13, para. 1 of Additional Protocol I set out two conditions for the loss of protection, one of a substantive nature and the other one of a procedural nature. Concerning the substantive condition, the provisions establish that the protection of medical facilities ‘shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy’. It is noteworthy that the wording of these provisions is in the negative, thus placing the burden of proof on the attacking party to the effect that the facility is used to commit acts harmful to it. Moreover, the phrase ‘outside their humanitarian duties’ constitutes an additional requirement to be respected by the belligerent. It means that there are acts committed without the intention of causing harm but may nevertheless be harmful to the enemy, and acts based on the intention to harm the enemy. For example, X-Rays in a hospital might interfere with a

radar, but this activity does not exceed the humanitarian function of the medical facility.

Although the types of acts falling into the above category are not spelt out in treaty law, the following are often cited as relevant examples: the use of a medical unit as a shelter for able-bodied combatants, as an arms or ammunition deposit, as a military observation or firing post, as a shield for a military objective, as a center for the collection or transmission of military information.

On the other hand, treaty law also lists – in a non-exhaustive way – the acts that cannot be considered as ‘harmful to the enemy’. For example, the fact that sick and wounded members of the armed forces are nursed in these facilities, the presence of small arms and ammunition taken from such combatants and not yet handed to the proper service, and the fact that the premises are protected by a picket or by an escort.

It is well known that these rules spell out a ‘special protection’ of medical units – a similar protection also exists for other objects. This means that these objects do not turn into a military objective by the sheer presence of the two elements required for it – namely, the effective contribution to military and the concrete military advantage. The presence of the above more restrictive substantive requirements, i.e., acts harmful to the enemy and that are carried out outside the humanitarian function of the medical facility, is needed for an attack against such unit to be lawful.

Turning to the procedural condition, treaty law requires that ‘protection may cease’ ‘only after a due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded’. It seems reasonable to affirm that ‘[t]he purpose of this specific warning is to allow those committing an act harmful to the enemy to terminate such conduct, or – if they persist – to ultimately enable the safe evacuation of the wounded and sick who are not responsible for such conduct and who should not become the innocent victims of such acts’.

1.2. Non-International Armed Conflict

1.2.1. The treaty framework

Treaty rules concerning NIAC and relating to the substantive condition for loss of protection of medical facilities are almost the same as those applicable in IAC with the exclusion of the list of acts that do not qualify as ‘harmful to the enemy’. Reference is here made to art. 11, para. 2, of Additional Protocol II, according to which ‘The protection to which

medical units... are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function’.

The rationale behind the protection of medical facilities lies in the fact that the latter are undisputedly granted special protection compared to other civilian objects. As the Commentary to Additional Protocol II specifies, ‘to respect’ medical units means, not to attack them or harm them in any way’ unless ‘there are some exceptional cases in which protection for them may cease’, that are those listed in art. 11, para. 2. Also the jurisprudence of international tribunals is quite clear on this point. The ICTY Appeals Chamber in Galić affirmed that ‘where a hospital is used for one... hostile purpose[s]..., the hospital loses protection’.

Treaty rules concerning loss of protection for medical facilities in those NIAC that fall short of the requirements for the application of Protocol II are less detailed. Art. 3 common to the Geneva Conventions, while requiring respect and protection for the sick and wounded, is silent on the criteria for loss of protection. One may argue that the obligation contained in common art. 3 to ‘care for the sick and the wounded’ cannot be fulfilled if medical units are attacked. This inference is certainly acceptable in legal terms but the question remains of *what* conditions must be fulfilled for a hospital to be lawfully attacked in a conflict where only art. 3 applies. It might not be automatic to derive from art. 3 the corollary that the protection of a medical unit ceases on the *exclusive* condition that it is used for an ‘act hostile to the enemy’ ‘outside the humanitarian function’ of the unit itself, since one may argue that a medical facility may be targeted if it satisfies the two conditions required for a military objective.

The difference between these two hypothesis is crucial. Should one believe that it is the notion of ‘military objective’ that is applicable, then a military unit might be attacked if it by ‘nature, location, purpose or use makes an effective contribution to military action’ and ‘its destruction capture or neutralization offers a definite military advantage’. This means, for example, that a hospital might be attacked if by its location makes an effective contribution to military actions, for example, by shielding the view of the enemy. On the other hand, if it is exclusively the *use* of the medical unit to ‘commit a hostile act outside its humanitarian function’ to be controlling, then only that *use* of that unit may lead to its loss of protection. In this case, for example, the treatment of enemy soldiers would not deprive the unit of its protection because attending to anyone in need of care is part of the medical function of the facility.

The above leads us to enquire whether the rules on loss of protection are applicable also to those NIACs not reaching the threshold for the coming into play of Protocol II and for those States that are not parties to Protocol II. The ICRC Study on Customary IHL, at Rule 28, finds the existence of a rule on loss of protection also in NIAC (‘Medical units exclusively

assigned to medical purposes must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy’) and mentions the relevant practice. However, no reference has been made to the practice relating to actual conflicts. I shall now briefly turn this practice, namely the actual targeting of medical facilities by one state that is not a party to Additional Protocol II and that in the recent years offers numerous examples of attacks against health facilities, namely Syria.

1.2.2. An overview of the practice concerning the Syrian conflict

According to Physicians for Human Rights, the year 2015 has seen a 25 percent increase over the previous high of 89 attacks in 2012 against health care in Syria, thus amounting to 112 attacks by government forces. These attacks materialize in a variety of behaviors that may be summarized as follows:

- (i) looting of medical equipment and products;
- (ii) positioning of tanks and heavy artillery within the hospital; and
- (iii) positioning snipers on the hospital roof.

This conduct not only results in total or partial destruction of the medical buildings, and death or injury to medical personnel and patients, but also to doctors leaving massively the country.

Most dramatically, reports show that the ‘denial of medical care as a weapon of war is a distinct and chilling reality of the war in Syria’.

The motives behind such attacks are difficult to trace, but reportedly, the government carries out deliberate attacks against medical facilities ‘to gain military advantage by depriving anti-government armed groups and their perceived supporters of medical assistance’. This assertion seems to indicate confusion between the notions of special protection to medical facility and military objective, whose import has already been examined above. At this point it is important to underline that the above explanation does not only fall short of the conditions in the presence of which a medical unit may lose protection, but it also shows total disregard for the notion of ‘military objective’. The mere fact of treating enemy soldiers cannot be considered as satisfying the second element of the notion of military objective, namely the ‘concrete’ military advantage coming from its destruction, because impairing the treatment of the enemies in order to prevent them to fight again once they have regained they health status merely provides a ‘potential’ – not a ‘concrete’ – military advantage and, therefore, does not hold the test for the lawful targeting of a military objective. In addition, it is difficult to envisage a situation in which a

medical unit may be considered as satisfying the other requisite of the notion of military objective, namely ‘making an effective contribution to the war effort’.

Finally, according to some sources, these attacks appear at least to some extent ‘to be in retaliation for recent advances by the opposition groups’ across two areas of the country. Here the confusion relates to the question of loss of protection and belligerent reprisals against protected objects and personnel.

As to the procedural requirement, namely the issue of warning before an attack, I found no reference to the question of warning relating to attacks on medical facilities in Syria.

Concluding remarks

Treaty rules on loss of protection of medical facilities in NIAC are much less numerous than those applicable to IAC. More specifically, while the relevant rule applicable to the state parties to Additional Protocol II (art. 11) is articulated in practically the same terms as the corresponding provisions concerning IAC, no specific treaty rules on loss of protection seem to apply in those conflicts not reaching the threshold of Protocol II or involving states not parties to the Protocol.

From a brief overview of the practice of attack against health facilities in the Syrian conflict a number of critical points emerge:

- a. The need for the gathering of data on attacks against health facilities. It is remarkable that only very recently attention has been paid to the lack of data concerning attacks to the medical function in armed conflict. It is only in the last 5 years that a few organizations, among them predominantly the ICRC (see the project *Health Care in Danger*), have started collecting these.
- b. No evidence has been found to the effect that the widespread attacks on health care in Syria were justified by the loss of the neutrality of the medical function. By contrast, other motives seem to have been used to justify a similar conduct. These motives highlight confusion between different notions, such as, on the one hand, the issue of loss of protection and, on the other, the notion of military objective and reprisal. The overlapping between the notions of loss of protection and military objective is extremely problematic, since adopting the criteria needed for a civilian object to become a military objective would unduly deprive medical units of the ‘special protection’ that IHL affords to them. For this reason, art. 8(2)(e)(ii) and (iv) of the Statute of the International Criminal Court, that qualifies as a war crime ‘intentionally directing attacks against hospitals and places

where the sick and the wounded are collected, *provided they are not military objective*’ (emphasis added), may be troublesome. A more accurate phrasing would have been ‘provided they have lost their special protection’.

- c. Finally, the fact that by and large a warning has not been given before attacking medical facilities in Syria might not only be indicative of lack of existence of the relevant IHL rule in NIAC but also calls into question the respect for the principle of precaution in general, since the obligation to give a warning is one of the corollary of this principle.

**IX. Selected issues:
compliance with IHL**

The Swiss-ICRC initiative on strengthening compliance with IHL¹

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Over the last few days, we have been discussing the current and the various challenges posed to IHL by the distinction between international and non-international armed conflicts. When it comes to the issue of compliance, there is a clear distinction in international humanitarian treaty law. Indeed, to the exception of the ICRC's mandate, the existing compliance mechanisms provided for in the 1949 Geneva Conventions and the Additional Protocols are only applicable in international armed conflicts. Given that most contemporary armed conflicts are non-international this leaves a significant gap as underlined yesterday in particular by Professor Françoise Hampson.

However, apart from this legal difference, it must be noted that in practice these existing mechanisms applicable in international armed conflicts – namely the Protecting Powers mechanism, the formal enquiry procedure and the International Humanitarian Fact-Finding Commission – have either never or rarely been used. The sad consequence is that the most fundamental challenge for IHL today, is a lack of respect for the rules in all kinds of armed conflicts whether international or non-international.

It is this serious concern that is at the heart of the Swiss – ICRC diplomatic process on strengthening compliance with IHL. In the past three years, we have led important consultations among States to find possible remedies to this situation. We are now at a very important and interesting stage of this initiative, as the consultation process has come to an end. The ICRC and Switzerland issued last July a Concluding Report, summarizing the discussions that have been taking place so far indicating the key points of convergence and divergence, and putting forth options and recommendations for the way forward. We are now engaging in a new phase which is focused on the preparation of a draft resolution for consideration at the 32nd International Conference, which will be held in December this year.

This presentation will provide an update on the process so far, on some of the specific challenges ahead, and on what we envisage as the next steps.

But let me briefly begin by recalling the background of this initiative. As you will be aware, the consultation process has its foundations in

¹ Text not revised by the author.

Resolution 1 which was adopted in 2011 by the 31st International Conference of the Red Cross and the Red Crescent. Resolution 1 mandated the ICRC to undertake a consultation process with States and other relevant stake-holders, on how to ensure and enhance the effectiveness of mechanisms of compliance with IHL. Resolution 1 asked the ICRC to present to the 32nd International Conference a report on the options that have emerged as well as on its recommendations in this regard.

So, over the last three years, the ICRC, together with the Government of Switzerland, co-facilitates a major consultation process, comprising four meetings of States and five preparatory meetings. Overall, there was a high level of engagement by States in this consultation process, with more than 140 States participating in the discussion. In addition, we have also been engaging with Red Cross and Red Crescent National Societies and with civil society on this initiative.

In the first stages of the process, the discussions and consultations were focused on a review of existing IHL compliance mechanisms, on the reasons why they did not work, and whether some of them could be resuscitated. The vast majority of States concluded that these existing mechanisms cannot be reformed to perform new functions, except perhaps the International Humanitarian Fact-Finding Commission and please also note that I also mentioned the Fact-Finding Commission in my presentation.

States also agreed that there is an institutional vacuum in the area of IHL implementation. Except for the International Conference of the Red Cross and the Red Crescent, there is no universal forum specifically dedicated to IHL where States can regularly exchange on IHL implementation.

Many States during this consultation also made the point that, in practice, some compliance functions related to IHL are increasingly being performed by institutions and mechanisms established under other bodies of law and, in particular, under international human rights law, and I'm really looking forward to the presentation of Mona Rishmawi on this topic in a few minutes. States noted that while it is certainly positive that IHL is being considered in these frameworks, this also has certain limitations.

Consequently, there was a strong general support among States for establishing a forum for a regular dialogue on IHL, that is, a regular Meeting of States. The consultations then focused on the possible format for such a forum and its possible functions. Over time, the discussions have been increasingly focused and detailed and the outlines of a new compliance system that could be supported by a large number of States have begun to emerge.

So what is the outline of this proposed new compliance system? A first key point here is that the whole system that will emerge from these

consultations should be based on several guiding principles. These principles evolved throughout the consultation process, for guiding both the consultation and any eventual outcome. There are ten guiding principles and I will not go through the list with you, I will simply imagine that the most fundamental guiding principles as any mechanism that would emerge should be voluntary, non-binding, non-politicized and de-contextualized.

I need to be transparent here and underline that before the consultations began, the ICRC's vision of an ideal compliance system was something stronger. In its Report submitted to the 2011 International Conference on Strengthening Legal Protection for Victims of Armed Conflicts, the ICRC indicated that these mechanisms to be established should be a system that would aim to prevent violations and/or halt them while they are occurring during hostilities, and that it should be a body with a real authority to make legally-binding decisions rather than simply able to make recommendations. That being said, it has been very clear throughout the consultations, facilitated by the ICRC and Switzerland, that most States want a system that is softer – voluntary, non-binding, non-politicized and non-contextualized. A key message has been that the new system should not aim at “naming and shaming” but instead at creating a space for States to come together and to discuss common challenges to IHL. So, these are the parameters that have shaped the outlines of the proposed new compliance system.

The central pillar of the new system is proposed to be a regular Meeting of States. The overall purpose of a future Meeting of States would be to foster dialogue and cooperation among States on ways of strengthening respect for international humanitarian law, and to promote awareness of this body of law at the domestic and international levels. The Meeting of States would also allow States to examine practical experiences, as well as challenges in the application of International Humanitarian Law, to exchange best practices and to flag capacity-building needs. More broadly, this Meeting of States would help deepen knowledge of international humanitarian law and foster the creation of a network of IHL experts by bringing together representatives from the different States.

A vast majority of States is in favor of the creation of this Meeting of States, and suggested that it could meet on an annual basis to give an opportunity for more frequent discussion on International Humanitarian Law issues than the four-yearly International Conference. However, a few States remain skeptical about creating such a meeting.

In any event, several important issues still need careful consideration and further discussion. One of them is the process for establishing this new Meeting of States. The divergence of views among States centers on whether a resolution of the International Conference can provide an adequate basis for establishing the Meeting of States or if a diplomatic

conference should be organized for that purpose. The ICRC and Switzerland have proposed a so-called hybrid solution, combining the advantages of both options. According to this hybrid solution, the relevant resolution adopted by the International Conference could aim to capture those elements of the future IHL compliance system that are acceptable to States, while deferring the formal establishment of the system to an initial Meeting of States to be held within a pre-determined timeframe. This “hybrid solution” was considered adequate by a majority of States and we hope it will offer a good way forward.

Other issues that will need further discussion include the institutional structure and form of a new compliance system namely the different supporting bodies or organs like a Chair, Bureau and Secretariat that could be created; the participation of other actors as observers in the Meeting of States and, in particular, the participation of National Red Cross and Red Crescent Societies in the Meeting but also the participation of relevant international organizations and civil society and the relationship between the Meeting of States and the Red Cross Red Crescent International Conference.

In summary, while important progress has been made in the consultation process over the last three years, it is clear that there are several issues regarding the Meeting of States that will need to be worked through further both in the lead-up to the International Conference and beyond.

The Meeting would not only serve as a forum for regular dialogue among States on IHL issues but would also be the anchor for two compliance functions.

So, the first function is thematic discussions on International Humanitarian Law issues. Such topical discussions should enable all actors involved in or responsible for the implementation of IHL at the national level to be better informed about current and emerging IHL issues, to exchange views on key legal, practical or policy questions and to better understand how the constant evolution of warfare may affect its implementation.

In addition to thematic discussions, most States agreed that a second important function should be attached to the Meeting of States and this second function is national reporting of compliance with International Humanitarian Law.

There was broad agreement among delegations that national reports would be an opportunity for self assessment by States, and would permit each State to highlight its experiences and best practices, as well as challenges observed in the implementation of IHL obligations. These reports would also enable the identification of capacity-building needs. There was general agreement that reporting should not be cumbersome. It

was suggested that this could be facilitated by ensuring that reports were prepared on the basis of templates or guidelines.

There are many issues relating to the proposed reporting function that require further discussion – including the type of reports, including the specific modalities for reporting and the follow up to these reports. However, it should be underlined that, in the State's view, national reports will not be reviewed individually, but should be grouped into a single document so as to identify common challenges, trends and best practices.

In the consultations, States also discussed whether an additional function, fact-finding, should be among the compliance functions at the Meeting of State. However, this generated very different views and it has been suggested that this topic be deferred for a future discussion, once the Meeting of States is established. Here again, even if the fact-finding function is added to the Meeting of States giving the principles, it will not to be a fact-finding function used to send missions to do fact-finding on States where there are current hostilities but a possibility to discuss how fact-finding in general from a conceptual way could be strengthened, for example, how we could strengthen the International Humanitarian Fact-Finding Commission.

So, where are we right now and what is the way forward? We feel that we have made good progress in the consultations over the past four years and that States consider this initiative important. At the same time, there are obviously a lot of questions to answer as we continue the process and we do not need to have resolved all of them before the International Conference in December this year.

But we are now at a critical stage of the process.

As I mentioned earlier, the ICRC has circulated draft elements of a proposed resolution for consideration at the 32nd International Conference. We have received feedback on these draft elements of resolution from States and National Societies, and we are currently preparing a first draft, or a draft zero, of the resolution, which will be distributed at the end of next week or the beginning of the week after. We will use the draft zero for further consultations and the official draft of the resolution will then be drafted and sent mid-October, in accordance with the normal preparation process for the International Conference.

The feedback received so far indicates that a vast majority of States is in favor of the establishment of a new International Humanitarian Law compliance mechanism and only few States voice reservation. The main concerns raised by those opposing States include the potential for the system to become politicized; the question of how the system would be funded; the institutional structure and composition of the Meeting of States; and the method for establishing the Meeting of States. Thus, a proposal has been put forward that more work could instead be done to reinforce the role

of the ICRC and, in particular, confidential dialogue with States, or to enhance the role of the Red Cross and Red Crescent International Conference.

At the other end of the spectrum, several States and National Societies have indicated that they would prefer to see the development of a stronger more robust system, for example, one that would be binding and that would have the capacity to consider individual country situations.

As facilitators, the ICRC and Switzerland are trying to find a middle-ground, as a way forward. The ICRC and Switzerland will continue engaging with States and try to find ways to address these concerns.

Another challenge will be to determine whether and how the new International Humanitarian Law compliance system could contribute to strengthening compliance with International Humanitarian Law by non-state parties to NIACs. How to improve compliance by non-state parties is of course a critical issue today and one to which a lot of thoughts and activities have been dedicated by others, and I look forward to the presentation of Annyssa Bellal on this topic. However, in the context of the Swiss/ICRC initiative, the issue of compliance by non-state parties was, unsurprisingly, a sensitive issue for many States, and it was felt that this was a topic that would need to be deferred for further examination once the Meeting of States was created. However, one of the guiding principles is that the new International Humanitarian Law compliance system should apply to all types of armed conflicts including non-international armed conflict and, therefore, this topic needs to be on the agenda of the Meeting of States once it has been established.

In conclusion, for the first time, the establishment of an institutional mechanism on compliance with International Humanitarian Law may become a reality. We think that the joint Swiss-ICRC initiative offers a unique opportunity to enhance compliance with International Humanitarian Law. We would like to see a resolution adopted in December that helps to move this initiative forward, so that the foundation of a new compliance system for International Humanitarian Law can be created next year.

We think it is important to achieve an outcome and believe me we are working hard to facilitate this. It is clear that the path forward to establishing the Meeting of States will not be an easy one. It is too early yet to predict exactly what will be decided at the International Conference. We are now in the hands of the members of the International Conference and in particular States parties to the 1949 Geneva Conventions, as to what will emerge.

A role for HRL monitoring mechanisms in situations of armed conflicts?

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The framework

First let me make some general observations regarding the international law framework. As the International Law Commission (ILC) explains, international law is not a random collection of norms, but it is composed of rules and principles that have meaningful relationship between them.¹ When several norms have bearings on a single issue, the ILC suggests that to the extent possible, the rules should be interpreted “to give rise to a single set of compatible obligations”. Therefore, human rights law and IHL cannot be considered as two domains operating in silos.

The second point to stress is the one that has been reiterated during several previous panels: it is now fully recognized that human rights law applies at all times, while international humanitarian law applies when the existence of an armed conflict is established. In all situations, human rights law remains the general law while IHL, depending on the fulfillment of specific criteria, could be considered the special law. As such and according to the ILC, human rights law being the general law, will “continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.”²

There are often geographic and temporal questions regarding the application of human rights law and IHL regimes that have been explored during this Roundtable. This complexity was recently made clear, for instance, during the Syria crisis. There, the anti-government protests, which started peacefully, began in February-March 2011, but were met by excessive force by the Government. As the situation became more militarized, it was eventually evolved into a fully-fledged armed conflict. The first time the ICRC spoke publically about the existence of an armed

¹ Conclusion 1, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, ILC, 2006.

² Conclusion 9, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, ILC, 2006.

conflict was in July 2012.³ Meanwhile, hundreds of individuals lost their lives, were detained, tortured, raped or made to disappear. It was very important to clearly ascertain the legal regime that was applicable in order to clarify obligations, influence conduct, and ensure accountability.

The UN Human Rights Council was amongst the first intergovernmental body to react to the protection crisis in Syria. It held a Special Session on 29 April 2011 and requested the UN High Commissioner for Human Rights “to dispatch urgently a mission to the Syrian Arab Republic to investigate all alleged violations of international human rights law and to establish the facts and circumstances of such violations and of the crimes perpetrated, with a view to avoiding impunity and ensuring full accountability”.⁴ Welcoming the report of the High Commissioner, the UN Human Rights Council stressed the need for an international, transparent, independent and prompt investigation into violations of international law, including international human rights law, and to hold those responsible to account. It established an Independent International Commission of Inquiry to facilitate these tasks.⁵

This example of the type of action undertaken by the UN Human Rights Council when faced with allegations of atrocities brings me back to the question: Is there a role for the human rights law monitoring mechanisms in situations of armed conflicts. The response is, yes: it is fact-finding, inquiry and public reporting. Let me elaborate.

Types of inquiry

Fact-finding occupies a central place in the legal field, playing a major role in the implementation of law whether it relates *inter alia* to dispute resolution, adjudication or assessment of damages. The premise is that professional and credible examination of facts and impartial assessments against legal principles lead to justice. Investigations also narrow the gap between the law and its implementation by making a more contextual and broader examination of a situation.

Antonio Cassese in his last work, *Realizing Utopia: the Future of International Law* considered several variables, including the legal authority for the investigation, who is conducting it, and the cooperation of the parties to distinguish monitoring from fact finding.⁶ In making the distinctions, he was building on his own experience as the President of the

³ See “Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting”, 17-07-2012 Operational Update.

⁴ A/HRC/RES/S-16/1.

⁵ S-17/1. Situation of human rights in the Syrian Arab Republic, 22 August 2011.

⁶ A. Cassese (ed), *Realizing Utopia: the Future of International Law*, OUP, 2013, at 295.

European Committee for the Prevention of Torture from 1989 to 1993, which is a consent-based system, and later in October 2004 as the chair of the International Commission of Inquiry on Darfur, which was established by the UN Security Council under Chapter VII. On my part, I would like to suggest that there are four types of international inquiries today.

Type 1: Investigations by Independent Experts Relying on the Consent of the Parties

The first generation of inquiries was fully anchored on the need for the consent and cooperation of the parties. As Cassese explains, the institution of international Commissions of Inquiry dates back to the 1899 and 1907 Conventions for the Pacific Settlement of International Disputes, which contained some elaborate rules on these mechanisms that were reserved for disputes of an international nature arising from a difference of opinion on points of facts “involving neither honour nor vital interests”. The two Conventions specifically stipulate that international Commissions of Inquiry can be constituted only by special agreement between the parties in conflict.

The predecessor to the Geneva Conventions, the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field also contained a provision under Article 30 providing for inquiry mechanism. The issue of the consent of the parties remained an important feature of the 1949 Geneva Conventions.⁷ The investigations are then carried out by ‘qualified persons’ agreed upon by the parties.⁸

There has been discussions during this Round Table about the International Fact-Finding Commission established under Article 90 of the 1977 Additional Protocol 1 and has been placed at the disposal of the parties of this Protocol, though it could also be utilized by others on a voluntary basis. Here too, the agreement of the parties remains paramount.⁹

⁷ Article 52 of GC I, Article 53 of GC II, Article 132 of GC III, and Article 149 of GC IV. The wording of the inquiry identical in all four instruments reads as “At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention”.

⁸ See Commentary on Article 149 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949; Good Offices, Conciliation, and Enquiry’, in A. Clapham, P. Gaeta, and M. Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015), 561-74.

⁹ International (Humanitarian) Fact-Finding Commission was established in 1991 and it has added an addendum ‘humanitarian’ in order to distinguish itself from other international fact-finding missions and commissions.

Also, since 1946, the UN has relied on fact-finding processes to investigate a range of issues, including border disputes, inter-state disputes, as well as international crimes and, in limited cases, national crimes, such as the investigation into the assassination of the former prime ministers of Lebanon Mr. Rafik Hariri and of Pakistan, Mrs. Benazir Bhutto. The consent and the cooperation of the State concerned have been essential in carrying out these mandates. There are also examples of the United Nations being requested by a State concerned to carry out human rights investigations such as the case of the investigation set up by the Secretary-General regarding Timor-Leste in 2006 and conducted by OHCHR.¹⁰

Type 2: Investigations by Independent Experts in the Absence of Consent

This type of inquiry came with the development of the UN human rights system. The first such fact-finding took place following the 1973 coup against President Allende by General Augusto Pinochet. The then UN Commission on Human Rights responded by establishing in 1975 an *ad hoc* Working Group to inquire into the situation of human rights in Chile. In 1979, this working group was replaced by a Special Rapporteur and two experts to study the fate of the disappeared in Chile. Establishing the facts regarding disappearances was more institutionalized with the creation of the Working Group on Enforced or Involuntary Disappearances in 1980. The inter-governmental human rights system continued to develop its own monitoring and fact-finding tools. The UN Human Rights Council continues to develop its monitoring and fact-finding approaches. As of 27 March 2016, it benefits from the voluntary efforts of independent experts who are considering 41 thematic areas¹¹ and 14 country situations, several of them involving conflict zones.¹² The experts visit the concerned countries and request unhindered access to places such as prisons and

¹⁰ The Independent Special Commission of Inquiry for Timor-Leste set up in 2006 by the UN Secretary-General.

¹¹ The covered thematic issues include: the plight of people of African Descent, Albinism, arbitrary detention, business and human rights, cultural rights, disabilities, disappearances, the right to education, environment and human rights, summary or arbitrary executions, the right to food, foreign debt, freedom of expression, freedom of assembly, right to health, right to housing, human rights defenders, independence of judges and lawyers, indigenous peoples, internally displaced persons, migrants, minorities, older persons, poverty, the right to privacy, racism, religion and belief, sale of children, slavery, counter-terrorism and human rights, torture, trafficking in persons, transitional justice, violence against women, and the right to water and sanitation.

¹² These are: Belarus, Cambodia, Central African Republic, Ivory Coast, People's Republic of Korea, Eritrea, Haiti, Iran, Mali, Myanmar, Occupied Palestinian Territories, Somalia, Sudan, and the Syrian Arab Republic.

detention centres, contact with civil society groups, access to documentation, and confidential and unsupervised contact with witnesses and other persons.¹³ If such access is not granted, or its quality is not guaranteed, the experts often carry out their examination on the basis of interviews with victims, witnesses and experts outside the concerned country.

The UN intergovernmental system has also been establishing independent commissions of inquiry and fact-finding missions. While these bodies were primarily established by the UN Security Council often under Chapter VII, today, the UN Human Rights Council is the one that has been regularly establishing them. These Commissions are also composed by independent experts and supported by a secretariat established by OHCHR. So far, OHCHR has assisted about 45 such bodies often considering situations of conflict.

Type 3: Mandates to OHCHR to Investigate Irrespective of Consent

The UN Human Rights Council has increasingly been requesting OHCHR itself to carry out human rights investigations. These investigations are to take place irrespective of the consent of the concerned party. The investigations are directed at both States and non-State actors covering conflict areas, including cross border activities, as is the case regarding Islamic State and Boko Haram.

The first request for such investigation came in response to the Syrian crisis. The UN Human Rights Council meeting in a Special Session on 29 April 2011, requested OHCHR “to dispatch urgently a mission to the Syrian Arab Republic to investigate all alleged violations of international human rights law and to establish the facts and circumstances of such violations and of the crimes perpetrated, with a view to avoiding impunity and ensuring full accountability”.¹⁴ Syria did not cooperate with OHCHR. The then High Commissioner Navi Pillay published the results of her investigations pointing to serious violations of human rights that may amount to crimes against humanity and noting the failure of the Government of Syria to cooperate.¹⁵

Another request to OHCHR was made on 1 September 2014 following a Human Rights Council Special Session on the human rights situation in Iraq in light of abuses committed by the Islamic State in Iraq and the

¹³ Terms of Reference for Fact-Finding Missions by Special Rapporteurs/Representatives of the Commission on Human Rights, UN doc. E/CN.4/1998/45, Appendix V.

¹⁴ A/HRC/RES/S-16/1.

¹⁵ A/HRC/18/53, “Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic”, 15 September 2011.

Levant and associated groups.¹⁶ The report was published in February 2015 looking at Non-State and State actors.¹⁷

In the situation of Sri Lanka, the Human Rights Council's request of April 2014 was for a "comprehensive investigation" into alleged serious violations and abuses of human rights and related crimes committed over several years.¹⁸ The report covered alleged serious violations and abuses of human rights and related crimes during the armed conflict between the Sri Lankan Army and the LTTE.¹⁹ In April 2015, it requested OHCHR to investigate and report on the atrocities committed by Boko Haram,²⁰ and in June 2015 it asked OHCHR to assess the situation in South Sudan.²¹ All these situations require complex analysis of the interplay between human rights law and international humanitarian law rules, particularly their temporal and geographic scope.

Type 4: The UN Acting under its own Initiative

The last type of inquiry can be initiated under the general authority of the UN Secretary-General or the UN High Commissioner for Human Rights. It is obviously the most controversial type of investigation and it must be undertaken with absolute care. The main authority for the Secretary-General's action in this regard is to be found in Article 99 of the Charter, which enables the Secretary-General to bring to the attention of the Security Council any matter that in his opinion threatens the maintenance of international peace and security. Building on this provision, Secretary-General Boutros Boutros-Ghali in his 1992 report to the General Assembly and the Security Council known as *Agenda for Peace*, recommended the increased resort to fact-finding in accordance with the Charter.

On several occasions, the Secretary-General (SG) has used his discretionary power to establish a number of inquiries, with various scopes,

¹⁶ HRC Resolution S-22/1, the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups, 3 September 2014.

¹⁷ A/HRC/28/18, "Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups", 27 February 2015.

¹⁸ HRC Resolution 25/1, Promoting reconciliation, accountability and human rights in Sri Lanka, 9 April 2014.

¹⁹ A/HRC/30/61, 28 September 2015.

²⁰ HRC Resolution S-23/1, Atrocities committed by the terrorist group Boko Haram and its effects on human rights in the affected States, 1 April 2015.

²¹ See HRC Resolution 29/13 "Mission by the Office of the United Nations High Commissioner for Human Rights to improve human rights, accountability and reconciliation in South Sudan".

without explicitly invoking article 99. Sometimes, the SG did so acting at the request of the concerned State; in other times he utilized his own initiative. For instance, in 2009, the SG established a Commission of Inquiry to determine the facts and circumstances of the events of 28 September 2009 in Guinea when the forceful military response to thousands protesting military rule in a stadium killed or wounded dozens of people.²² Looting and sexual violence was also alleged. The Government of Guinea later welcomed the UN action. The Inquiry report was eventually formally submitted to the Security Council.²³

The Secretary-General also established a Panel of Experts to consider the situation in Sri Lanka. The aim was to address allegations of violations of international humanitarian law and human rights law committed during the operations against the Liberation Tigers of Tamil Eelam (LTTE). The report of the Sri Lanka Panel was made public and triggered other UN action, particularly by the UN Human Rights Council.²⁴ The two investigations above were supported by OHCHR, with other UN entities participating.

The High Commissioner for Human Rights also has the legislative authority to exercise investigative power *proprio motu*. The General Assembly resolution 48/141 bestowed on the High Commissioner a wide mandate to promote and protect the enjoyment and full realization, by all people, of all rights. During her term as High Commissioner, Louise Arbour saw in this authority a major tool in exercising her mandate and embarked on complex investigations. The investigations into situations in Kenya²⁵ and the Democratic Republic of Congo,²⁶ Arbour also established the practice of issuing periodic public reports on country situations, particularly when there is a UN peace mission established under Chapter VII of the UN Charter.²⁷

²² SG/SM/12581-AFR/1902, “Secretary-General Announces Members of Guinea Commission of Inquiry to Investigate Events of 28 September”, 30 October 2009.

²³ S/2009/693, *Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea*, 18 December 2009.

²⁴ Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 31 March 2011.

²⁵ OHCHR Fact-finding Mission to Kenya, 6-28 February 2008. For more information see www.ohchr.org/documents/press/ohchrkenyareport.pdf.

²⁶ Mapping exercise documenting gross human rights violations committed between 1993-2003, see for more information www.ohchr.org/EN/Countries/AfricaRegion/Pages/RDCProjetMapping.aspx.

²⁷ See e.g., UNAMA Reports on the Protection of Civilians, available at: <http://unama.unmissions.org/Default.aspx?tabid=13941&language=en-US>.

Conclusion

I would like to conclude by stating that fact-finding is now an established tool in the hands of the international community to verify facts and draw conclusions. It is an essential measure to bring compliance with international law. Clarifying the rules and ascertaining their application should not be dependent on the whim of the parties. An international order based on the rule of law needs sufficient transparent measurement mechanisms to ensure that all its members respect the law and have the ability and willingness to address possible transgressions. If they fail, the international community cannot remain silent; it must act to bring compliance.

As this presentation shows, human rights law has developed some elaborate methods and mechanisms to examine the application of human rights law. International humanitarian law already benefits from this system which is being used to bring more respect for IHL.

Challenges for compliance by non-state armed groups

Annyssa Bellal

Legal Adviser, Geneva Call

Firstly, what we can observe is that conflicts between a state and an armed group are not necessarily the rule anymore. In fact, conflicts between groups such as in Syria, in the Central African Republic or in DRC are becoming more frequent. As a consequence, it could be a challenge to convince a group to abide by IHL when they are facing another ruthless armed group, which rejects the application of IHL or other international norms. This is the case in Syria, as you have guessed. Groups such as the YPG or the FSA, which have both signed the Geneva Call Deed of Commitment, do not necessarily contest the applicability of IHL to their actions but, for example, in a recent training one of the fighters told us he was not aware that IS was also bound by the same IHL norms as they were.

Secondly, in some contexts it is “the nature” of armed violence which has changed. One could say that there are less “classical” combat operations between groups and/or between a group and a state, but rather what we see is more direct violence against the civilian population. In the words of Professor Mary Kaldor from London School of Economics, “new wars involve a blurring of the distinction between war (which is defined as violence between state or organized political groups for political motives), organized crime (violence undertaken by privately organized groups for private purposes) and large-scale violations of human rights (violence undertaken by states or politically-organized groups or other groups against individuals).”

A third socio-political challenge is the changing nature of armed groups. I think we are still stuck with a slightly out-dated understanding of what armed groups are. In the Geneva Conventions, as well as in the case law, there is not so much information about the characteristics of armed groups. Talking about armed groups, we usually think of “armed opposition groups”, which usually have political motives or even national Liberation Movements who have the very particular intention of becoming a state. Hence, the Geneva Conventions and their Protocols when they were elaborated in the 70’s apply more neatly to these types of groups.

But today armed groups or armed “non-state” entities vary immensely in their structures and ideology. In terms of structure, they can go from partially recognized states or quasi-states; *de facto* authorities, paramilitary groups, urban gangs, transnational criminal organizations or self defense groups.

On one end of the scale, organized armed groups can raise implementation issues. For example, armed groups, which have a “cell structure”, are highly organized but operate in a clandestine manner: these groups may have difficulties to respect certain IHL norms on detention, for example, because they precisely don’t want to disclose their location or they will find themselves unable to detain.

On the other end of the spectrum, you have “self defense groups” for instance. Those can be defined as a militia composed of “civilians” who formed a group meant to defend themselves or defend others against armed violence committed by another group or by armed gangs. Anti-Balaka in the Central African Republic, at least at the beginning, could be described as such, or the so-called “vigilante” in some Latin American countries, like in Mexico or Guatemala. Self-defense groups are usually more loosely organized. In these contexts, despite a very high level of violence, the applicability of IHL will be unclear. Of course, human rights law would still be applicable but given the uncertainty of its applicability to armed groups, we would be facing a protection gap, at least legally, in situations of failed states or in situations where law enforcement is not possible as is the case in some areas controlled by armed groups or urban gangs. Self-defense groups also blur the distinction between civilians and fighters, as it will be very easy for a civilian to slide into self-defense. More generally speaking, as social scientists have shown, the apparition of self-defense groups blur the distinction between “peaceful” and “violent society” as a whole and one could wonder to what extent IHL and human rights law can even regulate these types of situations.

Another socio-political challenge with legal implications is the multiplication of armed groups. Sometimes they are several hundred acting in one situation. Some of those groups might merge or split. Some of them control territory at a certain time and then lose it again. Some of them, at one point are very organized and then lose part of their hierarchy over time. So, all these evolving and changing characteristics of the group is a challenge for the implementation of the norms, also because it is not always easy to determine at a certain point in time which legal framework is applicable.

In terms of motivation or ideology, groups also differ greatly. The ideology is not considered, as you know, pertinent criteria for the application of IHL. Yet we see now that ideology does matter in some instances. In theory, armed groups are bound by IHL whatever their motivations or ideology, provided there is protracted violence and a certain level of organization. Its implementation of IHL will, however, prove more difficult on the ground with those groups which reject the very idea of IHL or human rights law. How to engage with these groups is another pressing

challenge not only for Geneva Call, but more broadly for the humanitarian community.

So, what can be some of the solutions to these challenges? First of all, there is a need to enhance the role of armed groups in the elaboration of the norms. We heard many times that there is a convergence between the law of IACs and NIACs, particularly with regard to conduct of hostilities. This is of course a very positive development. But it is clear that this development comes from customary international law. When you talk with an armed group, trying to convince it of the fact that it is bound by treaties that it does not agree to is already quite challenging. But explaining to them that some of these obligations come from “customary international law”, i.e. from “*opinion juris*”, a notion that is also quite difficult for some law students to understand and a “practice” which is not even theirs, the practice of the armed groups, creates another very acute challenge. Yesterday, some of you mentioned and recognized the work of Geneva Call on that issue. As you know, in the past 15 years Geneva Call has developed three Deeds of Commitment on specific IHL and human rights norms. It has also elaborated 15 rules on IHL based on customary IHL that we use for training. However, more efforts towards taking into account armed groups’ views in the elaboration of the law and allowing for their ownership is still very much needed.

Secondly, there is an urgent need to clarify the applicability of human rights law to armed groups. When it is true that in some situations, IHL clearly applies, we sometimes find ourselves in the situation where the threshold is not necessarily reached. In our Deed of Commitment, we speak of “humanitarian norms” intentionally by which we mean IHL and human rights law.

In reality more and more groups, which control territory are requested to respect human rights and not only negative obligations but also “positive obligations”. For example, they have to provide for health care, they have to provide for education, and so on. But what precise human rights obligations apply to which group is still unclear. In order to answer some of these questions, Geneva Call, for your information, will be organizing an expert meeting on this very issue in November.

Thirdly, we need to come up with solutions regarding the lack of fora to address the responsibility of armed groups. True there are international criminal courts and most of the armed groups are aware of the risk they might commit war crimes if they don’t respect IHL norms. But individual criminal responsibility cannot and is not the panacea to address the responsibility of armed groups in conflict situations for many reasons. International criminal trials are lengthy costly and selective. The individual who has committed the crime may die, which is quite a common occurrence in armed conflict situations, leaving the crime unpunished. Thus

the group as such must be held accountable. The road is still long and we have seen reticence with regard to the Swiss and ICRC initiative to hold armed groups accountable *per se* but clear rules on responsibility including rules on attribution and reparations should be established.

But at a more general level, if we want to find solutions to the challenges of implementation of the law of armed groups, I think we might need to depart from our very legalistic binary mode of thinking:

- International *versus* non-international
- State *versus* non-State
- IHL *versus* Human Rights.

Allow me to finish my presentation with a quote which I think illustrates very well some of the challenges compliance of armed groups faces. It comes from a book written by Professor Christopher Clapham, a political scientist from Cambridge University. In his book, *African Guerillas Revisited*, he said that “the African continent is left with a plethora of movements for the most part locked into regional patterns of conflict which generally suffer from weak internal organization and poorly articulated goals and can be far less readily incorporated into stable political settlements than earlier liberation insurgencies and reform insurgencies.”

His observations, even if they address the African continent and were written in 2007, apply to my mind to other continents and are very much contemporary. Even if he talks about political settlements, a similar reasoning can be done for the challenges of implementation of international law by often fragmented and loosely-organized armed groups locked in complex and often un-ending conflict situations.

Closing remarks

Fausto Pocar

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Let me first thank all the speakers of the different sessions, as well as the moderators who had the challenging job of leading animated debates and keeping the discussion on the right track, and all those who participated in this thought-provoking Round Table. Everyone has given, over the course of these three days, a great contribution to clarify the complexities of the subjects covered.

This year, for the first time, the audience has been much larger than in past years. The well-chosen subject of the Round Table and the likelihood that the high level of the panelists would generate interesting debates prompted the Institute to make the discussions available on streaming. According to the reports we have received, the working sessions of the Round Table were followed, at least partially, in 40 different countries with around 2500 visitors. These figures will have to be carefully verified, but they give us an important indication, especially if we consider that certain parts of the world are in a different time zones and the streaming of the event was announced at short notice. However, I think that it is very important for the Institute that the Round Table has had such a wide coverage reaching many other interested persons and not only the participants present in Sanremo.

I am not going to discuss the challenges that we encountered during the sessions as they have been well and correctly summarized by Helen Durham. I would just like to add a couple of short comments.

The first one is related to the issue of categorization which was one of the initial questions raised in our debates. Do we need to categorize NIACs? I believe that the debate is still open, particularly if we consider the lively and interesting discussion we had yesterday on the issues of convergence, divergence and harmonization of the law applicable to IACs and NIACs. It is certainly possible to categorize NIACs, including transnational armed conflicts, but I believe that convergence would help to affirm certain principles applicable in any type of conflict, and to any participant in armed conflicts. Harmonization of the law is important in order to have a clearer framework. The issue is, however, whether this is possible considering the reality of the field. In that perspective, could new specific rules be a better solution? And as far as harmonization may be useful, should it be achieved through an attempt to codify the law or through a clarification provided by case law? The two options have their supporters, with competing good reasons. On the one hand, a codification would provide for a clearer legal framework of the general principles and

rules applicable under international law. On the other, the danger of overregulating existing law has been put forward. Drafting new specific rules would add a number of regulations that might not be compatible with all current principles. As a judge, I am naturally inclined to see the merits of relying on case law, especially if I look at the significant contribution that the international criminal courts and tribunals have brought to clarifying the law applicable to NIACs, although this clarification has been made through the lens of assessing individual criminal responsibility for violations of that law. In my introduction to the Round Table I mentioned some features that had been streamlined by the case law. However, I concede that relying on case law may give less certainty, in particular to field operators whose decisions have to be made quickly without the possibility to looking at judicial precedents.

The second issue which I think has to be further analyzed is the monitoring process. It was debated whether it is better to have distinct bodies for dealing with Human Rights Law and with IHL respectively. I do not think that there is a full answer to this question. I tend to say that the best option is to have specific bodies for each of the two branches of law – HRL and IHL – but at the same time that these specific bodies should not be limited in dealing with the other field of law. In my long experience in the field of monitoring compliance with HRL and IHL I have noticed that it has always been advantageous to have a plurality of bodies to assess compliance. This is certainly the case for human rights monitoring bodies, which are frequently set up to monitor the same rules, or overlapping ones. The problem is not the plurality of bodies having the same function, but their interaction. By interacting in monitoring compliance with HRL and IHL they will contribute to ensure a better protection of the individual – a goal which is common to the two fields of law.

Let me express the hope that initiatives aiming at strengthening compliance will be crowned by success in achieving this goal.

Closing remarks

Helen Durham

Director of International Law and Policy,
International Committee of the Red Cross, Geneva

It has always been a great pleasure for the International Committee of the Red Cross to work closely with the International Institute for Humanitarian Law on this annual Round Table, discussing current issues as they relate to IHL. This year's theme, "The distinction between international and non-international armed conflicts, challenges for IHL", is extremely pertinent and in the last few days we have demonstrated that this topic gives rise to a range of issues.

The depth and the richness of the discussions we have had is partly due to the fact that we have presenters and audience members from the military, academics, practitioners, international organizations, a range of NGOs and others, all of whom call attention to a range of matters that we need to respond to and think about. I would be foolish to even attempt to sum-up the range of the discussions we have had. But on the other hand, it would be far too easy to merely close such an enriching three days with the statement, "we had a very complex topic, very complex discussions, farewell and safe travels".

As you are all well aware, for good or bad, the ICRC never takes the easy road. As I was leaving the Headquarters of the ICRC in Geneva on Thursday to travel here, I left an institution in a very somber mood and bearing a heavy heart, mourning the loss of our two colleagues in Yemen that day. This made me reflect on how we find a connection, a genuine interface between what we have done in the last few days and the reality experienced in the field. This reality, I do not need to express today because we all know about it. We are faced with the challenges posed by some belligerents that profile and utilize their own breaches of IHL as a tactic and as a strategy, the challenges posed by the stances of States that either deny that they are engaged in armed conflict or claim that they are merely using counter-terrorism measures in order to obscure and deflect important discussions. Above all, we are grappling with the magnitude of the challenges we face in assisting victims, because of armed conflicts (some of which characterized by their duration) that are forcing hundreds of thousands of people to flee.

What we talk about is certainly important and somewhere between naïve hope and aggressive cynicism is that fine point of reasonable action. This involves having the courage to take activities forward to address real humanitarian problems with pragmatic solutions. As we have heard over the last few days, the point of that reasonable action, and what that entails,

is perceived differently by different people. For some, proposed ideas are like a bandage on a broken leg, meaning that they are far too weak. To others, proposed ideas are like the German tax system, creating more regulations than necessary (according to one of our speakers). So how do we find a balance within these two competing groups and with their expertise the point to move forward? This is a difficult question and it has been heartening to see panels over the last few days really engage with each other on a deeper level – we need to keep challenging ourselves on how we explore this terrain together.

Now, there are a few overarching issues I would like to raise. As noted, the topic we chose was the right one because the challenges relating to the distinction between international and non-international armed conflicts are not going to go away. This tension, whether it relates to the capacity to engage in discussions on classification of a conflict, on scope of application of the relevant legal regime, on the relationship between the different legal frameworks, or its implications for operational decisions, will continue to play a relevant role in reflections aimed at ensuring the continual relevance of IHL.

The other thing that was very clear in the last few days is that there is a plethora of attempts to respond to the concerns raised. We have new studies, we have new projects, and we have the increasing role of jurisprudence as courts increasingly review specific cases relating to armed conflict through human rights and IHL legal frameworks. One speaker raised a very interesting image of the differing subcultures that we fall into, which have a role in the way we identify and conceptualize responses to certain problems. I think this is an important point and if we swap the image of sub-cultures to ‘tribes’, we have an even more interesting display! I can see the “tribes”: the IHL group with the tattoo of “ensure respect”; the Human Rights group with the tattoo of “we, the people” - rumbling as tribes do and using jurisprudence and casebooks (instead of knives and clubs). Considering that this will never likely become a successful Broadway play (the “tribes” and sub-cultures of international lawyers as a musical – no one would go) we do not have the luxury to waste time and energy as practitioners with pressing issues to resolve. In reality we need to take up all challenges, respectfully work out when different approaches are more useful and then work together in ways where we support each other.

In the opening panel questions were posed about how we could work better to prevent major atrocities. In this regard, the practical efforts made and the concerns envisaged by the ICRC, particularly relating to multilateral NIACs, as well as the practical efforts undertaken by NATO to mitigate civilian casualties were raised. Moving onto the section where we defined the scope of our discussions and explored as to what we were talking about, we heard definite views about the existing typology of armed

conflict, the historical narrative which has for a long time tried to work out the conceptual distinctions between the two reinforced by the old idea that only international war was “real war”, and how these developments have occurred through the articulation of treaties. The question that was raised in this debate was whether this really mattered – and the speaker (like all good lawyers) answered “yes, no, maybe” and concluded that the answer depended on who the client was. So what does the word client mean in this room?

Next we reflected on categorization, hearing about transnational armed groups and the views of speakers on what conditions were needed to link such groups into a NIAC. We also moved onto the topic of the coexistence of NIAC and IAC and the existence of fragmented jurisprudential developments on this issue. When we looked at issues relating to the scope of application, we understood that in the beginning we moved on from the traditional requirement to “declare war” to the idea of first shot in IAC. However, we were warned that the issues faced are not simple and we were shown some of the complexities that arise in relation to the threshold required in NIAC and the growing range of terms that can be found in the relevant jurisprudence today, whether it be organizational and intensity requirements or factors such as duration.

Looking to matters relating to the end of a NIAC and IAC, we were reminded of the strong role that “facts” play in determining their conclusion, transcending even formal peace agreements. In many ways, other complexities arise when regarding the conclusion of a IAC and NIAC and we heard about a number of these (for instance, the meaning of the phrase “general close of military operations” or the interpretation of the notion of “peaceful settlement”). On the geographical scope, we were reminded of the lack of clarity, the consequences of the lack of treaty provisions, and the role played by jurisprudence. From an ICRC perspective it was flagged that the geographical scope of application was limited to the territory controlled or under the jurisdiction of the belligerents but not the third States (with the exception of spill-over NIAC) and for those interested you will be able to read more about that when we launch our Challenges Reports in mid-December at the International Conference.

It was very useful that we got practical insight from Geneva Call on the ways of using digital technology to engage with non-state armed groups with a demonstration of their new “app”.

Moving onto the section on the relationship between human rights law and IHL, we heard a crisp and clear explanation of the distinctions and similarities and a very interesting warning, if I may quote, “similar end results do not mean similar reasons for the rule” – an interesting reflection on our “sub-cultures”. We also had the pleasure of an explanation from a

practitioner's point of view that highlighted the importance of legal advice in the field, while another speaker flagged the necessity of investigations on doubtful use of force. We also heard about the growing trend to fill perceived "gaps" in IHL with human rights norms, particularly when it pertained to NIAC; the practical roles played by SOFA's and transfer agreements, and issues relating to the rules of engagements. Finally, we were reminded, from a very practical voice in the field, of the range of issues dealing with non-state armed groups including the challenges in distinguishing between civilians and combatants and the tension created because of lack of clarity of certain elements within UN Security Council resolutions.

On detention, we were presented with a problem analysis (in particular the humanitarian concerns caused by the lack of clarity relating to the legal framework during NIAC), and heard about the ICRC's project in this area and the important works leading up to the International Conference. We were forcefully reminded that in many places it is not about which relevant framework is applicable, but that it is about actually applying the rules, and we heard about the glorious gift common law gave to the world with *habeas corpus* and the continual debates relating to its potential application to persons detained in relation to an armed conflict.

On the topic of convergence of the laws governing IAC and NIAC, discussions arose about the "harmonization process", with vibrant debate on the merits and opportunities that it offers as well as the concerns it raises. Questions were also raised as to whether we were over regulating, with the counter view also expressed, that while this is a short fix to a problem, we need to consider as to what would be the other fixes? Discussions were held on the topic of equality of belligerents. On assistance, we looked at the issues relating to the distinction between arbitrary denial of consent or unlawful denial of consent and the issues of State consent raised this morning by my colleague. We heard sobering reminders of the statistics on deaths and injuries of humanitarian actors and looked at the protections afforded to this group and the obligations of state and non-state armed groups. We also heard about the issues relating to protected medical functions, the neutrality principle and problematic elements relating to a situation characterized by a loss of such protections.

Furthermore, we had a session on compliance, which is the big issue, and reflections on how we can increase this critical requirement. ICRC and the Swiss explained their initiative on this topic – the aim to create a "compliance mechanism" which would be voluntary and non-contextual – and the importance of the upcoming International Conference on this topic. We heard a resounding "yes" from the panelist in relation to the questions of whether human rights mechanisms play a role in IHL compliance and the articulation of what that role is – demonstrating the importance of

complementary approaches. We also heard accounts about the reality in the field; some examples of what can be done to more deeply engage with non-state armed groups, from a sociological and a political perspective, as well as through the legal normative framework. Now, that is a lot of food for thought. My apologies if I have skipped over a session or if I did not do it justice in terms of the depth of the presentations and discussion – but I wanted to flag these key points.

Finally, on behalf of ICRC I would like to express my sincere appreciation of all those who worked hard to make this event such a success.

Acronyms

AAR	After Action Review
AJP	Allied Joint Doctrine
AMISOM	African Union Mission in Somalia
API	Additional Protocol I to the 1949 Geneva Conventions
APII	Additional Protocol II to the 1949 Geneva Conventions
AQMI	Al-Qaeda in the Islamic Maghreb
AU	African Union
BDA	Battle Damage Assessment
CA	Common Article
CAI	Conflit Armé International
CANI	Conflit Armé Non International
CAR	Central African Republic
CCMT	Civilian Casualties Mitigation Team
CCTARC	Civilian Casualties Tracking Analysis and Response Cell
CCW	Convention on Certain Conventional Weapons
CEDH	Cour Européenne des Droits de l'Homme
CICR	Comité International de la Croix-Rouge
CIJ	Cour Internationale de Justice
CIP	Cour Pénal Internationale
CIVCAS	Civilian Casualties

CoESPU	Centre of Excellence for Stability Police Units
COJUR	Comité Juridique / European Union Working Group on Public International Law
DAESH	al-Dawla al-Islāmiyya (Islamic State in Iraq and Lybia)
DDP	Due Diligence Policy
DIDH	Droit International des Droits de l’Homme
DIH	Droit International Humanitaire
DPH	Direct Participation in Hostilities
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
EU	European Union
FARC	Fuerzas Armadas Revolucionarias de Colombia
FSA	Free Syrian Army
GAT	Groupe Armé Terroriste
GC	Geneva Conventions
GOP	Guidance for Operations Planning
HPCR	Humanitarian Policy and Conflict Research Programme at Harvard University
HRDDP	Human Rights Due Diligence Policy
HRs	Human Rights
IAC	International Armed Conflict

ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICT	Information and Communication Technologies
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IED	Improvised Explosive Device
IGAD	Intergovernmental Authority on Development
IGASOM	Inter-Governmental Authority on Development Peace Support Mission in Somalia
IHFFC	International Humanitarian Fact-Finding Commission
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IIHL	International Institute of Humanitarian Law
IL	International Law
ILC	International Law Commission
ILO	International Labour Organisation
ISAF	International Security Assistance Force
ISIL	Islamic State of Iraq and the Levant
JAG	Judge Advocate General
KFOR	Kosovo Force
LEGAD	Conseillers Juridiques Opérationnels / Legal Advisors

LOAC	Law of Armed Conflict
LTTE	Liberation Tigers of Tamil Ealam
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
MoD	Ministry of Defence
MONUSCO	Mission de l'Organisation des Nations Unies pour la Stabilisation en République Démocratique du Congo
MRLS	Multiple Rocket Launching System
NAC	North Atlantic Council
NATO	North Atlantic Treaty Organisation
NGOs	Non-Governmental Organisations
NIAC	Non-International Armed Conflict
OAE	Operation Active Endeavor
OAU	Organisation of Africa Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
ONG	Organizzazione Non Governativa
ONU	Organizzazione delle Nazioni Unite
OP	Occupying Power
OPLAN	Operations Plan
OT	Occupied Territory
OUP	Operation Unified Protection
PA I	1 ^{er} Protocole Additionnel

PA II	II ^{ème} Protocole Additionnel
PDT	Pre-Deployment Training
PIDCP	Pacte International relatif aux Droits Civils et Politiques
POC	Protection of Civilian
POW	Prisoner of War
PTC	Pre-Trial Chamber
RCA	République Centre Afrique
ROE	Rules of Engagement
RPGs	Rocket- Propelled Granades
SACEUR	Supreme Allied Commander Europe
SEA	Sexual Exploitation and Abuse
SG	Secretary-General
SOFA	Status of Forces Agreement
SOMA	Statute of Mission Agreement
SOP	Standard Operating Procedure
TC	Trial Chamber
TCC	Troop contributing Country
TDA	Target Damage Assessment
TTP	Tehreek-e-Taliban Pakistan
UAV	Unmanned Aerial Vehicle
UCAV	Unmanned Combat Aerial Vehicle

UCV	Unmanned Combat Vehicle
UK	United Kingdom
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Emergency Fund
UNITAR	United Nations Institute for Training and Research
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
US	United States
UV	Unmanned Vehicle
VBIED	Vehicle-Borne Improvised Explosive Device
VRT	Virtual Reality Training Tool
WWII	World War II
YPG	People's Protection Units (translated from Kurdish)

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QATAR RED CRESCENT

The Distinction between International and Non-International Armed Conflicts: Challenges for IHL?

The 38th Round Table on current problems of International Humanitarian Law (IHL), jointly organized by the International Institute of Humanitarian Law and the International Committee of the Red Cross, focussed this year on the complex and delicate issues concerning the application of IHL in the context of international and non-international armed conflicts.

Discussions and debates were drawn from the expertise of international IHL academics and specialists as well as from the field-tested experience of military practitioners. The aim was to identify lessons to be learned from recent developments in this area including related topics such as detention and humanitarian assistance.

This event provided the opportunity to examine and discuss fundamental questions regarding the application of IHL and International Human Rights Law in international and non-international armed conflicts. Furthermore, this Round Table tackled the challenge of how to enhance the compliance of non-state armed groups with international humanitarian law and strived to shed some more light on how international law applies to all forms of violence, be it in an international or a non-international environment.

The **International Institute of Humanitarian Law** is an independent, non-profit humanitarian organization founded in 1970. Its headquarters are situated in Villa Ormond, Sanremo (Italy). Its main objective is the promotion and dissemination of international humanitarian law, human rights, refugee law and migration law. Thanks to its longstanding experience and its internationally acknowledged academic standards, the International Institute of Humanitarian Law is considered to be a centre of excellence and has developed close co-operation with the most important international organizations.