Proceedings of the Bruges Colloquium

Scope of Application of International Humanitarian Law

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Le champ d'application du Droit International Humanitaire

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PROCEEDINGS OF THE BRUGES COLLOQUIUM
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DISCOURS DE BIENVENUE

François Bellon
Chef de la délégation du CICR auprès de l'Union européenne, de l'OTAN
et du Royaume de Belgique

Mesdames et Messieurs,

J'ai l'honneur et le plaisir, au nom du Comité international de la Croix-Rouge (CICR), de vous accueillir pour ce 13ème Colloque de Bruges, qui sera consacré à l'étude du champ d'application du droit international humanitaire.

Avec le Collège d'Europe, nous avons déjà organisé de nombreux Colloques de Bruges en droit international humanitaire qui ont traité de sujets importants et d'actualité. L'an dernier, par exemple, nous avions discuté de l'épineux problème de la responsabilité des organisations internationales en cas de violations du droit international humanitaire lors de missions de paix. Le sujet qui nous occupera ces deux jours est également d'un grand intérêt tant juridique qu'opérationnel, comme l'ont suffisamment montré les débats ayant entouré certains conflits récents. Il s'inscrit par ailleurs dans la suite logique du thème de l'an dernier. Mentionnons à ce propos que l'ordre des colloques aurait pu être inversé si l'on ne regardait que les thématiques, mais les événements des douze derniers mois ont soulevé certaines questions qui n'étaient peut-être pas apparues aussi nettement l'année dernière.

Dans son ouvrage intitulé « Principes de droit des conflits armés », le Professeur Eric David paraphrase l'auteur belge Hergé en disant que le droit international humanitaire, « c'est à la fois très simple et très compliqué ». Cette citation convient parfaitement pour décrire le thème dont nous allons discuter ces deux jours car elle souligne les aspects à la fois élémentaires et complexes de ce droit.

Aspects élémentaires, en effet, car les champs d'application du droit international humanitaire ne sont que la détermination de « à quoi, à qui, quand et où » s'applique ce corps de règles. Ce sont des notions aussi élémentaires qu'indispensables pour pouvoir appliquer le droit, s'assurer de la protection des victimes des conflits armés, conduire des hostilités dans le cadre que permet le droit international et, le cas échéant, engager la responsabilité des auteurs des violations.

Aspects complexes également, lorsque l'on regarde certaines prises de position, certains débats qui ont entouré certains conflits récents.

Tout le monde s'accorde pour dire qu'il n'est pas toujours aisé de qualifier une situation de conflit armé non-international, en raison principalement du difficile exercice d'évaluation des deux critères cumulatifs que sont l'intensité des violences et le degré d'organisation des parties. Les faits à évaluer ne sont pas toujours clairs et peuvent évoluer rapidement dans le temps, ou encore leur interprétation n'est pas forcément partagée par tous.

A priori, on pourrait penser en revanche que la qualification juridique d'un conflit armé international est chose entendue : deux ou plusieurs Etats recourent à la force armée pour régler leurs différends. Mais on réalise que beaucoup ont du mal à appréhender cette question, mélangeant droit et politique, ou encore mélangeant les notions de *jus ad bellum* et *jus in bello*. C'est ce que l'on a pu observer, par exemple, dans le cadre de l'opération Unified Protector en Libye. Dans ce contexte en effet, quelques jurisconsultes d'Etats participants à l'opération estimaient, sans pour autant l'exprimer formellement, qu'ils n'étaient pas partie à un conflit armé (international) en raison du fait qu'ils agissaient sur mandat du Conseil de sécurité. Juridiquement parlant, il s'agit d'une ineptie. Même si la raison d'une telle position était bien entendu politique, il est important de clarifier juridiquement les notions de *jus ad bellum* et de *jus in bello* et d'en maintenir la stricte distinction.

La question est d'autant plus compliquée qu'il n'y a pas d'autorité désignée pour qualifier les situations de conflit armé. Il serait faux de compter sur le CICR pour le faire. Oui, le CICR fait, pour chaque situation de violence armée, son analyse et y apporte sa qualification. Mais cette qualification n'est que rarement partagée publiquement, elle reste généralement confidentielle, et sert les besoins opérationnels du CICR uniquement. Elle permet de dialoguer avec les parties concernées sur la base d'un corps de règles identifié dans le but d'assurer aux victimes des conflits la protection et les garanties qui leur sont accordées par le droit international. Il revient en premier lieu aux Etats et à la Communauté internationale de faire l'exercice de qualification d'une situation donnée. Dans ce cadre, le Conseil de sécurité des Nations unies peut avoir son rôle à jouer, mais l'on connaît les limites structurelles de ce dernier. Post facto, une juridiction internationale pourra également utilement qualifier une situation, mais cette qualification n'arrivera que bien tard.

La problématique de savoir qui est protégé par le droit international humanitaire peut être également particulièrement délicate, alors même qu'elle est essentielle. Si la question de la détermination du statut d'une personne n'est pas nouvelle, elle a certainement pris de l'ampleur ces dix dernières années. Il y a eu des tentatives de faire sortir certaines personnes des catégories existantes, et partant, de leur refuser la protection juridique à laquelle elles ont droit. Certaines

notions ont vu le jour, comme celle de « combattant ennemi » qui peut paraître surprenante vu que l'on combat en général son ennemi et rarement son ami, ou encore la notion de « combattant illégal » (« *unlawful combatant* ») dont on n'est pas certain de ce qu'elle recouvre.

Une notion qui a également soulevé de nombreux débats est celle de la participation directe aux hostilités. Le droit international humanitaire prévoit que les civils seront des personnes protégées pour autant qu'ils ne prennent pas directement part aux hostilités, au risque de perdre alors, pour la durée de cette participation, leur protection. Le CICR a organisé de nombreuses réunions d'experts et a, sur cette base, publié un Guide interprétatif sur la notion de participation directe aux hostilités. Ce Guide a parfois suscité des réactions négatives et certaines pistes d'interprétation proposées sont contestées. Cette notion de participation directe d'un civil aux hostilités est présente dans nombre de conflits mais se révèle particulièrement importante dans un contexte comme celui de l'Afghanistan. Les troupes de l'International Security Assistance Force (ISAF) ou d'Enduring Freedom sont en effet quotidiennement confrontées à cette notion de participation directe aux hostilités et à la détermination de l'étendue de la protection à accorder à ceux qui, potentiellement, les affrontent. Si le Guide en question ne recueille pas une adhésion unanime, il a le grand mérite d'avoir mis au grand jour la nécessité de tenir le débat et, pour les Etats concernés, a souligné l'importance de se positionner sur cette notion aussi délicate que cruciale.

Nous aborderons également la question de savoir à partir de quand et jusque quand le droit international humanitaire est applicable. La plupart des conflits armés non internationaux, comme celui qui se déroule actuellement en Syrie, commencent par une période de tensions internes, de troubles, avant d'arriver au stade de conflit armé. Le cadre juridique applicable aux tensions internes, aux troubles et aux conflits armés n'est pas le même. Il sera cependant assez difficile de décider du moment où l'on glisse des troubles à un conflit armé non international. De même, il s'agira de pouvoir préciser le moment où le conflit armé s'estompe pour ne devenir qu'une situation de violence autre qu'un conflit armé, auquel le droit international humanitaire ne s'applique plus – sauf pour les suites directes du conflit armé –, comme c'est le cas aujourd'hui en Libye. Si la chose n'est pas aisée, l'exercice est pourtant très important pour que les forces de l'ordre, les forces de sécurité, ou encore les forces armées impliquées sachent à quelles règles elles doivent se conformer. Les discussions nous amèneront également à débattre du besoin éventuel de clarifier le début et la fin de l'application du droit international humanitaire.

Enfin, il nous faudra examiner le champ d'application géographique du droit international humanitaire. Quelle est donc son étendue territoriale ? Plusieurs situations concrètes peuvent se présenter. Si l'on reprend la situation qui prévalait en Syrie au printemps dernier, le fait que les combats se concentraient principalement dans deux zones du pays a amené certains médias à considérer que le conflit armé – et partant l'application du droit international humanitaire

– se limitait à ces deux zones. On se souviendra cependant que le Tribunal pénal international avait énoncé dans l'affaire Tadic que même dans les cas où les combats se limitent à certaines zones du pays, le droit international humanitaire s'applique sur l'entièreté du territoire aux personnes et aux biens entrant dans son champ d'application. Le problème dans ce cas-ci était très certainement sémantique et dû à une confusion entre les termes « combats » et « conflit armé ». Un autre cas de figure peut être celui qui s'est, par exemple, présenté lors de l'Opération Unified Protector l'année dernière en Libye. Un certain nombre d'Etats membres de l'Organisation du traité de l'Atlantique nord (OTAN), et d'autres Etats contributeurs, étaient parties à un conflit armé international. En toute logique, le droit international humanitaire s'appliquait, dès lors, également sur leur territoire. Qu'en était-il cependant des Etats membres de l'OTAN qui, sans participer aux hostilités, avaient approuvé l'opération au sein de l'OTAN ? Qu'en était-il des Etats membres qui avaient approuvé l'opération et qui apportaient un soutien logistique déterminant en mettant à disposition ports et aéroports, sans pour autant participer eux-mêmes aux opérations militaires ? Le droit international humanitaire s'appliquait-il également sur leur territoire aux personnes et biens entrant dans son champ d'application?

Enfin, une notion est née dans le cadre de la lutte contre le « terrorisme » qui est celle de « champ de bataille mondial », ou « *global battelfield* ». Un champ de bataille mondial est-il légalement concevable ? Que peut recouvrir cette notion? Il y a ici matière à polémique tant cette notion est entachée de zones d'ombre que nous nous efforcerons d'aborder demain matin.

On le comprend maintenant aisément : ce qui peut parfois paraître très simple est à vrai dire très compliqué. Il nous reviendra, pendant ces deux jours, d'aborder les aspects « compliqués » de ces notions a priori « simples », de partager des opinions, de confronter des points de vue, mais surtout, de ne pas se contenter de flou ou d'imprécision autour de ces notions essentielles qui constituent le champ d'application du droit international humanitaire.

Le CICR a ses idées, ses opinions, ses convictions basées sur sa longue pratique et l'expertise qu'il a pu développer. Nous sommes impatients de vous écouter et de les confronter à d'autres afin de pouvoir préciser ou clarifier ce qui mérite de l'être et de faire ainsi avancer le droit au bénéfice des victimes des conflits armés.

Je ne saurais terminer sans remercier les participants d'avoir été si nombreux à répondre favorablement à notre invitation à participer à ce 13ème Colloque de Bruges. Votre intérêt à prendre part à ces échanges, qui sont maintenant déjà devenus une tradition, nous conforte dans le choix du sujet de ce 13ème Colloque de Bruges.

Mesdames et Messieurs, je me réjouis d'avance des débats que nous allons avoir pendant ces deux jours qui s'annoncent très stimulants et je vous remercie de votre attention.

KEYNOTE ADDRESS

Ms. Christine Beerli
ICRC Vice-President

Ladies and Gentlemen,

It is a great pleasure to be here with you at the 13th session of the Bruges Colloquium and to have the privilege of making a few introductory remarks on the topic to be discussed over the next two days. As you will have seen, our chosen theme – The Scope of Application of International Humanitarian Law (IHL) – is broad and will allow us to look at some of the foundational concepts of IHL. Even though they are foundational, certain aspects of the law on these issues remain controversial or subject to different interpretations, and this is why I look forward, as usual in Bruges, to a lively and interesting debate.

While it remains universally accepted that international humanitarian law regulates, in material terms, situations of armed conflict, legal issues related to the notion and typology of armed conflicts have arisen over the past several years. In particular, questions have been asked about the adequacy of the current criteria for determining the existence of an international armed conflict (IAC) and about the adequacy of existing armed conflict classifications.

Under IHL, IACs are those waged between States, or between a State and a national liberation movement provided the requisite conditions have been fulfilled. Pursuant to common Article 2 of the 1949 Geneva Conventions, these treaties apply to all cases of declared war, or to 'any other armed conflict which may arise' between two or more State parties thereto even if the state of war is not recognised by one of them. As explained by Jean Pictet in his commentaries to the four Conventions: 'any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place'. In the decades since the adoption of the Conventions, duration or intensity have generally not been considered to be constitutive elements for the existence of an IAC.

This approach has recently been called into question by suggestions that hostilities must reach a certain level of intensity to qualify as an international armed conflict. Pursuant to this view, isolated or sporadic inter-State uses of armed force that have been described as 'border incursions', 'naval incidents', 'clashes' and other 'armed provocations' do not qualify as IACs because of the low intensity of violence involved, as a result of which States did not explicitly call them such in practice.

The International Committee of the Red Cross (ICRC) believes that the absence of a requirement of threshold of intensity for the triggering of an IAC should be maintained. This is because it helps to avoid potential legal and political controversies about whether the threshold has been reached based on the specific facts of a given situation. There are also compelling protection reasons not to link the existence of an IAC to a specific threshold of violence. To give but one example: under the third Geneva Convention, if members of the armed forces of a State in dispute with another are captured by the latter's armed forces, they are eligible for prisoner of war (POW) status regardless of whether there is full-fledged fighting between the two States. POW status and treatment are well-defined under IHL. It seems fairly evident that captured military personnel would not enjoy equivalent legal protection solely under the domestic law of the detaining State, even when supplemented by International Human Rights Law.

Queries have likewise been raised in recent and ongoing legal debates about whether the current IHL dichotomy – under which armed conflicts are classified either as international or non-international (NIAC) – is sufficient to deal with new factual scenarios, and whether new conflict classifications are needed.

It should be recalled that the key distinction between an international and a non-international armed conflict is the quality of the parties involved: while an IAC presupposes the use of armed force between two or more States, a NIAC involves hostilities between a State and an organised non-State armed group (the non-State party), or between such groups.

There does not, in the ICRC's view, appear to be, in practice, any current situation of armed violence between organised parties that would not be encompassed by one of the two existing classifications. What may be observed is that NIAC is by far the prevalent type of armed conflict today. It may also be noted that the typology of NIACs has significantly expanded over the past decade to currently comprise seven possible factual scenarios, the last two of which, admittedly, remain subject to controversy:

- first, there are "traditional" or "classic" NIACs in which government armed forces are fighting against one or more organised armed groups within the territory of a single State;
- second, an armed conflict that pits two or more organised armed groups between themselves may be considered a subset of "traditional" NIAC when it takes place within the territory of a single State;
- third, certain non-international armed conflicts originating within the territory of a single State between government armed forces and one or more organised armed groups have also been known to "spill over" into the territory of neighbouring States;

- fourth, the last decade, in particular, has seen the emergence of what may be called 'multinational NIACs'. These are armed conflicts in which multinational armed forces are fighting alongside the armed forces of a "host" State – in its territory – against one or more organised armed groups;
- fifth, a subset of multinational NIAC is one in which United United Nations (UN) forces, or forces under the aegis of a regional organisation, are sent to help stabilise a "host" government and become involved in hostilities against one or more organised armed groups in its territory;
- sixth, it may be argued that a non-international armed conflict ('cross border') exists – alongside an international armed conflict – when the forces of a State are engaged in hostilities with a non-State party operating from the territory of a neighbouring State without the latter's control or support;
- a final, seventh type of NIAC waged across multiple territories ('transnational') is believed by some – almost exclusively in the United States – to currently exist between 'Al Qaeda and associated forces', a view that the ICRC does not share.

The personal scope of IHL application in situations of international and non-international armed conflicts and, in particular, the related issue of the protection of so-called 'unlawful combatants' has also generated much attention over the past few years.

By way of reminder, IHL provides combatant – and prisoner of war – status to members of the armed forces only in international armed conflicts. The main feature of this status is that it gives combatants the right to directly participate in hostilities and grants them immunity from criminal prosecution for acts carried out in accordance with IHL, such as lawful attacks against military objectives. In case of capture, combatants become prisoners of war and, as such, cannot be tried or convicted for having participated in hostilities. The corollary is that captured combatants can be interned, without any form of process, until the end of active hostilities. Captured combatants may, however, be criminally prosecuted for war crimes or other criminal acts committed before or during internment.

IHL treaties contain no explicit reference to 'unlawful combatants'. This designation is shorthand for persons – civilians – who have directly participated in hostilities in an *international armed conflict* without being members of the armed forces as defined by IHL and who have fallen into enemy hands. Under the rules of IHL applicable to international armed conflicts, civilians enjoy immunity from attack 'unless and for such time as they take a direct part in hostilities'. It is undisputed that, in addition to the loss of immunity from attack during the time in which they participate directly in hostilities, civilians – as opposed to combatants – may also be criminally prosecuted under domestic law for the mere fact of having taken part

in hostilities. In other words, they do not enjoy the combatant's "privilege" of not being liable to prosecution for taking up arms, and they are thus sometimes correctly referred to as 'unprivileged belligerents' or incorrectly as 'unlawful combatants'.

Regarding the status and rights of civilians who have directly participated in hostilities in an *international armed conflict* and have fallen into enemy hands, there are essentially two schools of thought. According to the first, "unprivileged belligerents" are covered only by the rules contained in Article 3 common to the four Geneva Conventions and possibly in Article 75 of Additional Protocol I, applicable either as treaty law or as customary law. According to the other view, shared by the ICRC, civilians who have taken a direct part in hostilities and who fulfil the nationality criteria set out in Article 4 of the fourth Geneva Convention remain protected persons within the meaning of that Convention. Those who do not fulfil the nationality criteria are, as a minimum, protected by the provisions of Article 3 common to the Geneva Conventions and Article 75 of Additional Protocol I, applicable either as treaty law or as customary law.

Thus, there is no category of persons affected by or involved in *international armed conflict* who fall outside the scope of IHL protection. Likewise, there is no "gap" between the third and fourth Geneva Conventions, i.e. there is no intermediate status into which "unprivileged belligerents" fulfilling the nationality criteria could fall.

Combatant status, which entails the right to participate directly in hostilities, and prisoner of war status *do not exist in non-international armed conflicts*. Civilians who take a direct part in hostilities in such conflicts are subject, for as long as they continue to do so, to the same rules regarding loss of protection from direct attack that apply during international armed conflict. Upon capture, civilians detained in non-international armed conflicts for having directly participated in hostilities or for other reasons do not, as a matter of law, enjoy prisoner of war status and may be prosecuted by the detaining State under domestic law for any acts of violence committed during the conflict, including, of course, war crimes. Humanitarian Law, Human Rights Law and domestic law govern their rights and treatment during detention.

It must be emphasised that no one, regardless of his or her legal status, can be subjected to acts prohibited by IHL, including murder, violence to life and person, torture, cruel or inhumane treatment or outrages upon personal dignity, nor be denied the right to a fair trial and others. One of the purposes of IHL is to protect the life, health and dignity of all persons involved in or affected by armed conflict. It is inconceivable that calling someone an 'unlawful combatant' – or anything else – should serve to deprive him or her of the rights guaranteed to every individual under the law.

As regards the temporal scope of IHL, questions may be posed and have been posed in legal discourse regarding the beginning and end of its application. While that determination is easier to make in the case of an IAC, establishing when a NIAC has begun and when it has ended is undoubtedly more difficult. As is well known, at least two factual criteria must be met before it can be said that a NIAC has begun or a pre-existing situation of violence may be designated as such:

i) the parties involved must demonstrate a certain level of organisation, and

ii) the violence must reach a certain level of intensity.

i) Common Article 3 expressly refers to 'each party to the conflict' thereby implying that a precondition for its application is the existence of at least two 'parties'. While it is usually not difficult to establish whether a State party exists, determining whether a non-State armed group may be said to constitute a 'party' for the purposes of common Article 3 can be complicated, mainly because of lack of clarity as to the precise facts and, on occasion, because of the political unwillingness of governments to acknowledge that they are involved in a NIAC. Nevertheless, it is widely recognised that a non-State party to a NIAC means an armed group with a certain level of organisation. International jurisprudence has developed indicative factors on the basis of which the 'organisation' criterion may be assessed.

ii) The second criterion commonly used to determine the existence of a common Article 3 armed conflict is the intensity of the violence involved. This is also a factual criterion, the assessment of which depends on an examination of events on the ground, and indicative elements have also been developed in the jurisprudence.

It may be observed that while the criteria for the beginning of a NIAC have received a fair amount of attention in legal and academic literature, the same cannot be said for the end of this type of armed conflict. The International Criminal Tribunal for the former Yugoslavia (ICTY) has concluded that IHL applies until a 'peaceful settlement' has been reached and this criterion has been subsequently referred to by other bodies and relied on in writings. It must be admitted, however, that applying the ICTY standard to factual situations on the ground can prove challenging, given that many NIACs end without the requisite settlement. Thus, questions may be posed as to the indicators that may suggest the end of a NIAC, i.e. that a settlement in fact exists: is it the cessation of armed confrontations? The absence of a risk that they will resume? Or a combination of the two? Or is the end of a NIAC spelled out when one of the parties no longer shows a minimum of organisation? These and other questions seem to require more reflection than is currently taking place.

The geographic scope of IHL application will also be the subject of examination in the next two days. It may be said that the issue is again clearer in IAC than in NIAC as there is no

doubt that IHL applies to the whole territory of the parties in an inter-State armed conflict. While their updating and elaboration would be necessary, treaty-based and customary rules of the law of neutrality provide guidance on the rights and obligations of non-belligerent States and thus help determine the geographic reach of IAC. The situation is different in NIAC, for a variety of reasons for which only a small number of principles of the law of neutrality may possibly be applicable by analogy. Legal dilemmas are also generated by those who believe that there is a category of NIAC that is transnational in nature and is being waged between a State and one or more terrorist organisations. It is in this context that the phenomenon of the extraterritorial targeting of persons has arisen.

From a legal point of view, extraterritorial targeting requires an analysis of the lawfulness of the resort to force by one State in the territory of another (under the *ius ad bellum*) and an analysis of the international legal framework governing the way in which force is used (under the *ius in bello*, i.e. IHL, or under Human Rights Law, as the case may be). The latter determination will depend on whether the activities of the individual at issue take place within an ongoing armed conflict or have no link to an armed conflict.

In practice most questions have been raised about the lawfulness of the use of lethal force against persons whose activity is linked to an ongoing armed conflict, more specifically of individuals who are directly participating in an ongoing NIAC from the territory of a non-belligerent State. Different legal opinions on the lawfulness of the targeting of a person directly participating in hostilities from the territory of a non-belligerent State may be advanced.

Under one school of thought, a person directly participating in hostilities in relation to a specific ongoing NIAC "carries" that armed conflict to a non-belligerent State by virtue of continued direct participation (i.e. the nexus requirement) and remains targetable under IHL.

Pursuant to other views, which the ICRC shares, the notion that a person "carries" a NIAC with him to the territory of a non-belligerent State should not be accepted. It would have the effect of potentially expanding the application of rules on the conduct of hostilities to multiple States according to a person's movements around the world as long as they are directly participating in hostilities in relation to a specific NIAC. In addition to possible *ius ad bellum* issues that this scenario would raise there are others, such as the consequences that would be borne by civilians or civilian objects in the non-belligerent State. The proposition that harm or damage could lawfully be inflicted on them in operation of the IHL principle of proportionality because an individual sought by another State is in their midst (the result of a 'nexus' approach), would in effect mean recognition of the concept of a "global battlefield". It is thus believed that if the requisite *ius ad bellum* test is satisfied, the lawfulness of the use of force

against a particular individual in the territory of a non-belligerent State would be subject to assessment pursuant to the rules on law enforcement.

There have likewise been cases in which States have extraterritorially targeted individuals whose activity, based on publicly available facts, was outside any armed conflict, whether international or non-international. Leaving aside *ius ad bellum* issues, it is clear that the lawfulness of such a use of force cannot be examined under an IHL conduct of hostilities paradigm, but only under Human Rights Law standards on law enforcement.

Ladies and Gentlemen, allow me in conclusion to emphasise that I have not by any means attempted in these introductory remarks to cover all the ground that you will be examining, but to provide a brief outline of the ICRC's thinking on some of the questions that will be debated. I look forward with great interest to the next two days and thank you for your kind attention.

Session 1
Material Scope of Application of IHL

Chairperson: **Navy LCDR Elizabeth Josephson**,
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WHAT DOES IHL REGULATE AND IS THE CURRENT ARMED CONFLICT CLASSIFICATION ADEQUATE?

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Résumé

L'exposé qui va suivre analyse la pertinence et l'adéquation de la classification des conflits armés en droit international humanitaire (DIH).

Les conflits armés internationaux (CAI) sont traditionnellement considérés comme incluant tout usage de la force entre deux Etats. Ni la durée ni l'intensité n'ont en général été considérées comme des éléments constitutifs de l'existence d'un CAI. Cette approche a été remise en question, certains suggérant qu'il fallait que les hostilités atteignent un certain niveau d'intensité pour que l'emploi de la force entre des Etats puisse être considéré comme un CAI. La question qui se pose dès lors est celle de savoir si des incidents isolés ou sporadiques tels que des « incursions au-delà de la frontière » ou des « incidents navals », peuvent être considérés comme des conflits armés. Si tel n'est pas le cas, quel est le droit applicable à ces incidents ? Contrairement aux incidents internes auxquels le droit national et les droits de l'homme s'appliquent de manière peu controversée, un emploi isolé ou sporadique de la force ne se prête pas aussi facilement à l'application de ces législations. Il semble dès lors plus opportun de considérer de telles situations comme des conflits armés auxquels le DIH s'applique.

Le champ géographique des conflits armés non internationaux (CANI) est, quant à lui, devenu moins évident pour deux raisons. Premièrement, le manque de cohérence des tribunaux pénaux internationaux, qui utilisent des expressions différentes afin de déterminer la zone du conflit et le droit applicable, a semé la confusion. Deuxièmement, il a été admis que dans certaines circonstances les CANI puissent s'étendre au-delà du territoire d'un Etat. Le développement continu des droits de l'homme a également suscité plusieurs difficultés. Faut-il toujours plaider pour une large applicabilité du DIH en tant que meilleure source de protection ? Enfin, se pose

également un problème lié au crime organisé. Dans le passé, les Etats ont cherché à exclure les bandes criminelles du cadre du DIH et refusaient de leur attribuer un statut reconnu. D'une part, la motivation d'un groupe armé n'est pas un critère dans la détermination d'un CANI, ce dernier étant basé sur le niveau d'organisation et le seuil d'intensité. En outre, qui déciderait de la motivation criminelle ? D'autre part, peut-on avancer que des situations telles que la violence liée à la drogue au Mexique sont des conflits armés devant être régulés par le DIH ?

L'application du DIH à l'occupation belligérante a également soulevé des questions ces dernières années. Quand une occupation commence-t-elle si l'envahisseur décide de ne pas exercer de contrôle ? La fin de l'occupation pose également des questions on ne peut plus épineuses. Gaza en est l'exemple le plus débattu.

Une autre évolution qu'il convient de mentionner est liée à l'impact des nouvelles technologies. Si les attaques de drones – telles que celles en Afghanistan – menées dans le cadre d'un conflit armé reconnu ne représentent pas un enjeu particulier en ce qui concerne la classification et l'applicabilité du DIH, d'autres opérations ont lieu dans des circonstances dans lesquelles l'application du DIH est plus controversée. Ceci peut être dû à la localisation de l'attaque ; la réponse dépendra de la cible de l'attaque et de la question de savoir si cette cible peut être considérée comme faisant partie d'un conflit en cours avec l'Etat à l'origine de l'attaque. Si de ce qui précède il s'ensuit qu'il peut y avoir des attaques de drones auxquelles le DIH ne s'applique pas, il convient de déterminer quelles règles s'appliqueront à la manière dont la force est utilisée.

En ce qui concerne les cyber-opérations, deux questions se posent : 1) existe-t-il un conflit armé et dès lors le DIH est-il applicable ? 2) si tel est le cas, les règles de DIH sont-elles adéquates pour réglementer ces opérations ? Bien que pouvant, en théorie, être qualifiées de conflit armé si elles ont des effets graves d'une certaine nature, des cyber-opérations, dans leur forme la plus répandue, sont peu susceptibles d'atteindre le seuil d'intensité d'un conflit armé. Le DIH s'applique plus adéquatement dans le cadre d'un conflit armé où des cyber-opérations accompagnent des opérations cinétiques. Dans ce cas, il s'agit bien d'un conflit armé et les actions entreprises dans le cadre des hostilités – en ce compris les cyber-opérations – relèvent du DIH.

Introduction

This presentation aims to guide us through the dark jungle areas in which International Humanitarian Law (IHL) sometimes struggles to impose control, and look at some of the reasons why IHL's applicability and suitability are called into question.

What does IHL regulate? That is easy enough to answer – it regulates armed conflict. But if the answer was that simple, we could end the discussion right here. In fact we face numerous challenges in determining the existence of an armed conflict: when and where is the conflict, who is taking part in it, and are there types of armed conflict or actions in armed conflicts that fall outside IHL's scope? Indeed, perhaps we can look back with nostalgia to the days when the answer seemed clearer: and this was that IHL regulates international armed conflict (IAC) and non-international armed conflict (NIAC). Belligerent occupation, as a sub-category of IAC, was sometimes referred to as a third category. Let us begin therefore with these categories, and see whether they are in fact as clear as expected.

International Armed Conflict

This should be the clearest of all situations: traditionally understood to include any armed conflict between two States, regardless of declarations of war. However, there arises a question about the scale of violence. A literal reading would mean that any use of force between two States is an IAC. But does this include minor incidents? There have been cases of limited use of force between fishing vessels of various States, sometimes involving navies and coastguards, or low-scale incidents occurring between soldiers across a border. Are these armed conflicts, and does IHL apply to such situations?

The fact that States do not treat it as armed conflict might be seen as irrelevant, since the Geneva Conventions specify that they apply regardless of formal declarations of war: '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 recognised by one of them'.

Notwithstanding, perhaps it could be argued that this is meant for situations when one State attacks another without declaring war – note that the Conventions speak of a situation where one party denies the state of war (and the commentary does the same). The situation is very different when both States involved clearly have no intention of treating it as war or progressing to any further escalation. Without an *animus belligerendi* on either side, it might be argued to not be an armed conflict.

However, the remaining problem would then be that if minor incidents are not armed conflicts, then what is the applicable law? Unlike internal situations, which clearly allow for domestic law and International Human Rights Law with little controversy, a minor use of force between States, such as a brief border incident or a single clash on the high seas, does not lend itself with as much ease to these other bodies of law. Consider a brief shoot-out between two units of soldiers across a border, in a situation that both States say is not an armed conflict, but a mistake which will be dealt with quickly – if this is not an armed conflict, then do we use Human Rights Law? Domestic law? Of which State? The repercussions for the lawfulness of each shot by each soldier can be enormous.

We are therefore in a catch-22 situation where we might prefer not to consider these incidents as armed conflicts, but still believe that IHL is the only appropriate body of law to regulate the exchange of fire between opposing soldiers. One of the two desires will have to give way to the other. It may in this regard be better to accept such situations as legally being armed conflicts to which IHL applies, while recognising that the States might prefer not to speak of it as such publicly, and will choose to end the conflict almost as soon as it starts.

Non-international armed conflict

Here too there is – or at least there used to be – an assumption that we have a clear definition. Indeed, the classification of non-international armed conflicts was in the past primarily reserved for high intensity internal violence between States and armed groups, and even if there was disagreement, the positions were fairly predictable: States would deny the existence of armed conflict, and the International Committee of the Red Cross (ICRC) and others would demand the protections of IHL be applied. While this pattern still occurs nowadays, we also see examples of the opposite, where States take the position that a certain situation (e.g. the 'war on terror') is a non-international armed conflict, while others deny such a classification and claim the inapplicability of IHL (usually in order to assert primacy of Human Rights Law).

In addition, the geographical scope of non-international armed conflicts has become less clear for two reasons. First, international criminal tribunals have entered the world of classification, and through a series of cases each using different expressions in determining the area of the conflict and applicable law, have unfortunately muddied the waters with a number of inconsistent approaches. Second, it has become accepted that in certain circumstances non-international armed conflicts can extend beyond the internal territory of a State. While there have been proposals for new theories and interesting names suggested for new categories of conflict, there is in fact no need for these, as long as one focuses on the nature of the parties as the prime determinant for classification as either international or non-international armed conflict. Of course, once borders are crossed there may, depending on the facts of the

case, also develop two conflicts alongside each other, one international and the other non-international.

A further issue, which is especially pertinent to non-international armed conflict, but also applies to international, is the continued advancement of International Human Rights Law. The past desire to apply IHL as widely as possible was fuelled by a real concern to ensure regulation and protection. However, Human Rights Law has evolved since 1949, and even since 1977. Do we still need to advocate for wide applicability of IHL as the best source of protection, even when it might be possible to argue that this is not an armed conflict at all? The need to find ways for ensuring protection from the actions of armed groups will remain a concern, but there is work in progress through other legal frameworks on this front, too.

Organised crime presents another problem. The historical development of the concept of war was not intended to cover circumstances of criminal activity usually addressed by domestic law. Moreover, States have in the past sought to exclude criminal gangs from the ambit of IHL, so as not to accord them any recognised status. On the one hand, the motivation of an armed group is not a criterion in the determination of NIAC, which is based on a level of organisation and a threshold of intensity. Moreover, who would decide on the criminal motivation, and how can financial motivations be separated from political? On the other hand, are we soon going to argue that situations such as the drug-related violence in Mexico are an armed conflict to be regulated by IHL? There are a number of good reasons to resist such a notion, both through a closer examination of the intensity and organisation criteria, but possibly also if we decide to reconsider the earlier assumption of irrelevance of motive. Although there are obvious challenges and good reasons not to rely on motivation, there may be equally good reasons not to discard it altogether.

Military occupation

The applicability of IHL to belligerent occupation has also presented us in recent years with some interesting challenges, temporally and geographically. For example, when does an occupation start if the invader chooses not to exert control, and how does one determine whether the potential for control was there or not? The early stages of the US invasion of Iraq and the scenes of looting are a case in point. The end of occupation produces equally and perhaps more vexing questions, Gaza giving us the most hotly debated example for discussion. Do the IHL rules on occupation regulate the interaction between Israel and the Gazan population? Most of the discussion around this seems to have been based on starting points of political objectives and wishful thinking, rather than a full examination of the law, and one of two positions is usually advocated: 1) occupation law does not apply and nothing else does either; or 2) everything applies in full. In fact, neither position is entirely correct. The situation in

Gaza is a very awkward fit for the definition of a military occupation, and for those that argue that it is an occupation, there is usually no answer when presented with the legal consequence that this would mean Israel may have an obligation to send troops back inside in order to fulfil obligations on maintaining law and order. It is, however, clear that Israel maintains certain elements of control over the lives of the Gazan population, and with this control there must be certain responsibilities. One answer may be to develop a sliding scale of IHL obligations that are linked to the level of control – but the law as it stands does not appear to specify such an approach. An alternative is to determine that IHL occupation law does not regulate this situation, but to find applicable law through International Human Rights Law and other sources of legal obligations.

All the above challenges to classification and regulation are difficult to deal with, but would appear manageable insofar as they require us on occasion to address new situations, although the fundamental character of conflict remains unaltered. However, other developments, especially in the technological field, are said to raise new questions that may require us to go further in our solutions.

Drones

Crucially, it must be pointed out that, in fact, many of the issues surrounding drones would be just as pertinent if the same operations were carried out by manned aircraft.

Drone attacks occurring within a recognised armed conflict such as those in Afghanistan do not present a particularly serious challenge with regard to classification and the applicability of IHL (although we are left with questions such as: what is the status of the targeted individuals, are the attacks abiding by the principle of distinction and the prohibition on indiscriminate attacks?). Other operations occur in circumstances in which IHL applicability is debatable. This may be due to the location of the strike; the answer to this will depend very much on the target of the strike and whether it (or the individual) can be considered part of an ongoing conflict with the striking State, even outside the centre of the battlefield. The existence of an armed conflict between the State and the targeted group may also be questionable. Without a pre-existing armed conflict the applicability of IHL may have to rest on the highly problematic assertion that the drone attack is itself a new armed conflict (problematic because a one-sided attack of this kind with no response is not what we usually consider to be an armed conflict).

If the result of some of the above is that there may be drone strikes to which IHL does not apply, then we will need to know what body of rules regulates the way in which force is used. This is, of course, separate from *ius ad bellum* and sovereignty questions – these too are vital

concerns, but the *ius ad bellum* does not contain rules to regulate the way in which force is used during an operation on matters such as determining lawful targets. Without IHL we will then find ourselves back in the controversial area of extraterritorial applicability of International Human Rights Law.

Cyber operations

Two questions concern us here: 1) is this an armed conflict and therefore is IHL applicable? 2) if so, are the IHL rules adequate for regulating these operations?

Cyber operations alone could in theory be classified as armed conflict if they have severe effects of a certain nature, but, at least in their more prevalent form, are unlikely to reach the threshold of armed conflict without other kinetic operations occurring alongside.

Nonetheless, so much of the discussion over cyber operations is framed within the armed conflict discourse – both for *ius ad bellum* and *ius in bello*. A combination of factors has led to this, most notably the way in which States have placed the responsibility for cyber defence (and attack) in the hands of the defence and military establishments. Commentators are largely following this course, and we are left with an assumption that cyber operations belong purely in the military domain, *ergo* they belong in the IHL framework. Yet, cyber operations alone are often much closer to espionage and perhaps to intervention that does not cross *ad bellum* thresholds of armed attack, or meet *in bello* definitions of armed conflict. As such, we should be looking to other bodies of law – including telecommunications law, criminal law, and others.

Where IHL is more likely to become relevant is during regular armed conflict with kinetic operations, and cyber operations alongside. In this case it is an armed conflict, and actions taken as part of the hostilities – including cyber operations – should be covered by IHL. We are then faced with an armed conflict classification, but have questions over the adequacy of IHL for regulating cyber operations.

An interesting debate that has arisen is over the determination of which cyber operations should constitute 'attacks', and of the implications for the principle of distinction. The Tallinn manual takes the approach that an attack must result in physical damage, or at least in loss of functionality that necessitates replacing physical components of the system. Cyber operations that do not have these effects – an example here is of operations that cause destruction of data without physical damage – might not be attacks, and would not be subject to the principle of distinction. This risks being an outdated approach to the concept of damage as intended by the drafters of IHL. Destruction of data can cause significant harm, and law out-

side IHL has evolved to recognise this. By not recognising modern reality when interpreting IHL, we risk being left with obsolete and inadequate rules. The key point here is not that the law is inadequate, but rather that in order to keep existing law relevant, we need to adopt interpretations that reflect modern developments.

To conclude

The shape of armed conflict has been undergoing many changes: cyber operations, drone attacks, extraterritorial conflicts with armed groups, as well as recognised problems such as fuzzy temporal and geographical boundaries of international/non-international armed conflicts, and military occupations. All these also include changes in the nature of the actors involved, as well as the means and methods.

Most of these situations can fit within current classifications, and IHL is capable of regulating most of these developments, but in order to do so we must be aware of two key points:

1) While the law may remain static, our interpretations will have to evolve to reflect modern developments and keep it relevant.
2) As much as we want to beware not to under-regulate by failing to apply IHL, there is an equal danger posed by the desire to over-regulate and use IHL where it has no place.

As vital as IHL is to the regulation of armed conflict, it is not alone. We have to remember that the answer may sometimes lie in the *ius ad bellum*, in Human Rights Law, or in completely different areas of law.

It should be clear that IHL continues to apply to most situations we consider as armed conflict, but we must keep the interpretations updated, and remember to sometimes take a step back and question the wisdom of trying to apply IHL in the first place.

NON-INTERNATIONAL ARMED CONFLICTS: THE APPLICABLE LAW

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Résumé

Evolution historique de la réglementation

Historiquement, le droit international se focalisait sur la réglementation des conflits armés internationaux (CAI), s'intéressant peu aux conflits armés non internationaux (CANI). En effet, lorsque l'on analyse certains des instruments-clés de la période post-1949, on constate que ceux-ci réglementaient principalement les conflits armés internationaux. De même, au niveau du droit international coutumier, relativement peu de règles régissaient les CANI. Le droit matériel a cependant changé considérablement au milieu des années 1990, principalement grâce au travail du Tribunal pénal international pour l'ex-Yougoslavie (TPIY). Celui-ci a identifié de nouvelles règles et a donné de la substance aux règles existantes. Ces développements ont découlé essentiellement de l'établissement d'une analogie entre le droit applicable aux CANI et celui applicable aux CAI. Ainsi, dans l'affaire Tadic, le TPIY a posé le principe selon lequel ce qui est prohibé dans un CAI ne peut qu'être prohibé dans un CANI. Plus récemment, l'étude du Comité International de la Croix-Rouge (CICR) sur les règles coutumières du droit international humanitaire (DIH) a conclu que, de toutes les règles coutumières du DIH s'appliquant aux CAI, seules quelques-unes ne s'appliquent pas au CANI. Enfin, les droits de l'homme ont également joué un rôle important et influencé le droit des CANI. A ce jour il existe donc un corps important de droit international qui régit les CANI et qui est, à de nombreux égards, similaire au droit des CAI.

Difficultés liées aux développements récents.

Ces développements ont toutefois soulevé de nouvelles questions. Une première difficulté est liée au lien étroit qui existe entre le champ d'application du droit et les règles matérielles qu'il contient. Ainsi, à titre d'exemple, un CANI est défini par référence à l'intensité de la violence et l'organisation du groupe armé non étatique. Le critère d'organisation du groupe se mesure notamment par la capacité de ce dernier à appliquer et faire respecter le DIH. Dès lors, plus le DIH est élaboré, plus le degré requis d'organisation du groupe armé pour que celui-ci puisse appliquer et faire respecter le droit devra être élevé. Cela résulte en un seuil plus élévé des CANI. Une deuxième difficulté est liée au fait que le DIH opère selon le principe d'égalité des obligations : toutes les parties au conflit ont les mêmes droits et les mêmes obligations. Les droits de l'homme n'opèrent pas selon un tel principe. Des difficultés peuvent dès lors surgir lorsque les droits de l'homme visent à réguler des CANI. Enfin, bien que le droit des conflits armés internationaux et les droits de l'homme aient contribué au développement du droit des conflits

armés non internationaux, à certains égards le danger existe qu'ils puissent également réduire la protection garantie par ce dernier corps de droit. La loi portant sur la protection des ouvrages et installations contenant des forces dangereuses en est un bon exemple. Dans les CANI, le deuxième Protocole additionnel prévoit une liste d'installations contenant des forces dangereuses ne pouvant faire l'objet d'attaques lorsque de telles attaques peuvent provoquer la libération de ces forces et, en conséquence, causer des pertes sévères dans la population civile. Cette interdiction s'applique même si les installations constituent des objectifs militaires. La règle équivalente contenue dans le premier Protocole additionnel prévoit, quant à elle, également une interdiction d'attaquer certaines installations mais la protection peut cesser si ces bâtiments « sont utilisés à des fins autres que leur fonction normale et pour l'appui régulier, important et direct d'opérations militaires, et si de telles attaques sont le seul moyen pratique de faire cesser cet appui ». Le DIH conventionnel garantit donc une plus grande protection aux biens dans les CANI que dans les CAI. Cependant, l'étude sur les règles coutumières du droit international humanitaire conclut qu'en droit coutumier, ce sont les règles conventionnelles des CAI qui s'appliquent tant aux conflits armés internes qu'aux conflits armés internationaux.

Lacunes subsistantes

Plusieurs lacunes subsistent encore dans le droit des conflits armés non internationaux. Premièrement, alors que dans les CAI, le droit relatif à l'occupation belligérante régit la situation d'un Etat occupant le territoire d'un autre Etat, aucune règle du DIH ne régit la situation d'un territoire sous contrôle d'un groupe armé non étatique. Pourtant, ce dernier cas de figure est fréquent. Prenons par exemple les « Fuerzas Armadas Revolucionarias de Colombia » (FARC) en Colombie ou encore le « Sudan People's Liberation Movement/Army » (SPLM/A) au Soudan. Deuxièmement, dans les CAI, les combattants ne peuvent être poursuivis en raison de leur participation au conflit, à moins qu'ils n'aient violé le droit. Dans les CANI, une telle immunité n'existe pas. Du point de vue de l'Etat cette absence d'immunité se comprend dès lors que l'immunité pourrait encourager la rébellion. Mais le groupe armé n'a par contre aucune incitation à respecter le DIH dès lors que les combattants peuvent être de toute façon poursuivis, soit pour trahison s'ils respectent le DIH, soit pour crime de guerre s'ils ne le respectent pas.

The present contribution concerns the topic of 'non-international armed conflicts: the applicable law'. It will be evident that the entirety of the applicable law on non-international armed conflict cannot be considered in this short presentation; accordingly, my focus will be on how international law has approached the regulation of non-international armed conflicts. In doing so, I will cover some of the key areas of the substantive law and link this to the scope of application, which is the theme of this year's Colloquium.

I. Historical evolution

1. 1949 – mid-1990s

Historically, international law focused on the regulation of international armed conflicts, and neglected non-international armed conflicts. This was due to the idea that intra-State violence was a matter for the State concerned. Accordingly, when we consider some of the key instruments of the post-1949 period, we see that they primarily regulated international armed conflicts.

Only one article of the 1949 Geneva Conventions regulates non-international armed conflicts.[1] The 1954 Hague Convention on Cultural Property contains limited provisions on non-international armed conflicts.[2] If we compare Additional Protocol II with Additional Protocol I, we see that Additional Protocol II is far more limited. Comparing numbers of provisions is not necessarily a fair method, of course, but helps us comprehend the situation regarding non-international armed conflicts in the period up until the mid-1990s.

The content of these rules is also of interest. Whereas international armed conflicts benefited from detailed rules both in the area of humane treatment and the conduct of hostilities, albeit with the occasional exception, non-international armed conflicts benefited from detailed rules only in the area of humane treatment.

Likewise, in customary international law, relatively few rules regulated non-international armed conflicts: the customary equivalent of common Article 3 and the odd rule of Additional Protocol II but nothing outside these. Accordingly, relatively few rules governed non-international armed conflicts.

2. Mid-1990s – to the present

That is where things stood for about 45 years. However, the substantive law changed quite considerably in the mid-1990s, primarily through the work of the International Criminal Tribunal for the former Yugoslavia (ICTY). How did this come about? The ICTY had to apply international criminal law, one part of which is the law on war crimes. The law on war crimes is basically made up of the secondary rules, which provide for the criminal aspects of parts of the primary rules, namely International Humanitarian Law. Thus, in order to apply war crimes law, the ICTY also had to give substance to International Humanitarian Law. This was done at the level of customary international law.

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1 Common Article 3.

2 Article 19.

The ICTY identified new rules that it considered to exist in custom, e.g. rules on the means and methods of warfare. It also put some flesh on existing rules. For example, Article 13(2) of Additional Protocol II provides, in a rather minimalist fashion that, '[t]he civilian population as such, as well as individual civilians, shall not be the object of attack'. This was interpreted by the ICTY as including a prohibition on indiscriminate attacks, a prohibition on disproportionate attacks, a requirement of precautions, prohibition on attacks against civilian objects, and so on.[3]

What is particularly interesting is the methodology by which these developments took place. It was largely done through creating an analogy between the law on non-international armed conflict and the law on international armed conflict. In the first (and still most important) case – *Tadić* – the ICTY set out the guiding principle, namely, that which is prohibited in international armed conflict cannot but be prohibited in non-international armed conflict.[4] What this essentially meant was that the ICTY could draw on the law of international armed conflict to govern situations of non-international armed conflict. This transformed the law on non-international armed conflict considerably.

More recently, the Customary International Humanitarian Law study of the International Committee of the Red Cross (ICRC) concluded that States tend not to make a distinction between international armed conflicts and non-international armed conflicts in large parts of the applicable law. The study concluded that, of all the rules of customary International Humanitarian Law that apply to international armed conflicts, only a handful do not apply to non-international armed conflicts.[5] Therefore, with the odd exception, the customary rules of non-international armed conflict and international armed conflict are more or less the same. Indeed, in some of the post-*Tadić* jurisprudence of the ICTY, the Tribunal does not even consider the nature of the armed conflict. As long as the situation amounts to an armed conflict, the ICTY goes on to consider the substantive law.[6]

During this period there were also developments in the treaty law. Treaties concluded in the mid-1990s were drafted to encompass both non-international and international armed conflicts. This was done as a matter of course. Such treaties include the Chemical Weapons Con-

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3 See e.g. *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, Decision on Motions for Acquittal Pursuant to Rule 98*bis* of the Rules of Procedure and Evidence, 27 September 2004, paragraphs 29-30; *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, Judgment, 15 March 2006, paragraph 45.

4 *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 119.

5 See J-M. Henckaerts & L. Doswald Beck, *Customary International Humanitarian Law* (CUP, Cambridge, 2005).

6 See e.g. *Prosecutor v. Halilović*, IT-01-48-T, Judgment, 16 November 2005, paragraph 25.

vention, the Landmines Convention, the Cluster Munitions Convention and the Rome Statute of the International Criminal Court. Older treaties have also been amended to include non-international armed conflicts within their scope – this is true of the Convention on Certain Conventional Weapons.
International Human Rights Law has also had a role to play. There is, of course, much discussion on the role of Human Rights Law in times of armed conflict and its relationship with International Humanitarian Law. It is clear, though, that Human Rights Law has influenced the law on non-international armed conflict. For example, when we look for the definition of torture, we look up the definition in the Convention Against Torture with its amendments. When we look at the fair trial guarantees required by International Humanitarian Law, these have been considered implicitly to refer to the norms of Human Rights Law with their reference to 'judicial guarantees which are recognized as indispensable by civilized peoples.'[7]

So today, there does exist a developed body of international law that governs non-international armed conflicts. In many respects, it is similar to the law on international armed conflict.

II. Difficulties with recent developments

Let me turn, now, to some of the difficulties to which these developments have given rise and, given the topic of the colloquium, I will link my remarks to the scope of application issues.

The first difficulty relates to the link between the scope of application and the substantive rules. There is a close relationship between when the law applies and what rules are contained in that law. Thus, the more you increase the substantive content of the law on non-international armed conflict, the greater the likelihood that the rules of application will change when a non-international armed conflict actually takes place. What do I mean by this? Well, a non-international armed conflict is defined by reference to the intensity of the violence and the organisation of the armed group.[8] An aspect of organisation is the ability of the group to apply and enforce International Humanitarian Law. As such, the more substance International Humanitarian Law gets, the greater the degree of organisation will be required of the non-State armed group in order for it to be able to apply and enforce the law. This, in turn, means the raising of the threshold governing a non-international armed conflict. This is not inherently a bad thing; however, we need to be aware that this is a consequence of the increased content of the law.

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7 This is the language used in common Article 3.

8 *Prosecutor v. Tadić*, IT-94-1-T, Opinion and Judgment, 7 May 1997, paragraph 562.

The alternative is that a tipping point will be reached, at which time the parties will not be able to comply with the substantive content of the law. That does not serve a useful purpose. A useful exercise would thus be to assess the extent to which all armed groups are able to comply with all aspects of the law, assuming that they are willing to do so.

As has already been noted, the development of the content of the law on non-international armed conflict largely came from the ICTY and stemmed from the *Tadić* decision, which stated that: that which is prohibited in international armed conflict cannot but be prohibited in non-international armed conflict. This sounds appealing – and the approach was utilised to transform the law on non-international armed conflict. However, a later passage, also from *Tadić*, tends to be overlooked. That passage says that it is only the 'essence' of the rules and not their detail that is transferred from one body of law to the other.[9] This is crucial in order to avoid the danger mentioned above.

However, the difficulty should not be overstated. Some non-State armed groups do have considerable capacities, setting up courts and the like. Some groups have naval and air units. Some have human rights divisions and political divisions. Non-State armed groups are not monolithic entities.

A second set of concerns relates to the personal scope of application, in particular the principle of equality of obligation of belligerents. International Humanitarian Law operates on the principle of equality of obligation of belligerents, i.e. all parties to a conflict have the same rights and obligations. International Human Rights Law, however, does not operate on the basis of such a principle given that, generally speaking, States are the holders of the obligation and individuals the beneficiary of the rights. This causes certain difficulties when Human Rights Law purports to regulate non-international armed conflicts.

In the area of child soldiers, the Optional Protocol to the Convention on the Rights of the Child treats States differently from armed groups. State parties are not to recruit compulsorily persons under the age of 18, nor can they use such persons to take a direct part in hostilities. Armed groups, on the other hand, are not to recruit or use in hostilities persons under the age of 18. With respect to armed groups, then, there is an absolute prohibition on the use of children in hostilities (as distinct from *use (…) to take a direct part in hostilities*) and on recruitment (as opposed to *compulsory recruitment*). This difference in treatment has been criticised by a number of armed groups.

9 *Tadić* Decision on Interlocutory Appeal on Jurisdiction, paragraph 119.

A third set of concerns relates to the conflation between bodies of law. Occasionally, the law on non-international armed conflict requires more rigorous standards than the law on international armed conflict. Accordingly, by comparison to the law on international armed conflict, these more rigorous standards have been reduced. A case in point is the law relating to the protection of works and installations containing dangerous forces. In non-international armed conflicts, Additional Protocol II prohibits the targeting of certain listed objects containing dangerous forces if it would lead to the release of dangerous forces that would cause severe losses among the civilian population. This is the case even if the objects in question are military objectives.[10] The equivalent rule in Additional Protocol I is rather different. It also provides for a prohibition on the targeting of certain listed objects, but goes on to note that the protection shall cease if the object 'is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support'.[11] Conventional International Humanitarian Law thus affords greater protection to objects in situations of non-international armed conflict than it does in international armed conflict. Yet, the Customary International Humanitarian Law study shows that it is the content of the conventional rule of international armed conflict that applies as a customary norm in both international and non-international armed conflicts.[12] This despite the fact that the prohibition in Additional Protocol II is absolute and does not contain a provision on the cessation of protection. Furthermore, the military manuals of a number of States also contain an absolute prohibition on the targeting of the listed objects in non-international armed conflicts, while accepting that protection may cease in international armed conflicts.[13]

Much the same thing can be seen with the conflation between International Humanitarian Law and international criminal law. Take the example of deportation and forcible transfer. Whereas International Humanitarian Law, through Additional Protocol II, contains an absolute prohibition on deportation outside State borders, and prohibits forcible transfer within borders subject to certain exceptions, international criminal law in the Rome Statute makes those exceptions also applicable to deportation.14 Here, too, there is the potential for the standards of International Humanitarian Law in non-international armed conflict to be weakened should they be interpreted along the lines of the criminal standard.

Accordingly, while the law on international armed conflict, the International Human Rights

10 Article 15.

11 Article 56(2).

12 *Customary International Humanitarian Law, Volume I*, Rule 42.

13 *Customary International Humanitarian Law, Volume II*, 814-40.

14 Compare Additional Protocol II, Article 17 with the Rome Statute, Article 8(2)(e)(viii).

Law and the international criminal law have helped develop the law on non-international armed conflict, in certain respects there is a danger that they may also reduce the protection afforded by this latter body of law.

III. Remaining gaps

Let me end by pointing to some gaps in the law on non-international armed conflict. The consequence of the approach by analogy to the law of international armed conflict has been that where there is no analogy to be drawn, the situation has been left unregulated. A case in point is territory under the control of a non-State armed group. In international armed conflicts, the law of belligerent occupation regulates the situation where one State occupies the territory of another State. The orthodox view is that this does not apply to non-international armed conflicts as the relationships between the parties are different. In the law on belligerent occupation, there is a tripartite relationship between the occupier, the occupied and the displaced Sovereign. The same relationship does not exist in a non-international armed conflict. But no rules of International Humanitarian Law have been developed to fill the gap. Yet, non-State armed groups often control territory, e.g. the Fuerzas Armadas Revolucionarias de Colombia (FARC) in Colombia, the Sudan People's Liberation Movement/Army (SPLM/A) in Sudan and the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka. The lack of provision for this situation in International Humanitarian Law is problematic, in particular where destruction and confiscation of property is concerned, as well as with respect to issues of law and order.

Perhaps the most problematic gap in the law of non-international armed conflict is the lack of something akin to combatant immunity. In international armed conflicts, combatants cannot be prosecuted solely for participating in the conflict, unless they violate the law. In non-international armed conflicts, no such combatant immunity exists. We can understand why this is the case – from the perspective of the State, granting combatant immunity may encourage rebellion. From the perspective of the armed group, however, things appear rather different. The incentive of non-prosecution is no longer present and the members of the armed group may be prosecuted either way – if they respect International Humanitarian Law, they may be prosecuted for treason; if they do not respect International Humanitarian Law, they may be prosecuted for war crimes. As such, few incentives exist in respect of members of the armed group to encourage them to abide by International Humanitarian Law. Lack of combatant immunity – or of a concept akin to combatant immunity – is one of the most difficult issues in need of resolution today.

WHEN DOES VIOLENCE CROSS THE ARMED CONFLICT TRESHOLD: CURRENT DILEMMAS

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Résumé

L'existence de facto d'un conflit armé suppose-t-elle toujours un recours à la violence ? Si tel est le cas, de quel niveau et de quel type de violence parle-t-on et quels sont les critères permettant d'établir que le niveau requis de violence a été atteint ?

En ce qui concerne les conflits armés non internationaux (CANI), aussi bien les traités que la jurisprudence ont tenté de définir le seuil de violence. L'article 1(2) du deuxième Protocole additionnel (PAII) aux Conventions de Genève dispose que le Protocole ne s'applique pas « aux situations de tensions internes, de troubles intérieurs, comme les émeutes, les actes isolés et sporadiques de violence et autres actes analogues, qui ne sont pas considérés comme des conflits armés ». La clé se trouve dans cette dernière phrase, dès lors qu'elle prévoit un seuil d'intensité pour tous les CANI, y compris ceux de l'article 3 commun aux Conventions de Genève et ceux du PAII. La pratique, notamment celle du Tribunal pénal international pour l'ex-Yougoslavie (TPIY), montre que ce seuil est atteint chaque fois que la situation peut être qualifiée de « violence armée prolongée ». Cette condition doit être évaluée à l'aune de deux critères fondamentaux : l'intensité de la violence et le degré d'organisation des parties. Il ressort de la jurisprudence que l'évaluation du critère d'intensité doit se faire en mettant en balance une multitude de données indicatives telles que le déplacement de populations civiles, la nature des armes utilisées ou encore la durée du conflit. Il ne s'agit toutefois pas d'une formule automatique mais de facteurs d'appréciation, qui permettent de dire au cas par cas si le seuil d'intensité est atteint.

Une question qui se pose est de savoir si le crime organisé et les actions engagées pour le combattre peuvent être qualifiés de conflit armé au sens du droit international humanitaire (DIH). Selon certains, les organisations purement criminelles ne bénéficient pas du niveau d'organisation requis. Certains observateurs ajoutent que la motivation de ces groupes doit être prise en compte. Selon eux, seuls des groupes armés organisés ayant des objectifs politiques pourraient être légitimement parties à un CANI. Les organisations visant à protéger et étendre leurs gains matériels plutôt qu'à renverser un gouvernement ne pourraient dès lors en aucun cas être considérées comme des parties à un CANI. Cette position n'est cependant pas celle qui prévaut aujourd'hui en droit international.

En ce qui concerne les conflits armés internationaux (CAI), ni les traités ni la jurisprudence ne fournissent de définition quant au seuil de violence requis. Dans l'affaire Tadic, le TPIY a simplement énoncé qu'il y a conflit armé international « chaque fois qu'il y a recours à la force armée entre États ». Dans ses « Commentaires des Conventions de Genève du 12 août 1949 », Jean Pictet établit un seuil de violence très bas pour les CAI en énonçant que « tout différend surgissant entre deux Etats et provoquant l'intervention de membres des forces armées est un conflit armé (…) La durée du conflit ou le caractère plus ou moins meurtrier de ses effets ne jouent aucun rôle. Le respect dû à la personne humaine ne se mesure pas au nombre des victimes (…) Si le conflit ne fait qu'un seul naufragé, la Convention est appliquée dès que ce naufragé est recueilli et soigné (…) ». En vertu de cette approche, un simple tir transfrontalier suffirait à qualifier une telle situation de conflit armé. Les Commentaires semblent même dispenser de la nécessité de toute violence. Une telle approche n'est cependant pas sans poser problème. Premièrement, elle ne prend pas en compte les accidents. Un tir d'artillerie qui s'écarte de sa trajectoire ou une patrouille frontalière se fourvoyant de l'autre côté de la frontière suffisent-ils à constituer un conflit armé ? Deuxièmement, il existe des exemples de violence de basse intensité entre Etats qui n'ont été qualifiées de conflit armé par aucune des parties. Dans son rapport de 2010, l'Association de droit international a conclu qu'un CAI doit se distinguer d'un échange de tirs mineur ou d'un affrontement transfrontalier. Le rapport soutient que la violence doit atteindre un certain niveau d'intensité afin d'être qualifié de conflit armé. Si et dans quelle mesure ce niveau d'intensité diffère d'un CANI n'est en revanche pas clair. Cette question est importante dès lors que les Etats ont des règles internes régulant la violence d'un niveau plus faible surgissant au sein de leur propre territoire, mais les règles applicables à la violence entre Etats se retrouvent dans le DIH. Dès lors, quelles règles régissent la violence inter-étatique lorsque celle-ci est de plus faible intensité ?

La classification de conflits impliquant des forces multinationales est également problématique. La Convention de 1994 semble présumer que de tels conflits seraient des conflits internationaux. Cependant, il semble plus opportun de faire dépendre la classification du contexte dans lequel les forces opèrent et en particulier des parties au conflit. Mais quel est le seuil de violence à partir duquel de telles forces doivent être considérées elles-mêmes comme parties à un conflit armé ? Et quid de la notion subjective d'intention qui semble se réinviter dans la problématique ? Le débat reste ouvert.

My first reaction on being given the title of this slot was to ask myself: 'what current dilemmas?' Setting aside the usual practical and evidential difficulties in applying abstract International Humanitarian Law (IHL) rules and concepts to real world situations, the ground rules seemed reasonably clear. But in trying to get to grips with the subject I have found many of

my comfortable assumptions about the threshold of violence in armed conflict being challenged.

Violence – the use of physical force against people and property – is at the heart of most people's concept of armed conflict. That is certainly the case for disciplines outside the legal world. The Uppsala Conflict Data Programme in Sweden which tracks ongoing armed conflicts uses a definition based on at least 25 battle-related deaths a year. That gives a figure of 27 internal, one international and nine so-called internationalised conflicts for 2011.

But determining the relationship between levels of violence and the threshold of the legal concept of armed conflict is much more problematic.

Let me give three recent examples:

- Last Sunday, Brazilian police and commandos raided slums to the north of Rio de Janeiro. They deployed armoured cars and helicopters against heavily armed drug gangs. Fortunately in this case, there seem to have been few casualties. But similar paramilitary operations in the past against Rio *favelas* have been much more violent. In Mexico the number of deaths resulting in violence involving drug gangs has reached tens of thousands. Government armed forces have been involved and significant weaponry deployed on both sides. For many people these are in a very real sense a 'literal war on drugs' – a real armed conflict. And yet most legal commentators would disagree.
- Earlier this month Syrian mortar shells killed five Turkish civilians in Akcakala. The current tragic events within Syria are clearly an armed conflict – as the somewhat bemused reaction to the International Committee of the Red Cross's (ICRC) public qualification of the conflict in July demonstrated. Did this cross-border shelling constitute an international armed conflict between Syria and Turkey? Alternatively, did such a conflict arise when Turkey retaliated with artillery fire later the same day? Even here commentators appear to disagree.
- And in a week in which the European Union (EU) gets the Nobel Peace Prize, here is a European Union example. The EU currently deploys eight military missions around the world. The biggest is the naval force in Operation Atalanta deploying 1200 military personnel and seven warships in the Indian Ocean. It operates under mandatory United Nations (UN) Security Council Resolution 1851. This authorises all necessary measures 'for the purposes of suppressing acts of piracy (…) provided (…) that any measures (…) are consistent with international humanitarian and human rights law'. On this basis in July, the operation launched its first attack on the Somali mainland using armed force – naval helicopters and snipers – to destroy pirate bases. Was this an armed conflict, bearing in mind that the UN Resolution requires operations to be consistent with IHL? Or when

in 2008 European Force (EUFOR) forces in Chad found themselves in a gun battle with rebel forces, was this an armed conflict? In both cases the EU would say, and they are not alone in this, there was no armed conflict in legal terms. But why?

In addressing these questions, I am conscious that I will cover some of the same ground as the previous speakers – but overlap is perhaps inevitable as we are essentially examining the same issues from different angles.

It was of course, as always, all much simpler in the old days before the 1949 Geneva Conventions. A legal state of war could be established by declaration and determining an intent to wage war – an *animus belligerendi* – could be the key. It is a myth, of course, to suggest that factual assessments of violence and conflict were irrelevant.

Oppenheim defined war in largely factual terms, as 'a contention – a violent struggle through the application of armed force'. But as we have heard, the whole drive of the 1949 regime was to get away from subjective concepts allowing parties to evade their responsibilities by claiming that they were not involved in a war. Instead we are meant to have an objective, effective threshold – the factual existence of an armed conflict – determined by events on the ground.

The formal declaration of war of course remains, at least on paper, in common Article 1 of the 1949 Conventions, as a threshold for armed conflict which requires no armed conflict – no instances of violence. It still emerges from time to time as a political curiosity; in April of this year for example Sudan declared war on South Sudan. However, in such cases the factual criteria for armed conflict are also present.

The other case where IHL can clearly be brought to bear, without any need to demonstrate any threshold of violence, is occupation. That requires the effective control of a territory with the absence of the sovereign power's consent. In addition, as common Article 2 makes clear, the Convention applies even if the occupation 'meets with no armed resistance'.

Otherwise we need to demonstrate that there is, in factual terms, an armed conflict – but does that always mean demonstrating the use of violence? And if so, what level of violence? What kind of violence? And what are the criteria for demonstrating that the threshold level of violence has been reached?

Ironically, and at the risk of being provocative, the answer – in theory at least – may be easier for non-international armed conflicts (NIAC). And so, flouting decades of tradition, I will take them first.

Unlike international armed conflict (IAC), both treaty law and case law do at least try to define the violence threshold for internal conflicts. This is of course because determining the existence of such conflicts, and distinguishing them from other situations, is so much more difficult and sensitive – both legally and politically. But at least we have something to go on.

As we have heard, the concept of "armed conflict" is not defined in the 1949 Conventions – either for international armed conflicts in Article 1 or non-international armed conflicts in common Article 3. But in Article 1(2) of Additional Protocol II we at least get a threshold. The Protocol 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'.

The last phrase is the key because it clearly provides a threshold for all non-international conflicts including common Article 3 and the narrower definition of Additional Protocol II.

Article 8(2)(f) of the Statute of the International Criminal Court (ICC) appears to add an additional layer of complexity. It limits jurisdiction over serious violations of IHL in non-international armed conflict, other than violations of common Article 3, to 'protracted armed conflict' involving 'organised armed groups'. Much ink has been spilt on this. Does it create a new category? A different threshold of violence? Is there a dilemma here? Frankly, no. Others here, involved in the Rome Conference, will be better qualified than I to comment. But it appears to be simply a vestige of the negotiating process, a compromise from Sierra Leone, which only creates artificial complexity.

What the ICC text does of course, is simply borrow from the ample case-law defining the threshold for non-international armed conflicts, in particular that of the International Criminal Tribunal for the former Yugoslavia (ICTY). In a series of key cases – *Tadic, Limaj, Haradinaj, Boskoski* – we are given a much clearer definition of the threshold of non-international armed conflict than we could ever expect to find in the treaty texts.

Tadic has established what is now the classic binary threshold that is reflected in the ICC language. A non-international armed conflict requires there to be 'protracted armed violence' which is assessed against first, the intensity of the violence, and secondly the organisation of the parties.

In assessing the intensity of the violence, the tribunals have made it clear that one is dealing with much more than the notion of duration which the term 'protracted' suggests. A number of relevant factors may include: the displacement of civilians; the types of weapons used;

the deployment of State armed forces; the number of casualties; the extent of destruction; the duration of the conflict and the involvement of the UN Security Council and international organisations. And both the Yugoslav and Rwanda Tribunals have been clear in dismissing the subjective intentions and perceptions of the parties.

Of course this is not an automatic formula – it is not simply the body count used by political scientists. It requires case by case assessment where not all criteria will be relevant or have the same weight. This approach does not, and cannot, deliver absolute clarity or certainty. But that is true of other IHL rules – think in particular of the difficulties in applying the notions of proportionality, military advantage, necessity and so on. What it does do is provide a method to establish a dividing line, however tricky to draw, between armed conflict and internal disturbances and tensions.

One can certainly identify conceptual difficulties. When the cumulative intensity of violence, including duration, reaches the armed conflict threshold, does that then apply to the period of violence as a whole including retrospectively? How many criteria do in fact need to be present for a non-international armed conflict to be established? Why should the involvement of international bodies, which depends on political will, have any relevance to an objective, factual assessment – one only needs to look at the paralysis of the Security Council in relation to Syria.

In any case it is hard to argue that these conceptual points constitute real dilemmas in the words of the title. The much greater dilemma is where the threshold for the intensity of violence has apparently been met and yet commentators are reluctant to draw the conclusion that there is an armed conflict. I am not talking here about where Governments may deny the existence of internal armed conflicts on their territory for obvious political reasons, as in El Salvador or Sri Lanka. I am referring again to the drug wars of Latin America. Only a minority appear ready to characterise the significant use of armed force by and against criminal entities as armed conflict. Why?

Some academic commentators have certainly argued that the intensity of fighting in Rio has not reached the necessary level of intensity. But the reasoning usually comes down to the second criterion for a non-international armed conflict, that of organisation. Criminal gangs, it is argued, do not have the required level of organisation. That may come as a surprise, however, to readers of a recent Economist article which cited drug cartels – albeit slightly tongue in cheek – as a model of business organisation. Some cartels have indeed a highly sophisticated level of organisation.

Some analyses ingeniously link the organisation criterion to the nature of criminal activity. It is argued that such criminals are necessarily reactive and often clandestine. They do not demonstrate the necessary capacity for strategy and tactics. They seek to protect and extend their material gains rather than to challenge and overthrow governments. It is therefore in their nature not to pose the type of threat giving rise to a situation of armed conflict. However, here we seem to be getting dangerously close to basing the application of IHL on distinguishing between criminal and political objectives and motivation. In other words, reviving the subjective notion of intent which the 1949 Conventions were intended to eliminate.

Things are not much better when we turn, finally, to international armed conflict. Here treaty law does not provide us with any threshold of violence and case law is not much better. *Tadic* simply says that there is an international armed conflict 'whenever there is a resort to armed force between States'.

Pictet's Commentary on the Conventions sets the threshold for violence in international armed conflict very low:

> 'Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict (…) It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims (...) if there is only a single shipwrecked person (...) the Convention will have been applied as soon as he is collected and tended'.

With this view, arguably even a single shot across the border is sufficient to qualify the situation as one of armed conflict. The Syrian mortar attack on Atcakala would on this basis be sufficient. Others would argue that there must be an armed conflict between States – thus in the case of Syria such a conflict only arose later the same day when Turkey responded. In either case, and without disregarding the tragedy of the deaths incurred, a few rounds of artillery and mortar shells is all that is required.

Indeed Pictet might even be said to dispense with the need for there to be any violence at all. If a member of one armed force falls into the power of the other – sick, shipwrecked or taken prisoner – then IHL applies even without a shot being fired. In 2007 when British sailors were detained by Iran and paraded on television, the UK invoked the protection of Article 13 of the third Geneva Convention.

There are clearly problems with such a low threshold of violence. First it takes no account of accidents. Is an artillery round going astray, or an armed border patrol mistakenly finding

themselves on the other side of the frontier, sufficient to constitute an armed conflict? The obvious answer is that in such cases there was clearly no intention of hostility between the parties. But in that case intent and subjectivity again pop their heads above the parapet.

The second problem is that State practice has instances of low level violence between States which neither side has characterised as armed conflict. This is set out in the 2010 International Law Association's (ILA) interesting if controversial report on the Meaning of Armed Conflict. Examples given include clashes between US and Libyan warplanes over the Gulf of Sirte in 1981 and the so-called Cod Wars and Herring Wars between Iceland, the UK and Norway in the 1970s and 1980s. These all involved the use of armed force but despite the latter's name, none of these situations were described as armed conflicts by the parties.

The ILA report concludes that international armed conflict must be distinguished from 'a minor exchange of fire' or 'a border clash'. Violence, it argues, must reach 'a certain level of intensity' to qualify as an armed conflict. But what is unclear is whether and to what extent this level of intensity differs from that in non-international armed conflict. And that certainly is a dilemma. Because States have, independently of IHL, internal rules for regulating lower level violence within their own territories; yet the rules applicable to violence between States are – or many of us would have assumed that they are – IHL itself. If so what regulates such inter-State violence at the lower levels of intensity?

Of course IHL is only one of the legal regimes operating at international level and on this point let me conclude with one final dilemma. The umbrella organisations for such operations generally argue that multinational forces, unless deployed as combatants on enforcement operations, are not parties to an armed conflict. That, as far as the UN is concerned, is certainly the implication of Article 2(2) of the 1994 Convention on UN Personnel.

Equally however, most contributors and organisations would, I think, agree that, in certain circumstances and whatever the terms of their original mandate, multinational forces are capable of becoming a party to an armed conflict. That is certainly the working assumption, if not the express position, of the EU which requires IHL training of its component forces in its Use of Force Concept. Such forces are, after all, composed of armed military personnel, usually operating in highly hostile and ambiguous situations where there is often already a situation of international or internal armed conflict between other parties.

The classification of such conflicts involving multinational forces – whether international or non-international – is itself problematic. The 1994 Convention appears to assume that such conflicts would be international. The better view, which I believe is that of the International

Committee of the Red Cross (ICRC), is that it naturally all depends on the context within which the force is operating, and in particular the parties with which it finds itself in conflict.

What then is the threshold for the level of violence at which such forces are themselves to be regarded as a party to an armed conflict? Is it indeed the same as for other armed conflicts – whether international or non-international? Or does some other threshold apply?

The position of contributing organisations would certainly suggest that it must be higher than the Pictet threshold. As noted above in relation to EUFOR in Chad, members of such forces can find themselves engaged in a fire fight in self-defence. Others may have to have recourse to force in defence of their mission – for example to protect civilians. In the case of Atalanta, the very terms of the mission's mandate, the suppression of piracy, implies the use of force. These uses of force, it is argued, should not be sufficient to cross the threshold for armed conflict and make the multinational forces party to an armed conflict.

Let us be clear: we are dealing here with relatively low intensity violence. This is not a matter of relying on a UN mandate to argue that full scale military operations against another party's armed forces did not constitute armed conflict – as some North Atlantic Treaty Organization (NATO) States appeared to do in military operations against Libyan forces. Here we are in a situation akin to enforcement action. Equally, when the Mission de l'Organisation des nations unies en République démocratique du Congo (MONUC) forces found themselves providing military support to the Government against rebel forces in the Congo in 2008, it is clear that they were participating in hostilities.

But even for low intensity violence, what is the basis, if any, for drawing a distinction – as a matter of IHL rather than *ius ad bellum* – between the use of armed force by different types of military forces in different contexts? And if the threshold for violence is higher for multinational forces operating under particular mandates, where does that threshold lie?

Some have suggested that this arises when the multinational mission's use of force moves from the objectives of its specific mandate – suppressing piracy, peace-keeping or protecting civilians from the military – to the defeat of the enemy as such. Writing on Atalanta, Robin Geiss of the ICRC argues that 'the governments involved in the repression of piracy are not seeking to overcome their "enemy" militarily – the legitimate aim underlying the rules of IHL – but (...) rather (…) their operations are aimed at the full eradication of piracy, a legitimate law enforcement objective'.

If this is so, then once again the subjective intention of the party – the reason for which force is being used – comes back into the equation.

The notion of armed conflict was intended to achieve factual objectivity. But despite the progress achieved in refining the concept in case law the threshold of violence necessary to trigger an armed conflict remains problematic. Above all the subjective notions of intent and *animus belligerendi*, which the concept of armed conflict was meant to eliminate, seem to be creeping back into the debate. And that certainly is a dilemma.

During the debate following the presentations, the audience raised five main issues:

1. The importance of NIAC specificities

One of the speakers asked about the implications of assuming that International Humanitarian Law (IHL) applies when a non-international armed conflict (NIAC) reaches a certain threshold without thinking more deeply about the substantive rules that apply. A panellist replied that, indeed, there are a number of implications such as the capacity of the armed group and in particular the extent to which an armed group can follow IHL rules on, for example, detention. Are they able to follow due process guarantees if they decide to prosecute an individual? In addition to capability type issues, there are a variety of other issues, for example, can armed groups intern under IHL and if so on what legal basis, because internment, in so far as the state is concerned, will usually be regulated by national law. When using the law of international armed conflict (IAC) to regulate NIAC we have lost sight of a number of specificities and of the very particular context in which NIAC take place.

2. The issue of cross-border incidents

One of the speakers raised the issue of the different thresholds in IAC and NIAC, specifically with regard to the so-called border incidents. He highlighted the great danger of relying on an intent element for those types of incidents because it subjectivises the Geneva framework, which is supposed to be factual and objective. He asked whether there is any way to square the practice whereby States avoid acknowledging an armed conflict with regard to purely accidental use of force.

One panellist replied that relying on State practice in terms of classification of armed conflicts is inherently dangerous. States have political reasons for not classifying a situation as an armed conflict and that applies equally to IAC and NIAC. However, the fact that States do or do not classify a border incident as an armed conflict does not have any practical significance because what matters is not so much the theoretical classification of the conflict but the consequences that follow.

Another panellist wondered about the downside of requiring a threshold for border incidents. He gave the example of a brief clash involving soldiers from State A firing on soldiers of State B, who respond by firing back. If we consider this as not being an armed conflict and there-

fore IHL does not apply and if State B's soldiers have not abided by the rules of self-defence, they end up committing crimes or violating international law. This places the soldiers in a problematic position.

3. Piracy and organised crime

A panellist raised the issue of piracy and organised crime stressing that, in most cases, the combined requirement of intensity and level of organisation will exclude the possibility of considering such activities as armed conflicts. With regard to organised crime, the panellist explained that often, rather than having a single hierarchical organisation, there will be many different groups and if all the acts of violence cannot be linked to one single group, it will not be possible to accumulate them into a single threshold for one conflict. As for piracy, the organisational and violence threshold would also rule out considering it an armed conflict since most of the pirate organisations are not structured as a single group.

One of the speakers wondered about the case of targeting piracy with participating forces delivering kinetic force with a high likelihood of death. If this type of operation cannot be qualified as an armed conflict and therefore IHL does not apply, what rules are applicable?

A panellist answered by saying that participating forces will usually not take the view that the situation amounts to an armed conflict. During the July attack on Somali territory, for example, the European Union (EU) did not consider its forces as being a being a party to an armed conflict. In terms of what law applies, he explained that the situation will be regulated first of all by limitations in terms of *ius ad bellum* and that International Human Rights Law and national rules will apply to the military forces engaged. He agreed that the situation is problematic as most organisations – not only the EU but also the United Nations (UN) – argue that, except in the case of clear enforcement operations, using force in pursuance of a mandate, given the low intensity threshold, will not fall in the area of IHL. However, even where organisations refuse to consider the targeting of piracy as an armed conflict, the armed forces will be subject to very strict rules of engagement which are carefully scrutinised.

4. Violence threshold and targeted killings

One of the participants wondered how the panel analyses the violence threshold for the practice of targeted killings, including via drones.

One panellist answered by saying that if the target of the strike is a member of an armed group or a non-State party, the threshold required will be the one required by a NIAC. The question

will thus be whether there is an armed conflict between the State and the armed group whose members are being targeted. For IHL to apply to the use of force with regard to that particular individual, there will need to be an armed conflict between the State and the group that existed before the strike because for the NIAC threshold the strike itself is not indicative of an armed conflict.

5. The concept of associated forces

On the question of analogy between IAC and NIAC on who may be targeted, one of the speakers explained that the US has officially taken the position that "associated forces" is a concept upon which targeting authority may be based. Therefore, if an element in Somalia, for example, has some association to core al Qaeda, that association satisfies the required nexus to an armed conflict in order to invoke IHL targeting authority. The speaker wondered whether this is a legitimate stand-alone concept and whether it is an analogy to the concepts of co-belligerency in IAC.

A panellist answered by saying that this "associated forces" idea is the reason why a lot of the strikes carried out by the US are considered unlawful because they target individuals that are not part of any group engaged in an armed conflict with the US. There is a difference between targeting individuals in Pakistan who are members of the same groups that the US is fighting in Afghanistan as opposed to members of groups in Pakistan that have absolutely nothing to do with the war in Afghanistan.

Session 2
Personal Scope of Application of IHL

Chairperson: **Knut Doermann**, *Head of ICRC Legal Division*

PERSONS PROTECTED BY IHL IN INTERNATIONAL ARMED CONFLICTS: THE LAW AND CURRENT CHALLENGES

Colonel Kirby Abbott
SHAPE Assistant Legal Advisor

Résumé

Les rapports ambigus entre le droit international humanitaire (DIH) et les droits de l'homme (DH) constituent le plus grand défi au DIH dans le cadre de conflits armés internationaux (CAI) et encore plus dans le cadre de conflits armés non-internationaux (CANI). Un certain nombre de problèmes juridiques découlent de ces ambiguïtés :

1. L'absence de méthodologie permettant l'application pratique de la doctrine de la lex specialis

Savoir quelle méthodologie doit être utilisée afin d'appliquer en pratique, dans des situations opérationnelles, la doctrine de la lex specialis et afin de déterminer spécifiquement quand le DIH et les droits de l'homme s'appliquent ou ne s'appliquent pas est une question clé à laquelle ni la Cour internationale de justice (CIJ) ni la Cour européenne des droits de l'homme (CEDH) n'ont apporté de réponse. Il s'agit d'une question essentielle dès lors que, malgré l'important chevauchement entre ces deux législations, elles diffèrent largement en ce qui concerne l'autorité légale et la sphère d'application de la force létale et de la détention. S'il existe une incertitude quant au droit qui doit être appliqué, cette ambiguïté du cadre juridique accroit le risque de perte de vie et de liberté pour la population civile.

2. L'interaction entre la jurisprudence de la CEDH et la doctrine de la lex specialis lorsqu'il s'agit de donner un avis sur la conduite d'opérations militaires dans le cadre d'un CAI

L'ambiguïté juridique et les enjeux augmentent lorsqu'entre en ligne de compte l'application d'un traité régional des droits de l'homme tel que la Convention européenne des droits de l'homme (ConvEDH). La CEDH n'a jamais considéré et encore moins défini ni appliqué la méthodologie lex specialis en ce qui concerne la relation entre les deux législations. La conséquence est que les Etats membres de l'OTAN courent le risque que leur recours à la force militaire lors d'un CAI

soit considéré comme illégal en vertu de la ConvEDH alors même que cet usage aurait pu être conforme à la lex specialis, à savoir le DIH.

3. Juridiction – Le champ d'application extraterritorial des traités des droits de l'Homme

Les questions posées par l'application territoriale des traités relatifs aux droits de l'homme constituent un enjeu fondamental préalable à l'analyse de la question de la lex specialis.

4. Les Résolutions du Conseil de Sécurité des Nations Unies en tant que source d'autorité légale d'application du DIH

Le paragraphe 102 de l'affaire Al-Jedda est un paragraphe clé dans lequel la CEDH stipule qu' « (…) En cas d'ambiguïté dans le libellé d'une résolution, la Cour doit dès lors retenir l'interprétation qui cadre le mieux avec les exigences de la Convention et qui permette d'éviter tout conflit d'obligations. Vu l'importance du rôle joué par les Nations unies dans le développement et la défense du respect des droits de l'homme, le Conseil de sécurité est censé employer un langage clair et explicite s'il veut que les Etats prennent des mesures particulières susceptibles d'entrer en conflit avec leurs obligations découlant des règles internationales de protection des droits de l'homme ».

L'aspect le plus frappant de cette décision est la manière selon laquelle la Cour a interprété la résolution du Conseil de sécurité des Nations unies, à savoir uniquement en fonction du libellé des droits contenus dans la ConvEDH et sans aucune référence au DIH.

5. Détention – Paragraphe 100 AL-JEDDA

En ce qui concerne la détention, le paragraphe 100 de l'affaire Al-Jedda dispose qu' « il est établi de longue date que l'internement ou la détention préventive lorsqu'aucune poursuite pénale n'est envisagée dans un délai raisonnable ne figurent pas parmi les motifs exhaustivement énumérés à l'article 5 § 1 ».

Bien qu'il existe un chevauchement considérable entre le DIH et les droits de l'homme, la question de la détention de nature non-pénale est un domaine dans lequel les deux législations sont en contradiction. La troisième Convention de Genève (CGIII) autorise, dans le cadre d'un CAI, la détention de combattants jusqu'à la cessation des hostilités sans nécessité d'inculpation ou de jugement préalable. Si l'on s'en tient au paragraphe 100, le régime actuel de la CGIII serait illégal et contraire à la ConvEDH.

6. Droit à la vie

La CEDH n'applique pas automatiquement le DIH lorsqu'elle examine une perte de vie résultant du recours à la force militaire dans le cadre d'un conflit armé. Sous l'approche adoptée par la

Cour jusqu'à ce jour, tuer sur base du statut ou encore des pertes proportionnelles de vies civiles seraient considérés comme illégaux bien que permis en vertu du DIH dès lors que la Cour refuserait de prendre la lex specialis en considération.

7. ***Enquêtes sur les cas où la force était légale en vertu du DIH et de la Cour pénale internationale (CPI)***

Le défaut d'enquêter sur une perte de vie constitue en soi une violation du droit à la vie. Etant donné l'approche adoptée par la CEDH, il est théoriquement possible que des Etats soient considérés comme ayant violé le droit à la vie en raison de leur défaut d'enquête sur des pertes de vies jugées légales en vertu du DIH dans un CAI.

Starting with the standard caveat: I am presenting in my personal capacity and my comments do not necessarily reflect the views of the Canadian Forces or the North Atlantic Treaty Organization (NATO). If I am quoted please do not associate my comments with those organisations.

The legally ambiguous interrelationship between International Human Rights Law (IHRL) and International Humanitarian Law (IHL) is the biggest source of challenge to International Humanitarian Law.

From my perspective – emphasising throughout that it is of a North American lawyer working within NATO – I clearly place the legally ambiguous interrelationship between International Human Rights Law and International Humanitarian Law as the number one challenge facing IHL in situations of international armed conflict (IAC). I should say that I also view this as an even more pressing issue within the context of a non-international armed conflict (NIAC). The issue is most acute when relating to issues of detention.

Within the overarching issue of the interrelationship between IHRL and IHL are a number of operationally pressing sub-issues and challenges to IHL. I will briefly outline seven of the most significant.

1. The absence of a methodology which allows for the practical application of the lex specialis doctrine

Within the context of IAC and occupation it is generally accepted – and repeated like a mantra – at the starting point that IHL is *lex specialis*.

As many are aware, the International Court of Justice (ICJ) advisory opinion on the *Threat or Use of Nuclear Weapons*[1] noted:

> 'In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life (...) is to be considered an arbitrary deprivation of life (...) can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself'.

Of importance to note for later discussion is that the ICJ was looking at the right to life as defined under the International Covenant on Civil and Political Rights (ICCPR) – not by the European Convention on Human Rights (ECHR). The decision is indeed helpful in simply resolving the debate about which body of law is *lex specialis*[2] but, I would conclude, of very little utility when attempting to determine in practice what body of law regulates particular aspects of the use of force during the conduct of military operations on the battlefield during an IAC.

In the 2004 *Wall*[3] decision the ICJ noted: 'As regards the relationship between International Humanitarian Law and Human Rights Law, there are three possible situations: some rights may be exclusively matters of International Humanitarian Law; others may be exclusively matters of Human Rights Law; yet others may be matters of both branches of international law.'

Learning that IHL is *lex specialis* but that IHRL continues to apply, or that there are three possible situations relating to the application of IHL and IHRL during an IAC is not all that helpful when asked for legal advice on whether it is lawful to target someone or detain someone captured in an improvised explosive device (IED) factory, advising on detention operations, cordon and searches of dwellings, interrogation and questioning, restricting freedom of movement or association, legal accountability for military operations and compensation, to name a few.

Sir Daniel Bethlehem, in an upcoming paper to be published in the Cambridge Journal of International and Comparative Law draws four conclusions relating to the ambiguous interrelationship between IHL and IHRL. His second conclusion – and in my opinion the most important – is that 'the anxiety in this area is largely driven by warranted concern over the

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1 Paragraph 25

2 Lex specialis derogate legi generali: the more specific law has precedence over the more general law.

3 Paragraph 106

methodological short-comings of courts and other bodies seized of these issues, particularly on the human rights side of the equation'.

What is the methodology that one uses in practice to apply in operational situations the lex specialisis doctrine and to determine specifically when IHL applies and IHRL does or does not apply?

This is the key question. The answer to this question has not been settled. The ICJ does not answer this. The European Court of Human Rights (ECtHR) does not answer this. This is where the problems and subsequent issues begin.[4]

Why is this an important issue?

It is an important issue because, despite the significant overlap between the two bodies of law, the legal authority and scope of using deadly force and detaining people is vastly different between the two bodies of law. If there is uncertainty about when one body of law applies, civilians are potentially exposed to increased risk of loss of life and liberty either because military force is used, or at times not used to protect them, due to the ambiguity of the legal framework to be applied[5].

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4 Since receiving the invitation to speak I have encountered the following propositions with respect to the inter relationship. In no particular order in articles read, conferences attended or decisions read: 1. IHL applies to the exclusion of IHRL during IAC (popular in certain military circles), 2. Only IHRL applies when assessing the use of force during an IAC, 3. IHRL applies and compliments IHL – whatever "complements" means – throughout, 4. IHRL applies only if it can complement IHL, 5. IHRL will apply only if IHL is silent on a particular aspect in question, 6. IHRL will only apply if IHL is silent on a particular issue and only if implementing the rule would not breach the spirit and principles of IHL, 7. IHRL applies independently throughout regardless of whether IHL applies, 8. IHRL applies but can only be interpreted with reference to IHL, 9. IHRL acts as a gateway for the application of IHL, 10. IHRL informs the interpretation of IHL including the possibility by supplementing or completing the IHL rule.,11. In the absence of an IHL rule it is necessary to draw on the relevant IHRL rule, 12. If a person's rights are unclear under IHL it may be clarified with reference to the applicable IHRL rule.

5 IHL allows amongst other things for the use of deadly force to kill combatants and civilians taking a direct part in hostilities - killing based on status. It also allows for incidental civilian loss in situations where the lawful use of force would not be disproportionate. By contrast under an IHRL paradigm, the use of deadly force is restricted to situations of defending oneself against imminent threat to life where absolutely necessary. What may be unlawful in an IHRL paradigm may very well be lawful if an IHL paradigm is applied. The stakes are also significant in matters of detention where a person may be deprived of their liberty. Again the basis for detention and, most importantly, the various procedural rights and obligations are significantly different within the two legal frameworks.
See AP1 57 – Proportionality: an attack that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof which would be excessive in relation to the concrete and direct military advantage anticipated.

2. The interaction between ECtHR jurisprudence and the *lex specialis* doctrine when advising on the conduct of military operations during IAC

Legal ambiguity and challenges increase when one takes into consideration the application of a regional treaty – the ECHR. This certainly has implications for IHL when advising on the use of force within an alliance of European and North American States.

Unlike the Inter-American Commission applying the American Convention on Human Rights with cases such as *Abella*, the ECtHR has not considered the interrelationship between the two bodies of law.

I am often confronted by persons who cite ECtHR decisions as legal propositions defining the relationship between the two bodies of law in situations where military force is used during armed conflict.

The ECtHR has never considered, much less defined or applied a *lex specialis* methodology on the relationship between the two[6]. In short, the ECtHR cannot be used as a source of jurisprudence for the purpose of determining the methodology to be used when applying the *lex specialis* of IHL.

The effect of this is that (NATO) countries are currently exposed to the risk of having their use of military force during an IAC deemed unlawful under the ECHR even though it may have been compliant under the *lex specialis* of IHL. As a North American watching this unfold and watching the way in which NATO European States are and are not reacting to post *Bankovic*, *Al Skeini* and *Al-Jedda* developments, I have serious concerns over whether Canada and the United States are, or can be, legally interoperable with other NATO nations in any meaningful way.

The ECtHR has become a – albeit in fairness to the Court possibly somewhat *inadvertently* – *destabilising force* in the application of IHL as *lex specialis* to the conduct of military operations within the context of an armed conflict.

I emphasise *inadvertently a destabilising force* for a number of reasons. First, given the wording of the ECHR – unlike the wording of the ICCPR and the American Convention on Human Rights, which allow for consideration of the *lex specialis* relationship by defining the content of the term 'arbitrary' (in the prohibition of *arbitrarily* depriving of life and liberty) –, the ECHR's wording under Article 2 limits and lists the legal grounds under which force may be lawfully

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6 *Georgia v. Russia* may be the first.

used to deprive life; they all relate to law enforcement – not armed conflict – paradigms[7]. This is not the Court's fault. As Françoise reminded me last week in Malaysia, the States involved, in particular the UK, negotiated this language.

In short, the inability of the ECtHR to define the *lex specialis* doctrine is arguably[8] in part a product of the Convention's wording[9]. This is linked to a second reason why the Convention has been inadvertently destabilising the relationship between the two bodies of law, namely the failure of States to invoke the Convention's derogation clause under Article 15[10]. Article 15 allows for States to derogate from the deprivation of life and liberty protection in times of war threatening the life of a nation. In fairness to States, many may not have invoked Article 15 as it was not apparent that the Court would have jurisdiction or that participating in an armed conflict outside their territory would constitute a situation threatening the life of the nation.

Arguably both ECtHR and States were litigating before they could have – and should have – delved into exploring the *lex specialis* relationship but to date (with exception of *Georgia v. Russia*) have not done so.

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7 ARTICLE 2 - Right to life
1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

8 Hampson, Geneva ICRC Roundtable Paper, page 9: 'There is however another way in which it can do so. The ECtHR has always taken the approach that the ECHR is located within the body of international law and that it needs to take into account other rules of international law when interpreting the Convention (...) it would appear that the Court could take account of LOAC and could do so *proprio motu*.'

9 See Costa & O'Boyle "The ECTHR and IHL" in: *The European Convention on Human Rights, a Living Instrument*, ed. Christos Rozakis, Bruylant Press

10 ARTICLE 15 - Derogation in time of emergency
1. *In time of war or other public emergency threatening the life of the nation* any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from *lawful acts of war*, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

The result is that the Court has decided, and in the future could decide, that the legality of cases relating to the use of force which did occur within the context of an armed conflict would be assessed solely with reference to the ECHR.

This is a serious challenge when giving advice to the planning and conduct of NATO operations. The ECtHR – unlike the Inter-American Court – may very well find itself concluding that the actions of a State are unlawful even though they may have been totally compliant with IHL. This could most likely occur in cases involving deprivation of life or liberty or the implied duty to investigate under the 'right to life'.

3. Jurisdiction – The extraterritorial scope of Human Rights treaties

Looking at issues of the jurisdictional application of IHRL treaties is a fundamental preliminary step prior to exploring the *lex specialis*[11].

The ECtHR's jurisdiction has expanded from the *Bankovic* test[12] – of 'effective control of territory' plus other exceptions (including consent) to the presumption that jurisdiction is primarily territorial – to a jurisdictional test including 'State agent authority' as defined in the *Al Skeini* case.

Paragraph 137 of the *Al Skeini* decision is of most significance for the military lawyer and anyone that was giving advice based on the UK House of Lords decision:

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11 Even prior to the ECtHR decision of *Al Skeini* there was debate and divergence amongst States on the extra territorial application of international human rights treaties and the scope and ambit of 'effective control of territory' within the context of the *Bankovic* decision. Add to this issues concerning the extra territorial application of customary international law (not to mention a discussion on the content of CIL HR in and of itself), and one is immediately confronted with some fundamental preliminary issues.

12 See ECtHr *Bankovic* defining 'within their jurisdiction' '59. (...) While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States (...) 60. Accordingly, for example, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence ... In addition, a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying State in which case it can be found to exercise jurisdiction in that territory, at least in certain respects (...) 61. The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case (…)'

> 'It is clear that, whenever the State through its agents *exercises control and authority* over an individual and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under section 1 of the Convention *that are relevant to the situation of that individual*. In this sense, therefore, the Convention rights can be divided and tailored[13]'.

Within the context of military operations during armed conflict which will include such things as restricting freedom of movement, temporarily restricting the liberty of persons (sometimes for their own safety), cordons and searches of private dwellings and businesses, killing or capturing persons based on their status as combatants, whether or not they are posing an imminent threat at the time, etc., the full implications of now learning that they are entitled to ECHR rights 'that are relevant to the situation of that individual' – whatever that means – actually shifts the operational legal framework for military operations and further compounds the relationship between this regional Human Rights treaty and IHL.

4. Security Council Resolutions as a source of legal authority to engage IHL

On the same day as *Al Skeini*, the ECtHR issued *Al Jedda*. From a military legal perspective, the most significant aspect of the *AL Jedda* decision was the way the Court has interpreted the legal authority and scope, contained within a Chapter VII authorisation, to use all necessary means and how they interpreted it within the context of detention operations and Article 5 of the ECHR[14].

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13 See and contrast with HL decision judgment by Lord Brown at 128: 'There is one other central objection to the creation of the wide basis of jurisdiction here contended by the appellants under the rubric "control and authority"....for the indivisible nature of article 1 jurisdiction: it cannot be "divided and tailored"...129 The point is this: except where a State really does have effective control of territory, it cannot hope to secure Convention Rights within that territory and unless it is within the area of the Council of Europe, it is unlikely in any event to find certain of the Convention rights it is bound to secure reconcilable with the customs of the resident population.'.

14 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
a. the lawful detention of a person after conviction by a competent court;
b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

The key paragraph is 102, which reads in part:

> '(...) In the event of any ambiguity in the terms of a Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements *of the Convention* and which *avoids any conflict of obligations*. In light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under *international human rights law*.'

The most striking aspect of this decision is the way the Court interpreted the relevant Security Council resolution (SCR) without any reference to IHL obligations, but only by obsessively and exclusively focusing on how the rights in question are defined, not by IHRL jurisprudence which deals with arbitrary deprivation of life and liberty in general, but by the unique wording of those rights found within the ECHR.

The ECtHR's approach to a SCR interpretation on detention is a further course of concern where IHL has been potentially displaced and whose scope of application has been narrowed.

This is even more so if one adopts the logic of the ECtHR's SCR interpretation to use of force as it relates to how the ECHR defines the right to life under Article 2. One can ask whether the Court has now restricted its interpretation of the 'all necessary means' SCR authorisation to the use of force exclusively within a law enforcement paradigm.

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f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

5. Detention Paragraph 100 in *Al-Jedda*

The key paragraph 100 in *Al-Jedda* reads: 'It has long been established that the list of grounds of permissible detention in Article 5 does not include internment or preventative detention where there is no intention to bring criminal charges within a reasonable time.'

This paragraph requires particular scrutiny from a military legal perspective. While there is considerable overlap between IHL and IHRL, the issue of non-criminal internment is where IHL and IHRL are at odds.

Detention of prisoners of war (POWs) during IAC is one area where IHL is highly developed. The third Geneva Convention (GC III) allows for combatants to be detained until the end of active hostilities without being criminally charged or tried. If one accepts paragraph 100, the current GC III regime would be unlawful and contrary to the ECHR.

Paragraph 100 should be of real concern to those who value IHL. I would direct you to a recent article written by Jelena Pejic in the *International Review of the Red Cross*, Vol 93 entitled *'The European Court of Human Rights' Al-Jedda Judgment: the oversight of international humanitarian law'*. I do adopt her concluding remarks: '(...) *Al-Jedda* casts a chilling shadow on the current and future lawfulness of detention operations carried out by the ECHR States abroad. In addition their ability to engage with other non-ECHR countries in multinational military forces with a detention mandate currently remains, at best, uncertain.'

6. Right to Life

The Court's approach and European States' historic refusal to invoke the derogation clause or argue IHL will continue to destabilise the *lex specialis* legal framework applicable during IAC. As with detention and right to liberty, the ECtHR will not automatically apply IHL when considering deaths arising from the use of military force during an armed conflict. Killing based on status and proportional civilian loss of life is permitted under IHL. Under the ECtHR's approach to date – which would not consider the *lex specialis* of IHL – it would be unlawful. Consequently it is theoretically possible that a loss of life may be deemed unlawful under the ECHR but not under the ICCPR and IHL. The implications for the international legal framework on national but also coalition military operations are obvious.

7. Investigation of cases where force was lawful under IHL and the International Criminal Court (ICC)

Implicit within the right to life is a procedural duty to carry out an effective independent investigation of the loss of life. Failure to investigate is a violation of the right to life. Given the approach taken to date by the ECtHR it is theoretically possible – and I would say more than theoretically possible – that States will be held to have violated the right to life because they failed to investigate deaths that were lawful under IHL during an IAC, particularly in situations of proportionate strikes which resulted in civilian loss. I have also heard it asserted by well-placed people under Chatham House Rule that even killings done lawfully based on status – killing combatants – require an investigation under the ECHR.

I fully expect this will be an area litigated before domestic courts and the ECtHR in the future. It will be intertwined with allegations of failure to be accountable.

Conclusion

Seven issues arising within the legally ambiguous interrelationship between IHRL and IHL are the biggest source of challenge to IHL. I could go on, but I have run out of time – thank you for your patience and attention.

PERSONAL SCOPE OF IHL PROTECTION IN NIAC: LEGAL AND PRACTICAL CHALLENGES

Françoise Hampson[1]
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Résumé

1. Champ d'application personnel du droit international humanitaire (DIH) dans les conflits armés internationaux (CAI)

Aux fins du principe de distinction, les combattants sont définis à l'article 43 du premier Protocole additionnel aux Conventions de Genève (PAI) comme les membres des forces armées d'une partie à un conflit. Les combattants peuvent être pris pour cible à tout moment en vertu de leur statut, indépendamment du danger qu'ils posent. Les civils sont définis, quant à eux, comme toute personne ne bénéficiant pas du statut de combattant ou de prisonnier de guerre. Les civils ont droit à la protection contre les attaques directes sauf s'ils participent directement aux hostilités et ce pendant la durée de cette participation. Dans les CAI, il existe dès lors deux catégories de personnes pouvant faire l'objet d'attaques : les membres des forces armées d'une partie à un conflit et les civils qui participent directement aux hostilités.

2. Champ d'application personnel du DIH dans les conflits armés non internationaux (CANI)

En ce qui concerne les CANI, le deuxième Protocole additionnel aux Conventions de Genève (PAII) ne contient aucune référence à la notion de combattant. Les civils ont, quant à eux, droit à la protection contre les attaques sauf s'ils participent directement aux hostilités et ce pendant la durée de cette participation (article 13). Par conséquent, les seules personnes pouvant faire l'objet d'attaques dans un CANI sont les civils participant directement aux hostilités. Ceci suscite plusieurs questions. Tout d'abord, qu'entend-on par « pendant la durée de cette participation » ? En outre, quels actes constituent une « participation directe aux hostilités » ? Le Comité international de la croix rouge (CICR) a tenté d'apporter des clarifications à ces questions dans son Guide interprétatif sur la notion de participation directe aux hostilités. En ce qui concerne l'élément « pendant la durée » de leur participation, le Guide dispose que « les mesures préparatoires à l'exécution d'un acte spécifique de participation directe aux hostilités, de même que le déploiement vers son lieu d'exécution et le retour de ce lieu, font partie intégrante de cet acte ». Le Guide apporte également des précisions en ce qui concerne la notion de « participation directe aux hostilités » en disposant que les actes constituant une participation directe

1 This contribution has been written on the basis of audio record and has not been reviewed by the speaker.

aux hostilités doivent remplir trois conditions cumulatives : premièrement, un certain seuil de nuisance doit être susceptible de résulter de l'acte ; deuxièmement, il doit exister un rapport de causalité directe entre l'acte et les effets nuisibles attendus ; et, troisièmement, il doit exister un lien de belligérance entre l'acte et les hostilités conduites entre les parties à un conflit armé. Ces précisions semblent communément admises aussi bien en ce qui concerne les CAI que les CANI.

En revanche, les questions les plus controversées du Guide surgissent exclusivement dans le cadre des CANI. Selon le Guide, un membre d'un groupe armé exerçant une fonction de combat continue peut faire l'objet d'attaque 24h/24 et 7j/7 indépendamment du danger qu'il pose. Ceci signifie qu'il pourrait faire l'objet d'attaques la nuit pendant qu'il dort avec sa famille et même s'il se trouve à des lieues du champ de bataille. De nombreux Etats contestent cette « fonction de combat continue ». La règle selon laquelle des membres de groupes armés peuvent faire l'objet d'attaques en vertu de leur statut ne devrait pas s'appliquer à tous les CANI mais uniquement à ceux atteignant le seuil d'intensité requis par le PAII.

I would like to start by thanking the International Committee of the Red Cross (ICRC) and the College of Europe for inviting me to participate in this Colloquium.

I took the topic of the personal scope of International Humanitarian Law (IHL) protection in non-international armed conflicts (NIAC) to mean the same thing as the operationalisation of the principle of distinction or 'who can and who cannot be targeted'?

1. Personal scope of International Humanitarian Law protection in international armed conflicts

The principle of distinction is relatively straightforward in international armed conflicts (IAC). Additional Protocol I to the Geneva Conventions (API) distinguishes between combatants on the one hand, and civilians on the other. Combatants are defined in Article 43 of API as the fighting members of the enemy's armed forces. Combatants can be targeted 24/7 by virtue of status, regardless of the threat they pose at the time. Civilians are defined in Article 50.1 of API as any person not entitled to combatant or prisoner of war (POW) status. Civilians cannot be targeted unless and for such time as they take a direct part in hostilities. In those circumstances, civilians do not change their status, they do not become combatants but simply lose the protections they have been granted. In an IAC, two categories of persons can thus be targeted: the fighting members of the enemy's armed forces and civilians who at the time are taking a direct part in hostilities.

2. Personal scope of International Humanitarian Law in non-international armed conflicts

As for non-international armed conflicts (NIAC), the only relevant treaty law is Additional Protocol II to the Geneva Conventions (APII). The latter contains no reference to combatant status and one can easily understand why this is the case. Indeed, how could a State authorise persons within its jurisdiction to wage war against it? The absence of reference to a combatant status raises the question about the status of the State's armed forces in a NIAC. If they are not combatants, what is their status?

In NIAC, civilians are protected from attack unless and 'for such time' as they take a 'direct part in hostilities' (Article 13, APII). Therefore, in a NIAC the only persons who can be targeted are civilians at the time they are taking a direct part in hostilities. This raises two different kinds of problem. From a legal perspective, it raises the question of what is meant by 'for such time as'. Furthermore, what activities are and are not covered by 'direct participation'? Is making a bomb considered as direct participation? What about purchasing the elements that will be used by someone else to create a bomb? Where do you draw the line with regard to direct participation? From a military perspective, a person known to have killed people and to belong to a group which intends to carry on killing people and who personally intends to carry on killing people cannot be targeted unless caught in the act. This is a genuine problem as it is not necessarily compatible with the military task of protecting the population.

The ICRC tried to address some of these issues in its Interpretive Guidance on the Notion of Direct Participation in Hostilities (2009). The Guidance contains some elements that appear to be relatively uncontroversial. A first element on which there seems to be general agreement is the way in which it clarified 'for such time as'. The Guidance states that 'measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act'. This is a useful clarification in that it takes beyond doubt a wider time frame than might have been the case. Equally non controversial is the clarification of 'direct participation in hostilities'. The interpretative guidance uses three cumulative criteria, which all have to be satisfied for an act to amount to participation, namely: threshold of harm, direct causation and belligerent nexus. Both the clarification of 'for such time as' and the clarification of 'direct participation' apply in IAC and NIAC.

Interestingly, the most controversial issues of the Guidance apply specifically and exclusively in NIAC. According to the interpretive Guidance, a member of an organised armed group exercising a continuous combat function can be targeted 24/7 irrespective of the threat he poses at the time. In other words, instead of combatant privilege he has got combatant disadvan-

tage; he can be targeted if he is at home with his family sleeping and he can be targeted if he is miles away from any zone of combat. Another controversial element results from the fact that the Guidance states that that person is not a civilian. In other words, according to the Guidance, that person is deprived of civilian status and not merely from protection, whereas in an IAC, a person taking direct part in hostilities retains their status as a civilian, but loses its protections. Finally the ICRC study says: 'where possible, an attempt should be made to detain'. This is also regarded as controversial.

The objections to the above-mentioned controversial elements emanate mainly from States and armed forces. There is a common objection on the part of States to the 'continuous combat function' element. States also argue that there should be no requirement of an attempt to detain. The answer to this is straightforward: there is no such requirement. The interpretive Guidance only says you should think about attempting to detain but in no way says it is a legal requirement.

I personally have different objections to the interpretative Guidance. First of all, a lot of changes were made simultaneously. Given the relatively uncontroversial clarification of 'for such time as' and 'direct participation', it would have been helpful to have first determined whether that actually met the need for clarification. If, in fact, that was sufficient to enable the military to do what they need to do against the backdrop of the requirement of balancing military needs and humanitarian concerns, then we would not have needed the rest. My second objection is based on the fact that so many States object to the 'continuous combat function' element. This means that, in fact, members of organised armed groups in NIAC are going to be targeted simply by virtue of membership. In that case, the rule should not apply to all NIACs but only those above the threshold of APII in terms of disruption. If targeting by virtue of membership is allowed at a common Article 3 threshold, it means you are shifting from a law and order paradigm to an armed conflict paradigm very early on. Furthermore, it will make the relationship between IHL and Human Rights Law much more problematic. A further objection is that there was no need to deprive civilians of their status; it would have been sufficient to deprive them of protection. It is likely to have knock-on consequences elsewhere and gives the impression there might be a concept of "unlawful combatant". If the military interpretation of the ICRC Interpretive Guidance had been applicable at the time, the British armed forces would have acted lawfully at the 'Bloody Sunday' demonstration. This would have been counter-productive both for civilians and the armed forces. It is therefore very important to consider that, if you are about to apply a "membership test", it should only be applied in what can be called 'high intensity' NIACs. and not in all NIACs.

DOES IHL PROTECT "UNLAWFUL COMBATANTS"?

Gabor Rona
International Legal Director at Human Rights First

Résumé

Le droit international humanitaire (DIH) protège-t-il les « combattants illégaux » ? La réponse à cette question est d'une part « non », puisque, sous la construction binaire traditionnelle du DIH, il y a uniquement des combattants et des civils, mais d'autre part « oui », dès lors que les personnes qualifiées à tort de « combattants illégaux » sont protégées par les Conventions de Genève, leurs Protocoles additionnels et le DIH coutumier s'appliquant aux conflits armés tant internationaux que non internationaux.

Ce n'est pas sans raison que les rédacteurs de la troisième Convention de Genève et de son premier Protocole additionnel (PAI) ont défini les combattants comme des membres des forces armées d'un Etat partie à un conflit armé, en d'autres mots, comme des belligérants privilégiés ; ceci dans l'intention de définir qui peut bénéficier du statut de prisonnier de guerre. Au lieu d'avoir tenté une définition distincte et positive des « civils », la quatrième Convention de Genève définit les personnes couvertes par cette Convention en tant que toute autre personne se trouvant aux mains d'une partie au conflit et ne bénéficiant pas du statut de prisonnier de guerre sous la troisième Convention de Genève. Cette absence de définition est intentionnelle, le but étant de s'assurer que personne ne soit laissé de côté. Ainsi, un civil qui participe aux hostilités ne devient pas pour autant un combattant. Cette personne pourra être prise pour cible et détenue mais, sous la construction binaire traditionnelle du DIH, elle restera un civil.

Aussi bien les combattants que les civils sont protégés par les règles du DIH relatives à la conduite des hostilités et par les règles relatives à la protection des personnes au pouvoir de l'ennemi.

Le DIH opère sur la base d'une prémisse d'égalité entre les parties au conflit. Si les forces armées d'un Etat sont autorisées à participer aux hostilités, il en va de même pour les rebelles. S'il en était autrement, les rebelles seraient peu disposées à respecter le DIH. Cela ne veut clairement pas dire pour autant que les belligérants non-privilégiés bénéficient du privilège du combattant. Les combattants privilégiés jouissent d'une immunité vis-à-vis du droit national – qui interdit l'agression et le meurtre et punit ceux qui s'en rendent coupable – pour autant que la cible du combattant privilégié soit une cible militaire légitime. Ce que « belligérant non-privilégié » signifie réellement, c'est que dans un conflit armé international, où le statut de prisonnier de

guerre s'applique, les belligérants non privilégiés ne répondent pas aux critères leur permettant de bénéficier du statut de prisonnier de guerre. Dans le cadre juridique national, les belligérants non privilégiés, contrairement aux combattants, demeurent assujettis aux interdictions posées par le droit pénal national par le seul fait de leurs actes de belligérance.

Donc oui, les belligérants non privilégiés dans un conflit armé, qu'il soit international ou non international, sont protégés par des règles relatives à la conduite des hostilités (droit de La Haye). Par exemple, cela constitue autant un crime de guerre d'utiliser du gaz toxique ou d'user de perfidie afin de tuer un combattant non étatique ou un civil ayant participé directement dans les hostilités que de tuer un combattant. Les premiers sont également protégés par le droit de Genève contre les mauvais traitements quand ils sont au pouvoir de l'ennemi, que ce soit par la quatrième Convention de Genève, les Protocoles additionnels, l'article 3 commun aux Conventions de Genève ou le DIH coutumier. Cela constitue autant un crime de guerre que de torturer ou maltraiter un détenu qui est un combattant non étatique ou un civil ayant participé directement aux hostilités que de torturer ou maltraiter un prisonnier de guerre. Il s'agit en fait d'une question de vocabulaire qu'il importe de clarifier.

Does IHL protect "unlawful combatants"?

My answer is 'no', but what I mean is 'yes'.

'No' because technically, there is no such thing as an 'unlawful combatant'. There are merely combatants and civilians. The term 'unlawful combatant' obscures and conflates the distinction between combatants and civilians that is the most fundamental principle of International Humanitarian Law (IHL).

And 'yes', because the people erroneously referred to as 'unlawful combatants' are most certainly protected by the Geneva Conventions and their Additional Protocols (AP) and by customary IHL applicable to both international and non-international armed conflicts.

Some background. It was a very intentional construction by the drafters of the third Geneva Convention and API to define combatants as members of the armed forces of a State party to an armed conflict, in other words, privileged belligerents – all for the purpose of defining who is entitled to prisoner of war (POW) status. And instead of attempting a distinct, positive definition of 'civilian', the fourth Geneva Convention defines persons covered by that convention as almost everyone else in the power of the enemy who is not entitled to POW status under the third Geneva Convention. This is deliberate. The intent is to make sure, as

the International Committee of the Red Cross's (ICRC) Commentary to the Geneva Conventions famously says, that no one gets left out ('There is no intermediate status'). Thus, a civilian who takes part in hostilities, even if she is the rebel generalissima, does not therefore become a combatant. She may be targetable by virtue of what the ICRC Guidance on Direct Participation in Hostilities calls a 'continuous combat function', and she may be detainable, but by default, she is still a civilian under the traditional binary IHL construction. In fact, under this traditional construction, the only combatants in a non-international armed conflict are the members of a State party's armed forces. Non-State fighters simply do not have a privilege of belligerency, with the possible exception of those fighting colonial and racist regimes, whose causes are transmogrified by API, where applicable, from non-international to international armed conflict.

Given the definition of 'combatant' and its equation with the concept of privileged belligerency, the term 'unlawful combatant' is an oxymoron and the term 'lawful combatant' is redundant.

Both combatants and civilians are protected by IHL provisions on conduct of hostilities (Hague law) and rules for protection of persons in the power of the enemy (Geneva law).

The usual response from Americans who reject this analysis is *Quirin*. *Ex Parte Quirin* is the US Supreme Court case from World War II, in which the court uses the term 'unlawful combatants' for German saboteurs. Of all the things that were wrong with *Quirin* (the defendants were executed before their appeal was completed), the Court got one thing right: it used the term 'unlawful combatant' not with reference to the status of the accused, but rather to their conduct. They were privileged belligerents, members of the German military, combatants who were convicted of perfidious conduct, here to further the German war effort under the guise of civilian status.

These days, virtually all armed conflict is non-international, namely between a State and a non-State armed group, or between two or more non-State armed groups. That does not mean it cannot be transnational, but it is not 'international' because the definition of international is 'between two or more High Contracting Parties to the Geneva Conventions'.

The US took the position that its conflict with the Taliban and Al Qaeda was neither international (at least not after the Taliban ceased being the government in Afghanistan) nor 'internal' because several States were party to it. In fact, you will see in the President's infamous Memorandum of February 7, 2002, how this determination led to the desired and outrageous conclusion that in this war, detainees have no legal entitlement to humane treatment. The al-

ternative to international armed conflict is not internal armed conflict, it is non-international armed conflict.

Post 9/11, the constructs of IHL were derailed by the Bush lawyers and we still have not recovered. They determined that their Guantanamo detainees were neither combatants nor civilians in order to deny them the protections of IHL against torture. Thus was born the description of Guantanamo as a 'black hole', not only because of its legacy of detainee mistreatment, but also because it was a place that misguided American authorities attempted to place outside the rule of law. The Supreme Court corrected that in the *Hamdan* decision, which confirmed the application of common Article 3, which requires humane treatment, but the 'unlawful combatant' label remained.

The *Hamdan* case's application of common Article 3 is recognition, much like the definition of 'civilian' in relation to 'combatant', that all armed conflicts that are not international are non-international, governed at least by common Article 3. This construction is not obviously supported by the language of common Article 3, which speaks of 'armed conflict not of an international character occurring on the territory of one of the High Contracting Parties', but this language obviously doesn't exclude such armed conflicts simply because other States are involved. And while the Supreme Court did not rule that Common Article 3 applies *de jure* to armed conflicts that occur on the territory of more than one High Contracting Party (think Pakistan), it did rule that the protections of common Article 3 are a customary floor for all armed conflicts, in other words, including those not otherwise covered by the Conventions.

The Obama administration, which has a somewhat more sophisticated understanding of, and greater respect for IHL than the Bush administration did, created a distinction without a difference. 'Unlawful enemy combatants' became 'unprivileged enemy belligerents'. Some of them were, in fact, fighters, most were not.

One final point. There's a belief, within the US Congress that passed the Military Commissions Act, and the US administration that determines who to prosecute in the Guantanamo military commissions, that unprivileged belligerency is a war crime. It is not.

IHL operates on a premise of equality of parties to the conflict. If the State's armed forces are entitled to participate in hostilities, so are the rebels. Were it otherwise, the rebels would have little incentive to respect IHL. However, this is not to say that unprivileged belligerents have a privilege of belligerency – obviously. Privileged belligerents/combatants are immune from the operation of domestic law that prohibits and punishes those who commit assault and murder, as long as the target of the privileged belligerent is a legitimate military objective.

What unprivileged belligerency really means is that in an international armed conflict, where POW status applies, unprivileged belligerents do not qualify for POW status. In the domestic law frame, unprivileged belligerents, unlike combatants, remain subject to domestic criminal law prohibition merely for their acts of belligerency.

So yes, unprivileged belligerents, whether in international or non-international armed conflict, are protected by rules concerning the conduct of hostilities (Hague law). It is as much a war crime to use poison gas or perfidy to kill a non-State fighter or a civilian who has directly participated in hostilities as it is a combatant. And they are also protected by Geneva law from mistreatment when in the power of the enemy, whether it is the fourth Geneva Convention, the Additional Protocols, common Article 3 or customary IHL. It is as much a war crime to torture or otherwise mistreat a detainee who is a non-State fighter or civilian who has directly participated in hostilities as it is to torture or otherwise mistreat a POW.

Now if we could only get our vocabulary right.

Thank you.

SESSION 2 – PERSONAL SCOPE OF APPLICATION OF INTERNATIONAL HUMANITARIAN LAW (IHL)

During the debate following the presentations of the second session, the audience raised two main issues:

1. The issue of threshold and direct participation in hostilities

One of the speakers questioned the relevance of the distinction between common Article 3 situations on the one hand and second Additional Protocol (APII) situations on the other with regard to direct participation in hostilities. He stressed that the threshold of APII is hardly ever reached in practice and wondered whether customary international law recognises the existence of two thresholds.

A panellist stressed the need to have a customary study on thresholds of applicability, in particular in the case of non-international armed conflicts (NIACs).

Another panellist raised the issue of using status rather than conduct to determine targetability in NIAC regardless of whether it is a common Article 3 NIAC or an APII NIAC.

One panellist replied that, under treaty law, in NIAC the only test is a behaviour test meaning that a person can only be targeted if by his or her behaviour he or she is taking a direct part in the hostilities. However, according to the majority of States who commented on the International Committee of the Red Cross's (ICRC) Interpretive Guidance on the Notion of Direct Participation in Hostilities, a person would be targetable merely by virtue of his or her membership of an organised armed group, irrespective of what that person is doing and regardless of the threat they pose at the time. Furthermore, according to the concept of targetability by virtue of membership, there would be no legal obligation to attempt to detain. This is why it is important not to have too low a threshold for NIAC so that the IHL paradigm does not replace the law and order paradigm too early in the escalation of the situation. Otherwise, this could lead to low intensity situations in which the armed forces start firing on anybody they think is a member of an organised armed group. On the other hand, a high minimum threshold would make it more difficult to deal with non-State actors. If a member of an organised armed group intentionally killed civilians, that would not be qualified as a war crime in the case IHL was not applicable.

One of the speakers asked whether an individual, member of an organised armed group fighting against State A, could be legally targeted by State B that is in no way involved in that armed conflict. Is the answer different according to whether the conflict is an IAC or a NIAC?

A panellist replied that, as there is no nexus between State B and the individual, the latter could not be legally targeted by State B. The situation would however be different if State B was assisting State A in dealing with a NIAC happening on State A's territory. In that case, State B, as an assisting State, could regard anybody participating in the armed conflict against State A as also participating in an armed conflict against itself. For example, in the case of Afghanistan, if a person is taking part, as a member of an organised armed group or directly participating in hostilities directed against Afghan forces, that does not prevent the International Security Assistance Force (ISAF) contributing nations to regard that as direct participation in hostilities also against them. The key question is not whether you are a third State, but whether you are a third State involved in the conflict.

2. The interplay between IHL and Human Rights Law

One of the speakers highlighted the danger of drawing conclusions about what the European Court of Human Rights (ECtHR) would do were it faced with the issue of the relationship between IHL and European Convention on Human Rights (ECHR) on the basis of what it decided in the *Al-Jedda* case with regard to the relationship between the ECHR and a Security Council resolution, since the policy behind these two is not the same. Furthermore, IHL was never argued in the *Al Jedda* case.

Another speaker raised the issue of using the *lex specialis* doctrine to approach the interplay between IHL and International Human Rights Law arguing that the term *lex specialis* is interpreted and applied in too many different ways. The speaker further argued that the *lex specialis* doctrine will not solve the issue of the interplay between IHL and International Human Rights Law and that there are other ways of trying to approach this interplay.

A panellist drew attention to the fact that the relationship between Human Rights and the law on armed conflict can be an important dilemma not only in NIAC, but also in IAC. Indeed, in its report on the IAC between Cyprus and Turkey for example, the European Commission of Human Rights found that the detention by Turkey of people in Cyprus was unlawful as there is no provision in Article 5 of the ECHR for detaining people on the basis that they are prisoners of war. On the relationship between Human Rights Law and IHL, the panellist agreed with

the previous speaker that it cannot be assumed that the ECtHR's attitude towards IHL will be the same as its attitude towards a Security Council resolution. The panellist added that in the judgments it has issued, the ECtHR has taken into account the Vienna Convention on the Law of Treaties, the customary rules on jurisdiction and international rules about the operation of the international legal system. The panellist argued that from what the Court has decided in those cases, there are certainly grounds for a State to argue that the Court should take into account the separate applicable body of law which applies by virtue of international law and is specifically designed for this, namely IHL.

Session 3 – Temporal scope of application of ihl

Chairperson: **Frederik Harhoff**, *Judge, ICTY*

BEGINNING OF IHL APPLICATION: OVERVIEW AND CHALLENGES

Louise Arimatsu

Chatham House

Résumé

L'application du droit international humanitaire (DIH) dépend de l'existence d'un conflit armé. Il convient dès lors d'examiner les critères permettant d'établir l'existence d'un conflit armé international, d'une part, et d'un conflit armé non international de l'autre.

1. Conflit armé international (CAI)

Les critères généralement reconnus permettant d'établir l'existence d'un CAI sont dérivés de l'article 2 commun aux Conventions de Genève de 1949 qui dispose que « La présente Convention s'appliquera en cas de guerre déclarée ou de tout autre conflit armé surgissant entre deux ou plusieurs des Hautes Parties contractantes, même si l'état de guerre n'est pas reconnu par l'une d'elles. La Convention s'appliquera également dans tous les cas d'occupation de tout ou partie du territoire d'une Haute Partie contractante, même si cette occupation ne rencontre aucune résistance militaire ».

Pour que le droit relatif aux CAI trouve à s'appliquer, le conflit doit impliquer deux ou plusieurs Etats. Il est sans importance que les États impliqués dans un conflit se reconnaissent mutuellement en tant qu'Etats. Le DIH trouvera à s'appliquer pour autant qu'un conflit armé existe dans les faits. Le terme « conflit armé » présuppose l'existence d'hostilités entre les forces armées des belligérants. Le Commentaire du CICR relatif à l'article 2 commun aux Conventions de Genève dispose que « tout différend surgissant entre deux Etats et provoquant l'intervention des membres des forces armées est un conflit armé (…) La durée du conflit ni le caractère plus ou moins meurtrier de ses effets ne jouent aucun rôle ». Contrairement à cette affirmation, les Etats ont tendance à refuser de considérer des incidents isolés (communément dénommés « affrontements frontaliers sporadiques ») comme des CAI. Certains de ces incidents ont pourtant causé des décès, blessures et des destructions et dommages considérables aux biens.

2. Conflit armé non international (CANI)

L'article 3 commun aux Conventions de Genève s'applique aux « conflits armés ne présentant pas un caractère international et surgissant sur le territoire de l'une des Hautes Parties contractantes ». En estimant qu' « un conflit armé existe chaque fois qu'il y a recours à la force armée entre Etats ou un conflit armé prolongé entre les autorités gouvernementales et des groupes armés organisés ou entre de tels groupes au sein d'un État », le Tribunal pénal international pour l'ex-Yougoslavie (TPIY) a affirmé que deux critères de base doivent être pris en considération : la violence doit atteindre un degré minimal d'intensité et les parties impliquées dans le conflit doivent montrer un degré suffisant d'organisation. Les tribunaux ont identifié plusieurs indicateurs permettant d'évaluer si le seuil d'intensité a été atteint. Parmi ceux-ci figurent la gravité des attaques et leur récurrence, l'expansion temporelle et territoriale de la violence, le caractère collectif des hostilités, le type d'armes ou encore le nombre de personnes déplacées. En ce qui concerne le second critère, les acteurs non étatiques doivent être « armés », c'est à dire être capables d'organiser des attaques. Afin de déterminer si ce seuil a été atteint, les tribunaux se sont basés sur des critères tels que l'organisation et la structure du groupe armé ; l'adoption de règlements internes ; la nomination d'un porte-parole ; l'émission d'ordres ; la capacité de recruter de nouveaux membres ; etc.

Les CANI du deuxième Protocole Additionnel (PAII) sont ceux « qui se déroulent sur le territoire d'une Haute Partie contractante entre ses forces armées et des forces armées dissidentes ou des groupes armés organisés qui, sous la conduite d'un commandement responsable, exercent sur une partie de son territoire un contrôle tel qu'il leur permette de mener des opérations militaires continues et concertées et d'appliquer le présent Protocole ». Contrairement à l'article commun 3, le PAII ne s'applique pas aux conflits entre acteurs armés non étatiques. Il est important de noter que le PAII développe et complète l'article 3 commun aux Conventions de Genève sans en modifier les conditions d'application.

The term 'threshold' has been referred to by speakers throughout the two previous sessions. It is a notion that dominates the question of what conditions function to operationalise the application of International Humanitarian Law (IHL). IHL's applicability is often contested on the basis that the requisite 'threshold' has not been met; the term not only is invoked to dispute the facts but also facilitates the reintroduction of a subjective test.

Although the vast majority of IHL rules apply only in certain situations of violence, some obligations are binding on States at all times.[1] The aim of these rules is to ensure that in times

1 In some cases the obligation arises by virtue of the customary international law status of the rule while in other cases, the obligation on a State is treaty-based.

of armed conflict the warring parties are able to adhere to their obligations.[2] The following discussion does not apply to this latter class of rules.

As a principle, the applicability of IHL is dependent on the existence of an armed conflict. The simplicity of this rule nevertheless obscures the difficulties faced in finding, and in naming, a particular situation of violence as an 'armed conflict'.

1. From 'war' to 'armed conflict'

Prior to the adoption of the 1949 Geneva Conventions, it was common practice for States to insist that the applicability of a law of war treaty was contingent on the existence of a 'state of war' in the *legal* rather than material sense.[3] The fact that States were engaged in armed hostilities was consequently regarded as *insufficient* to displace the law of peace with the law of war; what was required was an express declaration of war or compelling evidence of an *intention* on the part of the States to initiate a 'state of war'[4]. Since the applicability of IHL was, for the most part, dependent on whether a State chose to recognise the existence of a 'state of war', the humanitarian ambitions embedded in the law were often thwarted by arbitrary political decisions.

In an attempt to remedy the disconnection between fact and law, the drafters of the 1949 Geneva Conventions deliberately avoided the term 'war' in the text, preferring to use 'armed conflict', founded on the reasoning that the latter entailed a factual assessment. This new terminology, it was thought, would circumvent the vexing question involving the legal definition of 'war' thereby ensuring that the rules would apply in all situations that, as a matter of fact, amounted to armed conflict. The belief that the applicability question had been resolved was short-lived. Today, arguments persist as to whether a given situation of violence is in fact an armed conflict for the purpose of determining whether IHL applies.

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2 Examples include: in the study, development, acquisition or adoption of a new weapon, means or method of warfare, it must be determined whether its use would, in some or all circumstances, be prohibited by international law (Article 36 of API); legal advisers for military leaders must be employed and trained (Article 82 of API, Rule 141 of the ICRC *Study on Customary International Humanitarian Law* - SCIHL); States must provide instruction in IHL to their armed forces (Articles 47, 48, 127, 144 of the four Geneva Conventions respectively, Article 83 of API, Article 19 of APII, Rule 142 of the SCIHL). There are some provisions within the Geneva Convention that, because they are not self-executing, require States to introduce implementing legislation, as for example the obligation to prosecute grave breaches.

3 Quincy Wright, "When Does War Exist?" in: *American Journal of International Law*, vol.26, 1932, pp. 362-368 .

4 Ibid., pp. 364-367. See ICRC "Commentary to common Article 2" which notes that law of war conventions were applicable only in respect of 'international war, regularly declared, with recognition on either side that a state of war existed'.

The term ‘armed conflict’ is context-dependent in that the criteria for determining the existence of an armed conflict differ according to whether the armed violence is one fought between States (international armed conflict) or between a State and non-State actor or between such actors (non-international armed conflict). The conditions that trigger the application of IHL for international and non-international armed conflict are therefore addressed separately.

2. International armed conflict (IAC)

The generally accepted criteria for the existence of an international armed conflict are derived from common Article 2 of the 1949 Geneva Conventions which provides:

> ‘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 recognised 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’.[5]

For the law applicable +to IAC to apply, the conflict must involve two or more States as parties on opposing sides. IHL applies equally to all the belligerents and is not contingent on the lawfulness of the use of force (*jus ad bellum*).[6] The attempts on the part of States to challenge the applicability of IHL on the grounds that they did not recognise the government or the State with which they were engaged in armed hostilities was specifically addressed in the Geneva Conventions and Additional Protocol I.[7] Accordingly, whether States have formally recognised one another is irrelevant insofar as the application of IHL is concerned.[8]

As common Article 2 makes clear, the Conventions apply to any armed conflict between States, even if a state of war is not recognised by one of them. Even if none of the parties recognise the existence of a state of war, IHL will apply provided that an armed conflict exists *in fact*.[9]

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5 Common Article 2, Geneva Conventions (GC) I-IV.

6 Paragraph 5 of the preamble to Additional Protocol I provides that its provisions, as well as those of the four 1949 Geneva Conventions, ‘must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.’

7 Article 13, paragraph 3, GCI; Article 13, paragraph 3, GCII; Article 4A, paragraph 3, GCIII; Article 43, paragraph 1, API.

8 See for example February 7, 2002 memorandum released by President George W. Bush reversing the Administration’s previous policy that the Geneva Conventions did not apply to the conflict in Afghanistan because it was a ‘failed’ State. See also *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004)

9 See for example *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, 2004, paragraph 3.2.3

The applicability of IHL is not affected by a State's domestic laws nor by how States characterise the conflict to their domestic audience.[10]

An IAC can materialise and activate the application of IHL in a number of different ways. In by far the majority of cases, this has involved the use of armed force but in some situations IHL has applied despite the absence of hostilities. This distinction is sometimes described in the literature as a difference between *de facto* war (war in the "material" sense) and *de jure* war (war in the "legal" or "technical" sense). A typical example of the latter would be a declaration of war.

a) A formal declaration of war

With the adoption of the UN Charter and the *jus ad bellum* regime, the practice of States to formally declare war on one another all but disappeared. Until then, such declarations were often preceded by a conditional declaration of war in the form of an ultimatum.[11] Although this latter practice has not altogether been abandoned by States[12], the application of IHL is not activated by the ultimatum but, rather, by the subsequent use of force. A declaration of war *following* a use of armed force is better viewed as merely a (political) confirmation that IHL applies to the conflict. In other words, it is the prior use of armed force that activates the application of IHL rather than the subsequent declaration.[13] Armed hostilities may not necessarily take place immediately following a declaration of war; nevertheless, IHL will govern the relations between the States.[14] For example, if prior to the use of armed force and following a declaration of war, a State decides to intern enemy nationals within its jurisdiction, persons so interned will be entitled to the protection of Geneva Convention IV.[15]

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10 IHL will apply as demonstrated by the 1982 armed conflict between the UK and Argentina. For a useful analysis see Michael Meyer, "Liability of Prisoners of War for Offences Committed Prior to Capture: The Astiz Affair", in: International and Comparative Law Quarterly, vol. 32, 1983, pp. 948-949

11 See the 1907 Hague Convention III requirement that hostilities would commence only after a formal declaration of war or following an ultimatum with a conditional declaration of war.

12 For example, see letter from President George W. Bush to Saddam Hussein of January 5, 1991 following the invasion of Kuwait and just prior to the launching of Operation Desert Storm. See also address to Joint Session of Congress on 20 September 2001 by President George W. Bush directed at the Taliban regime following the 9/11 attacks.

13 *New York Life Insurance Company v. Bennion*, 158F. 2d. 260 (10th Cir. 1946): IHL governed the relations between the US and Japan on December 7, 1941 at 7:30 a.m. Honolulu time – the commencement of the attack on Pearl Harbour – and not the following day at 4:10 p.m. when Congress declared war on Japan.

14 During World War II a number of Latin American countries declared war on the Axis Powers. Although they did not take part in the hostilities, those countries treated nationals of the Axis Powers within their jurisdiction as enemy nationals. *L.C. Green, The Contemporary Law of Armed Conflict*, Manchester University Press,1993, p. 74.

15 Christopher Greenwood, "Scope of Application of Humanitarian Law", in *The Handbook of International Humanitarian Law* (Dieter Fleck ed., 2d ed. 2008) 47.

b) Resort to armed force

Although armed hostilities are *not* a precondition to the existence of a conflict, IACs are typically characterised by a use of armed force coupled with the invasion of the territory of an adverse party. As L.C. Green comments, 'when this occurs, for parties to the Geneva Conventions of 1949 and Protocol I the laws of war as defined in those instruments come into immediate effect, even in the absence of a declaration'.[16] Armed hostilities triggering the applicability of IHL need not necessarily involve the incursion of enemy territory since an IAC can, in theory, be waged exclusively on the high seas, international air space, or outer space. Moreover, in the digital age, it is not beyond the realms of possibility that an IAC can exist in the cyber domain not requiring the physical deployment of the armed forces beyond a State's own borders.[17]

The term 'armed conflict' presupposes the existence of *hostilities* between the armed forces of the belligerents. As noted above, although the displacement of the term 'war' for 'armed conflict' may have quelled the disputes over the legal definition of war, the term 'armed conflict' has generated its own set of disagreements. Central to these debates is whether a minimum level of violence is required before the armed exchanges between States are considered to be an armed conflict. At one end of the spectrum is the view exemplified by the ICRC's Commentary to common Article 2 of the Geneva Conventions which states: '[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict (…). It makes no difference how long the conflict lasts, or how much slaughter takes place'.[18] This low threshold of violence corresponds with the view that the overriding purpose of the Conventions is to ensure maximum protection for those groups that the law seeks to protect.[19] That said, State practice appears to convey another story in that isolated incidents (commonly described as 'sporadic border clashes' or 'naval incidents') have, by and large, not been

16 'Wars frequently begin with the crossing of an international border and the invasion of the territory of the adverse party.' Greenwood, ibid. p.77.

17 Under existing international law, the applicability of IHL as a consequence of a cyber operation must result in death, injury, destruction or damage.

18 ICRC *Commentary on the Geneva Conventions of 12 August 1949* – Convention I at 32; Convention II at 28; Convention III at 23; Convention IV at 20. See also ICRC *Commentary on the Additional Protocols* (AP); commentary to API states: 'humanitarian law also covers any dispute between two States involving the use of their armed forces. Neither the duration of the conflict, nor its intensity, play a role: the law must be applied to the fullest extent required by the situation of the persons and objects protected by it.' p. 76, paragraph 62.

19 IHL is 'aimed, above all, at protecting individuals, and not at serving the interests of States'; API Commentary ibid., p. 76, paragraph 63. See also example of US pilot shot down and captured by Syrian forces over Lebanon in the 1980s; Greenwood, op.cit. p. 81, p. 48.

treated as international armed conflicts.[20] Despite the fact that some of these incidents have resulted in death, injury and considerable destruction and damage to property, the tendency on the part of States to dismiss such confrontations as falling short of armed conflict, has led some commentators to conclude that the intensity of the violence does matter, as does possibly its duration.[21] Accordingly, it is argued, the threshold at which the violent exchanges between States transform from a series of 'incidents' to an armed conflict is relatively high. The reluctance on the part of States to articulate an unambiguous test that leaves open the possibility for such incidents to be evaluated on 'a case-by-case basis in light of the attendant circumstances'[22] is not surprising given the gravity of conceding that a state of war exists.

States often suggest that because those involved in such incidents are law enforcement personnel and acting in that capacity, the operation is governed by the law enforcement paradigm rather than IHL. Since an IAC may also materialise as a consequence of a military operation authorised by a State but conducted by entities other than the regular armed forces the question of 'who' is involved in the operation is irrelevant. Likewise, deploying the armed forces to conduct assignments that are normally the responsibility of non-military agencies does not alone initiate an armed conflict.

This cursory examination of State practice leads us to the conclusion that the objective test that the drafters of the Geneva Conventions introduced (with the substitution of the term 'war' with 'armed conflict') has assisted in ensuring greater protection to the victims of armed conflict. Nevertheless, there has not been a complete departure from pre-Geneva Convention practice since the invoking of the notion of 'threshold' has enabled States to assert subjective judgments that do not necessarily correspond with the facts. In other words, it is the *intention* of the State that, after all, matters.

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20 Greenwood, op.cit. p. 81, pp.47-48, but also see Howard S. Levie, "The Status of Belligerent Personnel 'Splashed' and Rescued by a Neutral in the Persian Gulf Area", p. 31 in: *Virginia Journal of International Law*, (1991) pp. 611, 613-614. In the period since the conclusion of the 1953 Panmunjom Agreement (which had the legal effect of terminating the armed conflict between North and South Korea) there has been a catalogue of military clashes between the two States. For example, in 2002 an exchange of fire between North and South Korea resulted in the sinking of a patrol boat and the death of four South Korean sailors and in 2010, North Korea launched an attack on Yeonpyeong Island in South Korea killing four people including two soldiers. In none of these cases has there been a suggestion that an international armed conflict existed between the two States.

21 *International Law Association report on the Use of Force* (2010); <http://www.ila-hq.org/en/committees/index.cfm/cid/1022>

22 *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, 2013, Rule 22, paragraph 12.

c) Belligerent Occupation

As the text of common Article 2 makes clear, a belligerent occupation meeting with no armed resistance will, as a matter of law, trigger the application of IHL.[23] In most situations, IHL would have been rendered applicable following a declaration of war and/or the outbreak of armed hostilities ; consequently, occupation situations falling within the scope of the definition in Article 2 are likely to be rare.

d) Withdrawal of consent

The question of whether the withdrawal of consent to the presence of foreign armed forces triggers the application of IHL was addressed by the International Court of Justice (ICJ) in *the Armed Activities* case[24]. On 28 July 1998, President Kabila called for the withdrawal of foreign troops from the Democratic Republic of the Congo's (DRC) territory, having previously consented to the presence of the armed forces of both Uganda and Rwanda. The ICJ found that by 8 August the DRC had withdrawn any earlier consent and that the nature of Ugandan action along the common border was of a 'different nature from previous operations'. According to the Court, from this time onwards, Uganda was not engaged in military operations against the rebels who were carrying out cross-border raids but rather, Ugandan troops were engaged in military assaults that resulted in the taking of numerous towns within the DRC's territory. There is no doubt that an IAC existed between the DRC and Uganda from at least 8 August to which IHL applied. But what of the period in between? Kabila's declaration on 28 July would not necessarily have operationalised the applicability of IHL but the subsequent decision by Uganda not to withdraw its troops would have done so.

e) Blockades

The establishment of a naval or aerial blockade will initiate an international armed conflict and trigger the application of IHL.[25]

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23 Geneva Conventions I-IV, common Article 2. It does not follow that the termination of an occupation can be equated to the end of an international armed conflict. The law applicable to IAC will continue to govern the parties at least until the 'cessation of active hostilities' (GCIII, Article 118, paragraph 1) or the 'general close of military operations' (API, Article 3, sec. b,) or any other method by which the armed conflict is terminated.

24 Case Concerning Armed Activities on the Territory of the Congo *(Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J Reports 2005, p. 168.

25 'The American Civil War began with President Lincoln's proclamation of blockade on April 19, 1861. Congress recognised President McKinley's blockade of Cuba on April 22, 1898, as beginning war against Spain, and on April 25, 1898, made a declaration retroactive to that date'. Wright, op. cit. p. 78, p.364.

f) Additional Protocol I conflicts

For States party to Additional Protocol I, armed conflicts in which peoples are fighting against colonial domination, alien occupation, or racist regimes in the exercise of their right of self-determination, are to be considered international armed conflicts.[26] Armed conflicts meeting the above criteria will be governed by the Conventions and Protocols as long as the authority representing the people has made a unilateral declaration as set forth in Article 96, API.

3. Non-international armed conflict (NIAC)

Treaty law together with the *ad hoc* tribunals' rich body of jurisprudence provides detailed guidance as to when a situation of violence amounts to a non-international armed conflict so as to trigger the application of IHL. Of the two instruments that apply to NIAC – common Article 3 of the Geneva Conventions (CA3) and the 1977 Additional Protocol II to the Geneva Conventions (APII) – it is the latter that sets forth far more detailed rules despite its narrower scope of application. As with international armed conflict, there is no codified definition of NIAC although treaty law does inform us as to what type of violence is *not* governed by IHL.

Article 1(2) of APII identifies situations of violence that do not meet the 'armed conflict' threshold and in so doing excludes 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature'.[27] As elaborated in the Commentary to Article 1(2), even if the Government is forced to deploy armed units, to the extent that the purpose is to restore law and order, such violence is considered *not* to constitute armed conflict in the legal sense.[28] This threshold also applies to CA3.

a) Common Article 3 conflicts

CA3 applies to 'armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties'.[29] Although not in the text, it has always been assumed

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26 See Article 1(4) of Additional Protocol I.

27 Further insight is provided in the Commentary to APII which adds, 'riots, such as demonstrations without a concerted plan from the outset; isolated and sporadic acts of violence, as opposed to military operations carried out by armed forces or armed groups; other acts of a similar nature, including, in particular, large scale arrests of people for their activities or opinions'. Commentary to APII, op. cit. p. 82, paragraph 4474.

28 Ibid. paragraph 4477.

29 The reference in the text that a NIAC occurs 'in the territory of one of the High Contracting Parties' has generated debate over the geographical scope of non-international armed conflict. Although some commentators suggest that NIACs are confined to those that take place *within* the territorial boundaries of a single State, the dominant view is that 'one' is a reference to the territory of any of the Contracting Parties. The phrase imposes no territorial limitations so long as the relevant States are party to the 1949 Geneva Conventions.

that the provision applies to hostilities between government forces and armed groups as well as between such groups.[30] Over the years, the international tribunals have contributed significantly to our understanding of the requisite criteria for determining the existence of a NIAC.[31] With the simple statement that 'an armed conflict exists whenever there is (...) protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'[32] the International Criminal Tribunal for the former Yugoslavia (ICTY) affirmed that two basis criteria must be met: the violence must reach a minimum level of intensity and the parties involved in the conflict must show a minimum degree of organisation.[33]

The tribunals have identified various indicators that should be considered when assessing whether the intensity threshold has been met.[34] These include the gravity of attacks and their recurrence; the temporal and territorial expansion of violence, the collective character of hostilities, whether various parties were able to operate from a territory under their control, an increase in the number of government forces, the mobilisation of volunteers, the distribution and type of weapons among both parties to the conflict, the numbers of people displaced, and whether the situation has come to the attention of the Security Council.[35] More recent judgments of the ICTY have de-emphasised factors such as geographical scope and temporal duration of the violence which have been integrated within the concept of intensity.[36]

Insofar as the second criterion is concerned, the non-State actors must be 'armed' in that they must have the *capacity* to mount attacks. Although there must be some measure of organisation to be a party to the conflict, this does not have to reach the level of a conventional

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30 See Commentary to APII, ibid., paragraph 4461.

31 That said, there was already widespread agreement that the existence of a non-international armed conflict requires 'open hostilities between armed forces which are organised to a greater or lesser degree' Commentary to APII, ibid., paragraphs 4341 p 1355

32 *Prosecutor v. Tadić* Decision on the Defence Motion for Interlocutory Appeal, paragraph 70. Although the Appeals Chamber described the violence as being 'protracted' the term has not been quantified in the law. In *Abella*, the Inter-American Commission on Human Rights (Inter-Am. C.H.R) characterised a 30-hour clash between dissident armed forces and the Argentinian military as non-international armed conflict. *Abella v.Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA\Ser.L\V\II.98, doc. 6 rev. (1998). It would seem that the violence need not be continuous in nature since frequent attacks occurring within a defined period may be characterised as 'protracted'.

33 See, e.g., *Milošević* Decision, IT-02-54-T, paragraphs 16-17; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber Judgment, paragraph 59 (International Criminal Tribunal for the Former Yugoslavia, Dec. 10, 1998); *Delalić* Judgment, IT-96-21-T, paragraph 183; U.K. Manual op.cit. p. 80, paragraph 15.3.1.

34 See, e.g., *Haradinaj* Judgment, IT-04-08-T, paragraphs 40-49.

35 See e.g. *Limaj* Judgment IT-03-66-T, paragraphs 135-167.

36 *Haradinaj* Judgment, paragraph 49.

militarily unit. To determine whether this threshold has been met, the tribunals have assessed: the organisation and structure of the armed group, the adoption of internal regulations, the nomination of a spokesperson, the issuing of orders, political statements and communiqués, the establishment of headquarters, the capacity to launch coordinated action between the armed units, the establishment of a military police and disciplinary rules, the ability to recruit new members, the capacity to provide military training, the creation of weapons distribution channels, the use of uniforms and various other equipment, and the participation by members of the group in political negotiations.[37]

The guidance provided by the tribunals has helped to clarify, in concrete terms and by reference to objective criteria[38], what factors should be considered when determining whether or not a NIAC exists. Nevertheless, the absence of an authoritative body with the mandate to issue a categorical statement as to the existence of a non-international armed conflict means that disagreements as to whether IHL applies in a particular situation continue to subsist. Increasingly, this shortcoming has been remedied as international organisation such as the ICRC, various United Nations (UN) bodies and the International Criminal Court (ICC) have issued statements and reports as to the existence of an armed conflict.[39]

b) Additional Protocol II conflicts

APII conflicts are those 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'. Unlike CA3, APII does not apply to armed conflict between non-State armed groups; however, there is nothing in the text to preclude such groups from implementing the Protocol by special agreement, particularly in situations where there is no established government/armed forces of the State.

The applicability of APII is further limited by the criterion that the organised armed group exercises control over territory. The quality of the control over territory is important since it must be sufficient to enable the group to carry out sustained and concerted military opera-

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37 *Limaj* Judgment IT-03-66-T.

38 *Akayesu* Judgment, paragraph 603.

39 For example, see ICRC Operational Update, 17 July 2012, which stated: 'the ICRC concludes that there is currently a non-international (internal) armed conflict occurring in Syria opposing Government Forces and a number of organised armed opposition groups operating in several parts of the country (including, but not limited to, Homs, Idlib and Hama)'; Human Rights Council, Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, A/HRC/17/44.

tions and to apply the Protocol. These are objective criteria and do not depend on the subjective determination by the parties.

It is important to note that Protocol II 'develops and supplements Article 3 common to the Geneva Conventions 'without modifying its existing conditions of application'.[40]

Conclusion

This cursory overview of the conditions that operationalise the application of IHL exposes some of the challenges that continue to be faced by those who seek to invoke the law to ensure the maximum protection of all victims of armed conflict. Over the years significant progress has been made primarily by the insistence that the application of the law is governed by objective criteria. Nevertheless, the continued reluctance on the part of States to concede that an armed conflict exists – particularly in respect of non-international armed conflict within a State's own territory – means that these challenges are likely to persist.

40 Sylvie Junod, "Additional Protocol II: History and Scope" ,1983, p. 33, in: *The American University Law Review*, 35.

END OF IHL APPLICATION

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Résumé

Si la question de savoir quand le droit international humanitaire (DIH) commence à s'appliquer est complexe, celle de la fin de son application l'est encore plus. C'est une question à laquelle les traités n'apportent aucune réponse précise. Un principe général communément admis est que le DIH cesse de s'appliquer une fois que les conditions ayant déclenché sa mise en œuvre cessent d'exister. Par ailleurs, pour que le DIH conserve sa pertinence, son seuil d'application doit être maintenu à tout moment. Afin de préciser davantage ce principe général, il convient d'analyser les éléments constitutifs de chaque type de seuil d'application selon son contexte.

Conflits armés internationaux (CAI)

Le Commentaire des Conventions de Genève de 1949 dispose que « tout différend surgissant entre deux Etats et provoquant l'intervention des membres des forces armées est un conflit armé au sens de l'article 2, même si l'une des parties conteste l'état de belligérance. La durée du conflit ni le caractère plus ou moins meurtrier de ses effets ne jouent aucun rôle ». L'existence d'un CAI repose donc sur un critère purement factuel et objectif, à savoir le recours à la force armée entre Etats, et il devrait dès lors en être de même pour la fin d'un CAI. Pour qu'un CAI puisse être considéré comme ayant pris fin, les hostilités entre les deux parties doivent avoir pris fin de manière stable et permanente. La fin d'un CAI reposera toujours sur une analyse factuelle qui variera au cas par cas et le moment exact auquel le CAI prend fin peut être difficile à déterminer. Entre autres possibilités, des accords – de quelque nature qu'ils soient – conclus par les belligérants peuvent fournir la preuve que les hostilités ont pris fin avec le degré de stabilité et permanence requis, mais c'est le fait que les hostilités aient pris fin qui, au final, sera déterminant.

Les Conventions de Genève (CG) contiennent très peu de dispositions relatives à la fin de leur application. L'article 118(1) de la troisième CG dispose que « les prisonniers de guerre seront libérés et rapatriés sans délai après la fin des hostilités actives ». L'article 6(2) de la quatrième CG stipule quant à lui que « en territoire occupé, l'application de la présente Convention cessera un an après la fin générale des opérations militaires ; néanmoins, la Puissance occupante sera liée pour la durée de l'occupation – pour autant que cette Puissance exerce les fonctions de gouvernement dans le territoire en question – par les dispositions des articles suivants de la présente Convention (…) ». D'autre part, l'article 5 de la troisième CG et l'article 6(4) de la quatrième CG

disposent que la Convention continuera à s'appliquer même après la fin générale des opérations militaires si les personnes protégées sont toujours aux mains de l'ennemi et qu'elles n'ont été ni libérées ni rapatriées avant ce terme. L'on peut donc voir comment l'application des dispositions protectrices de la Convention peut s'étendre au-delà de la fin du conflit armé qui a initié leur application.

Conflits armés non internationaux (CANI)

La définition du CANI se retrouve quant à elle à l'article 1(1) du deuxième Protocole additionnel (PAII) et à l'article 3 commun aux Conventions de Genève interprété par le Tribunal pénal international pour l'ex-Yougoslavie dans l'affaire Tadic comme requérant une violence armée prolongée (« protracted armed violence ») entre un Etat et un acteur non étatique ou entre deux acteurs étatiques suffisamment organisés pour conduire des hostilités. Comme pour les CAI, la fin d'un CANI repose sur une analyse purement factuelle. Cependant, le seuil d'intensité requis par l'article 3 et par le PAII rend cette analyse plus difficile que pour un CAI. Pour qu'un CAI prenne fin, les hostilités elles-mêmes doivent avoir pris fin avec un certain degré de permanence. Une option pourrait consister à traiter les CANI exactement de la même manière et considérer que le CANI persiste tant que certaines hostilités continuent. Une autre option cependant, qui semblerait plus logique, serait de prendre en considération le niveau plus élevé du seuil d'intensité. Il suffirait alors que les hostilités tombent en dessous du seuil de « protracted armed violence » avec un certain degré de permanence et de stabilité. Comme pour les CAI, un CANI peut prendre fin par un accord conclu entre les parties ou par la défaite ou reddition de l'une d'elles ; cependant, la seule question légalement pertinente sera celle de savoir si le seuil d'intensité requis subsiste.

Transformation : internationalisation (CANI à CAI) et internalisation (CAI à CANI)

La transformation d'un CAI en un CANI constitue un enjeu principal dès lors que cette internalisation peut potentiellement entraîner une réduction des protections prévues par le DIH. Bien que les régimes légaux applicables aux CANI et aux CAI aient largement été rapprochés par le biais du développement du droit coutumier, des différences significatives subsistent dans des domaines tels que la détention et le privilège du combattant. Ainsi, bien que les processus de transformation ne mettent pas un terme à l'application du DIH, leurs conséquences pratiques ne doivent pas être sous-estimées.

L'occupation belligérante

Si l'on définit l'occupation comme un contrôle effectif exercé par un Etat sur le territoire d'un autre Etat en l'absence de consentement de ce dernier, il s'ensuit qu'il existe deux modalités par lesquelles une occupation peut prendre fin : la perte de contrôle par l'occupant et le consentement donné à l'Etat occupant par la Puissance souveraine évincée.

Introduction

The question about when International Humanitarian Law (IHL) starts applying is complex enough[1]; the end of IHL's application perhaps even more so. It is certainly one of those questions to which the relevant treaties provide no clear answer, while the complexity is exacerbated by three further considerations.

First, IHL is not a single, coherent body of law. It had no original designer who thought everything through and tied its loose strands together. Rather, like international law generally, IHL is written on a palimpsest, with layers building upon layers and the new replacing the old, but rarely, if ever, doing so completely.

Thus, the Hague law that we still apply today was embedded in the then customary framework in which "war", as an operative legal concept both subjective and formal, was rigidly opposed to "peace". The various waves of Geneva law then built upon that, with the 1949 Conventions and the 1977 Additional Protocols in particular redefining the thresholds of IHL's applicability. We can then add to that the judicial gloss of these thresholds, developed mainly by international criminal courts and tribunals, the developments of customary law that they precipitated, and further developments in State practice in the post-9/11 global arena. Navigating this mess is not easy, as we all know.

One issue that arises from this observation that IHL is a palimpsest is whether the concept of "war" still has any relevance for our modern debates. Common Article 2 of the 1949 Geneva Conventions thus provides that they will *begin* to apply in cases of declared war. But conversely, will their application *end* only with the end of the war in the formal, technical legal sense, once a state of war commenced on top of a plain international armed conflict? Just imagine a scenario of hostilities long having come to an end, yet without a peace treaty normalising in full the relations between the parties.

Some authors, most notably Yoram Dinstein, still give great significance to war as a legal concept.[2] Most, however, and here I include myself, would argue that the main point of the 1949 Geneva reform was precisely to do away with both the subjectivity and formalism of war, and make the thresholds of application objective and factual, with this tendency being only

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1 Generally on classification of armed conflicts see M. Milanovic & V. Hadzi-Vidanovic, "A Taxonomy of Armed Conflict", in C. Henderson & N. White (eds.), *Research Handbook on International Conflict and Security Law* (Elgar, forthcoming 2013), pre-print draft available on SSRN at <http://ssrn.com/abstract=1988915>, on which some parts of the following discussion draw heavily .

2 See generally Y. Dinstein, *War, Aggression, and Self-Defence* (5th ed., CUP, 2011).

strengthened in the intervening years. Having said that, the possibility of the "old" law still having an influence cannot be conclusively excluded.

Second, and in a similar way, even the factual and objective thresholds of modern IHL are fragmented, as is IHL itself. One cannot speak of the end of application of IHL in general terms, but only of the end of application in cases of international armed conflict (IAC), non-international armed conflict (NIAC), and belligerent occupation. While this is true for the bulk of IHL rules, some of them apply all the time, i.e. even outside armed conflict and occupation (e.g. the obligation to disseminate IHL, mark cultural objects, etc.), while the application of others might have started with an armed conflict but need not have ended with the armed conflict (e.g. the obligation to investigate and prosecute grave breaches that occurred in an IAC).

Third, our interpretation of the thresholds of application and IHL's temporal scope will inevitably depend on how we, either individually or as the profession more generally, weigh a number of competing policy considerations. As the law attempts to regulate the ever-evolving practice of warfare, these considerations evolve as well.

Thus, for example, in Geneva in 1949 most of the humanitarian-minded crowd wanted IHL to apply as widely as possible, particularly when it came to hitherto almost unregulated NIACs. States, on the other hand, wanted to both heighten the NIAC threshold and reduce the substantive scope of IHL rules applicable in NIACs, because they wanted to preserve their own freedom to suppress rebellion and internal strife as they saw fit. Today, on the other hand, the fluffy, dovish humanitarians might *not* want IHL to apply expansively, since they may see it as a departure from concurrently (and if need be extraterritorially) applicable International Human Rights Law (IHRL). States, on the other hand, might want IHL to apply, precisely since they would see it as *empowering* rather than constraining them, e.g. with regard to targeted killings and preventive detention.[3] Yet even so, IHL might be still be seen as the last humanitarian refuge, e.g. with regard to the question about whether the occupation of Gaza has ended. Result-oriented jurisprudence is of course nothing new, but I for one would like to see these various considerations weighed openly rather than furtively.

General principle

Bearing these three points in mind, we can, I think, state the one *general* principle on the end of application of IHL: unless there is a good reason of text, principle or policy that warrants an exception, the application of IHL will cease once the conditions that triggered its applica-

3 See Milanovic & Hadzi-Vidanovic, op.cit. p. 93, at 45-47, and the references cited therein.

tion in the first place no longer exist. In other words, if a particular situation can no longer be qualified as an IAC, a NIAC, or an occupation, even if it was so qualified at a particular point in the past, the application of IHL will end.[4]

In the absence of any specific guidance to the contrary, this general principle makes perfect sense in the factual, objective Geneva threshold framework. For IHL to apply, its thresholds of application it must *continue* to be satisfied at any given point in time. In order to elaborate on this general principle further, we must, of course, look at the constitutive elements of each threshold in the context of those particular scenarios in which these elements might be extinguished. We must then establish whether a departure from the general rule is warranted. In doing so, we will observe certain *terminating* processes and events, which end the application of IHL altogether, and certain *transformative* processes and events, which end the application of one IHL sub-regime but engage another.

Let me now deal with each threshold in turn.

International armed conflict

As is well known, IAC was crafted as an explicit replacement for the concept of war. As with war, IAC as defined in common Article 2 (CA2) is of an exclusively interstate nature, a conflict between two equal Sovereigns. In the words of the authoritative Pictet *Commentary*:

> 'Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of [Common] Article 2, even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4 [of the third Geneva Convention]. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application.'[5]

The CA2 threshold is thus remarkably low – all it needs is a difference between two States leading to the intervention of their armed forces. Whether Pictet is indeed correct in this, or

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4 See also D. Jinks, "The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts", in: *HPCR Background Paper*, January 2003, available at <http://www.hpcrresearch.org/sites/default/files/publications/Session3.pdf>, at 3.

5 J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, 4 vols., (Geneva: ICRC, 1952–1959; the full text of the Commentary is available at <www.icrc.org>), at 23.

whether a *de minimis* level of violence needs to occur in order to avoid mere border incidents being classified as IACs, is not the object of my inquiry at this time. Opinions and practice on this point seem to be conflicted. However exactly defined, the IAC threshold is far lower than the NIAC 'protracted armed violence', since it is not subject to the same sovereignty concerns as NIACs. The exact same amount of violence may produce an IAC if perpetrated between States, but might not qualify as a NIAC if committed by non-State actors.

The principal distinguishing point between "war" and "IAC" is the latter's objective and factual nature. All we need is a use of force between States, subject perhaps to a very low *de minimis* threshold. The end of IAC should equally be based on purely factual criteria – what matters is that the hostilities between the two parties have ceased. Because, however, the IAC threshold is relatively easy to satisfy, and because it would be both impractical and open the door to abuse to treat every lull in the fighting as an end to an IAC and each resumption as the start of a new one, hostilities must end with a degree of stability and permanence in order for the IAC to be terminated. Thus, for example, in the *Gotovina* case the Trial Chamber stated that:

> 'Once the law of armed conflict has become applicable, one should not lightly conclude that its applicability ceases. Otherwise, the participants in an armed conflict may find themselves in a revolving door between applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion. The Trial Chamber will therefore consider whether at any point during the indictment period the international armed conflict had found a sufficiently general, definitive and effective termination so as to end the applicability of the law of armed conflict. It will consider in particular whether there was a general close of military operations and a general conclusion of peace.'[6]

This is always a factual assessment, which will vary from case to case and the exact time at which the IAC ended may be hard to pinpoint. Agreements concluded by the belligerent parties, whatever they are called, or unilateral statements by either of them, or resolutions of relevant international organisations, e.g. those of the United Nations (UN) Security Council,[7] may provide *evidence* that the hostilities have ended with the needed degree of stability and permanence. But it is the *fact* that the hostilities have ended that ultimately matters, not the precise legal nature of the instrument in question. Depending on the political and military environment, a cease-fire agreement or an armistice may actually signify the point at which the hostilities have permanently ended, while a formal peace treaty might not be worth the paper it is written on if hostilities continued unabated.

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6 *Prosecutor v. Gotovina*, Trial Chamber Judgment, 15 April 2011, paragraph 1694.

7 Leaving aside the possibility that the Council is through its decisions actually modifying the applicable IHL regime, and indeed that it has the power to do so.

This factual approach is, I think, supported by what little we have in the Geneva Conventions (GC) regarding the end of their application. Thus, Article 118(1) GCIII provides that 'Prisoners of war shall be released and repatriated without delay after the *cessation of active hostilities*.' Article 6(2) GCIV, on the other hand, stipulates that 'In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations', while in occupied territory 'the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.'

Taken together, these two provisions may be seen as making a distinction between two points in time: (1) the cessation of active hostilities and (2) the general close of military operations, so that the former precedes the latter, especially because under Article 20 of the Hague Regulations the obligation to repatriate started at the (formal) conclusion of peace. The Pictet commentary interprets the 'general close' formula as a 'final end of all fighting between all those concerned.' Article 5 GC III and Article 6(4) GCIV, on the other hand, make it clear that the Convention will continue to apply even after the general close of military operations if protected persons are still in the power of the enemy and they have not been released or repatriated before that time. Article 3(b) of API sets out this principle very clearly:

> '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 and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.'

Thus, we can see how the application of the protective provisions of the Convention can survive the end of the armed conflict that initiated their application, as an exception to the general principle which would apply, mainly to IHL rules regulating the conduct of hostilities. That humanitarian exception extends to NIACs as well, as evident from Article 2(2) APII which provides that

> 'At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same

reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.'

Non-international armed conflict

As it stands today, NIAC is a plural legal concept, defined differently under different treaty regimes. The basic definition of NIAC, which encompasses all others, is that in common Article 3 (CA3). Its terms were famously elaborated by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeal Chamber in the *Tadic* Interlocutory Decision on Jurisdiction,[8] which has been widely accepted as reflecting custom. Under *Tadic*, CA3 requires 'protracted armed violence' – a threshold of intensity and possibly duration – between a State and a non-State actor or between two such actors, which are sufficiently organised to conduct hostilities. However, the heightened threshold of Article 1(1) APII requires a non-State actor fighting a State to have an organisational structure with a responsible command, control of a part of the State's territory, the ability to conduct sustained and concerted military operations and the ability to implement the Protocol.

As with IACs, the termination of NIACs is a factual inquiry, but the intensity threshold in CA3 and APII makes that inquiry even less straightforward than in IACs. For IACs to end the hostilities themselves need to end with a certain degree of permanence or finality. One option would be to treat NIACs in exactly the same way – so long as *some* hostilities continue, so would a NIAC.[9] Another option, however, and to me more logical, would be to take into account the heightened NIAC intensity threshold. It would then be enough for the hostilities to fall below the threshold of 'protracted armed violence' with a certain degree of permanence and stability; they would not need to end altogether. As with IACs, NIACs can end through an agreement between the parties, a stalemate, or one of the parties' defeat and surrender, but again the only legally relevant question would be whether the threshold continues to be satisfied. Similarly, APII NIACs could end or transform into simple CA3 NIACs if the non-State party fighting the State becomes so structurally compromised that it no longer has a responsible command, or control over territory, or the ability to conduct sustained and concerted military operations or implement the Protocol.

For an example of a NIAC ending through the complete defeat of an adversary we need only look at the Sri Lanka conflict. For an example of a NIAC petering out we can take post-surge Iraq. Again, the inquiry is purely factual; in some cases it will be relatively easy to make out

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8 *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber) (Oct. 2, 1995), paragraph 70.

9 Cf. S. Sivakumaran, *The Law of Non-International Armed Conflict* (OUP, 2012), at 252-254.

the exact moment in which the conflict ended, especially when there is a peace agreement, in others it might be exceedingly difficult to pinpoint the exact time when the hostilities fell below the 'protracted armed violence' threshold, with Iraq again being a case in point.

Transformation: internationalisation (NIAC à IAC) and internalisation (IAC à NIAC)

Until now we have looked at terminative events or processes, which end the application of IHL altogether. But we also need to examine transformative processes, which end the application of one IHL sub-regime but start another.

Let us first look at internationalisation, one of the most controversial topics of modern IHL. In my view, the concept of internationalisation is only legally useful if it is defined as the transformation of a *prima facie* NIAC into an IAC, thereby applying to this conflict the more comprehensive IAC legal regime.[10] The most important of these legal consequences is the grant, in principle, of privileged belligerency to combatants on both sides of the conflict.

As for the mechanism of internationalisation, we have seen that IACs are defined under CA2 as differences leading to the use of armed force *between two States*. Accordingly, there are two basic ways of internationalising a NIAC. First, a *prima facie* NIAC can be subsumed under the *existing* CA2 definition. In other words, what at first glance looks like a conflict between a State and a non-State party is, on a deeper look, actually a conflict between two States. This can either happen because a third State exercises control over a non-State at some point during a NIAC, with the most controversial issue here being what test or standard of control is to be applied, or because a non-State party involved in a NIAC emerges as a State during the conflict – a rare occurrence, but one that we can perhaps observe in some of the conflicts in the former Yugoslavia. Secondly, a NIAC can be internationalised through the *redefinition* of IAC in terms of its party structure, so that the CA2 definition is exceptionally expanded under a treaty or customary rule so as to potentially include some non-State parties. Internationalisation under this heading would clearly require proof of a specific rule to that effect. One such rule can be found in Article 1(4) AP I, while another possible candidate is the customary doctrine of the recognition of belligerency which has fallen into disuse, but perhaps not desuetude.

The second transformative process is internalisation, or de-internationalisation, and it again flows from the inter-state CA2 IAC definition. It may be easy to say that IACs are fought be-

10 Note that one can use the term 'internationalised armed conflict' in a different, descriptive sense, as any NIAC in which there is some type of foreign intervention. This is again, *not* how I will be using the term, in order to maximise both its utility and precision.

tween States and statehood may even be uncontested in a given case, but who gets to *represent* the State may turn out to be a very difficult issue. Not only is this question important for the initial qualification of a conflict, but it may also prove to be crucial for its requalification or transition from one type to another. Just consider all those conflicts during which some kind of regime change takes place, whether in Afghanistan, Libya, Iraq, or the Côte d'Ivoire. In all of these conflicts we had (broadly speaking) a foreign intervention coupled with a reversal of roles between a government and a rebel group, with a new government extending its invitation to the intervening State or States to assist it in fighting the former government.

What is at stake here is a process of transformation from an IAC into a NIAC. Looking at the competing policy considerations, we can see what is *not* enough for such internalisation to occur. That the incumbent government of a country is defeated cannot by itself transform the conflict, nor can the establishment of a proxy government by the victors, as this would allow them to effectively strip by force the protections granted in IACs to the remaining combatants of the defeated State, turning them into unprivileged belligerents. Similarly, that a rebel group is recognised as the new legitimate government of the country cannot of itself transform the character of the conflict, as this would again allow the intervening States to unilaterally do what they will.

In my view, both considerations of policy and recent practice support a rule consisting of the following three elements: the conflict would transform from an IAC into a NIAC only when (1) the old regime has lost control over most of the country, and the likelihood of it regaining such control in the short to medium term is small or none (negative element); (2) the new regime has established control over a significant part of the country, and is legitimised in an inclusive process that makes it broadly representative of the people (positive element); (3) the new regime achieves broad international recognition (external element). None of these elements is enough by itself, but jointly they take into account both questions of legitimacy and factual developments on the ground while providing safeguards against abuse. With regard to both the positive and the negative elements, the degree of control would be looked at holistically, taking into account not just troops on the ground but also direction over State institutions more generally, its economic assets, the media, and the like.

Obviously, it may be difficult to pinpoint the exact moment of internalisation in any given case, and thankfully in most cases it may be unnecessary to do so, but it *is* necessary for us to be aware of the relevant elements and their interplay. And doing so, we must also be aware that the internalisation of a conflict has as its consequence a possible reduction of various protections under IHL. While the legal regimes applicable to IACs and NIACs have largely been brought together through the development of custom, significant differences still remain in

areas such as detention, privileged belligerency, and status-based targeting. Thus, though transformative processes do not end the application of IHL altogether, their practical consequences should not be underestimated.

Belligerent occupation

We have now seen the terminative and transformative processes that can end the applicability of the IAC and NIAC regimes; that leaves us with one more IHL threshold, that of belligerent occupation.

The end of occupation is again a complex topic, recently examined, for instance, by an expert meeting on occupation convened by the International Committee of the Red Cross (ICRC).[11] As with IACs and NIACs we can start with the general principle that IHL will normally cease to apply once its threshold of application – here belligerent occupation – is no longer met. If we define occupation as effective control by a State of the territory of another State without the latter's consent, it follows that there are two basic modalities through which an occupation can end: loss of control by the occupant, and the occupant being granted consent by the displaced Sovereign.

Occupation can end through loss of control in a variety of scenarios: unilateral withdrawal – think (controversially) of the Israeli disengagement from Gaza; defeat of the occupying forces by the displaced Sovereign or other outside intervention; or loss of control due to an insurgency in the occupied territory. End of occupation through loss of control has parallels in the extraterritorial applicability of Human Rights Law in the occupied territory. One issue raised before British courts and the European Court of Human Rights in the Al-Skeini litigation was whether the UK possessed effective control for the purposes of Article 1 of the ECHR jurisdiction in Basra, due to the level of sustained insurgency there, and despite the fact that the UK was formally the occupant in Southern Iraq. The House of Lords held that the UK did, in fact, lose effective control for the purposes of Article 1 of ECHR (but not, perhaps, for the purposes of the law of occupation),[12] while the Grand Chamber of the European Court managed to avoid the issue altogether.[13]

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11 See T. Ferraro, *Occupation and other Forms of Administration of Foreign Territory*, Expert Meeting Report, ICRC, 2012, at 26 ff.

12 See *On the application of Al-Skeini and others v. Secretary of State for Defence*, [2007] UKHL 26, [2008] AC 153, paragraph 83 (per Lord Rodger).

13 *Al-Skeini and others v. the United Kingdom* [GC], App. No. 55721/07, 7 July 2011.

With regard to occupation ending by the occupant obtaining consent, we can observe at work considerations similar to the transformative process of the internalisation of an IAC into a NIAC. Which entity has the sufficient capacity and legitimacy to provide meaningful consent may be a difficult and controversial issue. In any event, as with IACs and NIACs, the end of occupation should not be presumed lightly.

IS THERE A NEED FOR CLARIFICATION OF THE TEMPORAL SCOPE OF IHL?

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Résumé

En l'absence d'une définition communément acceptée de « conflit armé », une seule et même situation factuelle peut être sujette à des interprétations divergentes selon les intérêts politiques des parties au conflit. Pour un juriste militaire, la compréhension du régime légal applicable à des circonstances données est d'une importance primordiale, dès lors que ce régime déterminera l'avis juridique pratique qui sera donné aux forces armées engagées dans un conflit et établira les paramètres de ce qui constitue une action ou conduite permissible, obligatoire ou prohibée.

S'il est relativement facile de discerner les circonstances dans lesquelles deux ou plusieurs Etats sont engagés dans un conflit armé, la question prédominante a trait à l'existence, y compris au début, d'un conflit armé non international. En l'absence d'un point de départ clairement défini, les Etats évaluent la nature des hostilités en cours. A cette fin, l'évaluation des circonstances factuelles sur le territoire où les hostilités ont lieu est cruciale. Ceci impliquera d'analyser l'étendue des hostilités, le niveau et l'intensité de la violence, la sophistication et l'organisation des participants, et le territoire sur lequel les hostilités se déroulent. Si cette évaluation milite pour l'existence d'une situation de conflit armé, l'Etat ordonnera à ses forces d'appliquer le droit international humanitaire (DIH).

Outre la question du début d'un conflit se pose le problème de la qualification d'un conflit à un moment donné. Comme en témoignent les conflits récents dans les Balkans, en Irak et en Afghanistan, les conflits armés ont tendance à changer de qualification. Cette question de qualification est cruciale dès lors que la nature du régime applicable détermine le comportement des forces armées, l'étendue et le champ du droit applicable. Lorsqu'il y a doute sur le régime légal applicable, des organisations telles que la Cour européenne des droits de l'homme vont exploiter cette confusion et cette lacune apparente dans les protections pour étendre leur juridiction à des situations qui n'auraient a priori pas dû les concerner.

Il est important de ne jamais perdre de vue le fait que le droit interne est le droit qui régit la responsabilité de l'Etat et des acteurs non étatiques pour leur conduite. Partant, bien qu'un Etat puisse décider d'appliquer le DIH, c'est vers le droit national du territoire concerné qu'il faut se tourner afin d'obtenir réparation pour toute infraction occasionnée par le conflit. Ceci peut créer

une friction entre le but du DIH (à savoir l'atténuation des conséquences d'un conflit armé) et le maintien du respect pour le droit national du territoire dans lequel le conflit a lieu.

Par conséquent, savoir à quelle étape d'un conflit l'on se situe et avoir une compréhension de son champ temporel est primordial afin de pouvoir émettre un avis sur les éléments essentiels devant être pris en compte par les forces armées engagées dans les hostilités. Clarifier ce que sont le début et la fin des hostilités permettrait donc au praticien de cadrer ses avis juridiques au commandement et de s'assurer en permanence de leur pertinence. Cependant, il est essentiel d'éviter une définition excessivement prescriptive du concept afin de permettre au praticien d'adopter une approche pragmatique à son application. Une telle flexibilité permettra d'assurer que le DIH soit appliqué plus facilement, limitant ainsi le risque d'impunité.

Sirs, Ladies and Gentlemen, first, may I say that it is an honour and a privilege to have been invited to the 13th Bruges Colloquium, and for having been given the opportunity to address you on the subject "Is there a need for clarification of the temporal scope of International Humanitarian Law (IHL)?" In particular, may I thank the College of Europe and the International Committee of the Red Cross (ICRC) for the invitation and Stéphane Kolanowski and Laura de Jong for the excellent manner in which they have hosted me. Many of you may be aware that the invitation was originally conveyed to my colleague, Colonel Darren Stewart who, most unfortunately, is unable to be present today. Colonel Stewart has asked that I convey his gratitude for the kind invitation and his sincerest apologies for the fact that he is not able to be here with you all. His only instruction to me, apart from making my presentation interesting, was for it not to be so successful that he is not invited back next year; as his subordinate I will seek to do my best.

In answer to the proposition that has been set, it would be trite to say simply 'yes'. As lawyers, both practitioners and academics, clarity is always preferable to confusion and obfuscation. However, one must be alive to the realities of the world that we live in and to the fact that the search for clarity can often be elusory. As a military lawyer, and therefore a practitioner in the application of IHL, of paramount importance to me is the overarching legal regime that is operating at any given time, in order that I may provide my chain of command with the most appropriate and accurate legal advice relevant to the prevailing circumstances. This is all the more true now, as the Legal Adviser to the British Army's Provost Marshal (Chief of Military Police), than it was as a staff officer on the command of a British Armed Forces Headquarters, or coalition headquarters, deployed in an operational environment.

Following on the most excellent presentations that have been given by Louise Arimatsu and Marko Milanovic regarding the commencement and cessation of the application of IHL, I will

seek to make some observations on the practical application of IHL in the context of the discussion as to whether further clarification is required in this area. When I say practical application, I am referring to the bridge between the intellectual and academic debate over the temporal scope of IHL and its practice. Practitioners are concerned with the practical application of the principles so that they are workable within the realities existing at any given time (and location). This invariably requires an analysis of the interface between the temporal, personal and geographic application of IHL and the impact on the classification conflict for this purpose.

As we have already heard, the historical position regarding the scope of IHL was that its commencement was consistent with the declaration of war, or in the recognition of belligerency of a non-State party in the case of "civil wars" and, usually, its cessation was marked by some form of treaty acknowledging that fact. However, invariably this led to States seeking to avoid the formal declaration of war in order to avoid the application of IHL. This was sub-optimal as it could easily be seen to allow for impunity of action during any such conflicts. The international community arguably recognised the limitations of prescription in this manner, hence the use of the broad phrase 'armed conflict' within the Geneva Conventions of 1949, and the new nomenclature of international and non-international armed conflict.

Arguably, by not being prescriptive as to the definition of armed conflict, the drafters were seeking the widest possible application of IHL to both definitions of conflict. Put another way, one could say that the historical approach sought to establish the existence of a war as a matter *de jure*, whereas, the post-1949 approach sought to establish the existence of an armed conflict, as a matter de facto and make, therefore, IHL applicable. Pragmatism over prescription; and this is, in my view, of assistance to the practitioner.

However, moving from a purely legal concept of the existence of war to a pragmatic evaluation of the existence of an armed conflict, as a matter of fact without a concurrent binding judicial arbiter, still provides significant room for policy considerations at the highest State level to come into play. As we have heard, without a definitive definition of 'armed conflict', there remains scope for variable interpretations to be placed on the same factual situation, depending upon the prevailing policy issues of particular parties to a conflict. In other words, there is still the possibility of one, or more, parties to a conflict arguing that the conflict has not reached a level of violence, sophistication, intensity or duration as to warrant the label of an 'armed conflict' and that therefore IHL is not applicable (accepting that this contention is more likely to occur within the scope of a putative non-international armed conflict than it is in an international armed conflict).

As I have already alluded to, of paramount importance to a military lawyer is an understanding of the overarching legal regime that is applicable to any given circumstances. It is the applicable legal regime that informs the practical legal advice that is provided to armed forces engaged in a conflict and sets the parameters of what action and conduct is permissible, mandatory or prohibited. In my experience, which is inevitably UK-centric, such a determination of the applicable legal regime is taken at the highest level of government after consideration of legal advice received from the most eminent domestic experts in the field of international law. Since the formation of the present government within the United Kingdom, this has been through to UK's National Security Council, chaired by the Prime Minister.

If one accepts that it is relatively easy to discern circumstances where two, or more, countries are engaged in an armed conflict, so that Article 2 of the Geneva Conventions is invoked, the main issue relates to the existence, including the commencement, or otherwise, of a non-international armed conflict. In the absence of a concurrent examination of the legal status of a conflict by a legally binding judicial arbiter, it is through these essentially political processes that States determine their own position with regards to the commencement or otherwise of an armed conflict. Furthermore, and this is particularly important where there remains contention over the exact nature of a conflict, a State may, as a matter of high policy, decide to apply IHL to a conflict on the basis that to do so provides the best protection to those engaged in hostilities. Put another way, in the absence of a clearly defined starting point, States will assess the nature of the hostilities that are ongoing and, if such an evaluation militates towards the existence of a situation of armed conflict (through the prism of its own interpretation of what that concept means), the State will direct that its forces apply IHL as a matter of policy. Clearly, what is crucial here is an assessment of the factual circumstances as they exist on the ground in the territory where the hostilities are taking place. This will involve an analysis of all the factors that have hitherto been discussed, namely the extent of the hostilities, the level and intensity of the violence, the sophistication and organisation of the participants, and the territory within which it is occurring. This position is manifested within the contemporary operating environment where concern is heightened by the tendency for armed conflicts to morph from one particular type, or classification, to another. One only needs to make reference to the recent conflicts in the Balkans, Iraq and Afghanistan to observe examples of this. In Iraq, an IAC started in 2003 and moved fairly swiftly into a period of occupation. The IAC then developed into a NIAC. For a military lawyer, it is crucial to be aware of which particular stage you are at at any moment in time so as to advise appropriately on the applicable IHL. So, in addition to the issue of the commencement, or otherwise, of a conflict, there is the actual classification of a conflict at any given moment in time. This is crucial because the nature of the applicable regime is germane to how armed forces conduct themselves and the extent and scope of the applicable law. As I say with my myopic UK view, this is of particular

relevance to European armed forces in the context of the increasing tendency of organisations, such as the European Court of Human Rights (ECtHR), to adjudicate on the application of regional Human Rights instruments within non-international armed conflicts. Where you move into another paradigm and there is an absence of any particular regime or a question mark surrounding the application of a particular legal regime, there is scope for that gap to be filled. The UK, amongst other States, has certainly had to deal with the apparent enthusiasm of the ECtHR to determine the European Conventions of Human Rights' (ECHR) application in such circumstances which, of itself, has created issues as to what legal regimes apply and how potentially conflicting legal norms are accommodated within such circumstances. Consequently, the temporal scope, and therefore the application or otherwise of the full extent of IHL in international and non-international armed conflict, has particular resonance with those European countries that have had to respond to human rights associated litigation. The UK's experience of cases, predominately emanating from Iraq, but increasingly so from Afghanistan, are examples of this latest judicial activism. It is arguable, that where there is doubt as to the applicable regime, there is scope for organisations such as the ECtHR to exploit this confusion and apparent "gap" in protections, by extending its reach to circumstances that may not have been initially considered as subject to their jurisdiction.

In the circumstances we have been discussing, which predominately involve situations consistent with an interpretation that a non-international armed conflict exists, States that are engaged must be cognisant of the domestic legal framework operating within the territory of the State within which the conflict is occurring. I say this because, from a practitioner's perspective, one must never lose sight of the fact that it is the domestic law that, on the whole, governs the accountability of the conduct of State and non-State party participants; at least in the absence of some form of supranational judicial process. Consequently, whilst a State may, as a matter of high policy rather than pure law, apply IHL, it is to the domestic law of the territory concerned that one must, in the first instance, turn with regards to seeking redress for any transgressions occasioned by the conflict. This can then create friction between the purposes of IHL (namely the mitigation of the suffering caused by the armed conflict) and the maintenance of compliance with the domestic law of the territory within which it is taking place. This is especially pertinent where the domestic legal infrastructure of the State within which the conflict is taking place is unable or incapable of enforcing its own law (because its law and order institutions may have disappeared or may be so inadequate as to be non-effective).

Therefore, knowing where one is on the spectrum of conflict, and hence having an understanding of its temporal scope, is crucial to being able to advise upon the essential elements of consideration for armed forces engaged in such hostilities, namely: the means and methods of warfare, kinetic and non-kinetic targeting (and the corresponding rules of engagement), dis-

crimination and participation in hostilities, and the detention of those taking a direct part in the same. Clarification of the commencement and cessation of such hostilities would certainly enable the practitioner to frame his or her legal advice and ensure its continuing relevance to the command. However, in the absence of such definitive prescription, practitioners, in my experience, adopt a pragmatic approach to the application of IHL with a view to mitigating the consequences of the conflict. Whilst, arguably, this practical approach may lead to IHL being applied in circumstances where some commentators would argue that it should not apply, one can see the attraction of applying best practice and the high standards of protection afforded by IHL in preference to no credible protection as the alternative. In that direction impunity may lie.

So, to conclude, one can understand the force of the proposition that there is a need for clarity about the temporal scope of IHL. However, in the absence of universal consensus on what this should actually mean in practice, it is essential that an overly prescriptive definition of the concept should be avoided in order to permit it to remain flexible. Arguably, this will in turn ensure that IHL, as the best practice in situations of conflict, is applied more readily than not, thus mitigating the risk of impunity of action.

Sirs, Ladies and Gentlemen, thank you for your time and patience and I look forward to a continuation of the debate in the discussion.

SESSION 3 – TEMPORAL SCOPE OF APPLICATION OF IHL

During the debate following the presentations of the third session, the audience raised four main issues.

1. The existence of a warming up and cooling down period

Recalling that International Humanitarian Law (IHL) begins to apply at a certain point when the required threshold has been reached and ends when the conditions that triggered the conflict have ceased to exist, the chair wondered about the warming up period and the cooling down period before and after those points in time. He argued that, if we have to wait for a certain level of hostility to have taken place before we agree to the rules beginning to apply, there is always a warming up period prior to that. He gave the example of the conflict in Rwanda which started with the shooting down of the President's airplane on 6 April 1994. The International Criminal Tribunal for Rwanda (ICTR) manifestly decided that that was the time when the conflict had started. Similarly, as was the case with the situation in Kosovo, after a conflict has ended there is normally a long period of hostilities of lesser intensity that could be included as well.

One speaker stressed that, given the fact that rules of engagement always operate within the legal framework, one cannot qualify a situation as an armed conflict when it is not one because the normal paradigm that would apply – the human rights paradigm – would be more restrictive.

One panellist noted that the cooling down period for a non-international armed conflict (NIAC) is different from that in an international armed conflict (IAC). For an IAC, what matters is that all hostilities have ended with finality. For a NIAC on the other hand, what matters is that hostilities have fallen below the protracted threshold, which does not require that all hostilities have ended. The threshold can cease to be satisfied even while some violence is still going on, as was the case with Iraq.

2. The role of rules of engagement

The Chair of the session wondered how, from a practical point of view, those who are involved in the hostilities know which regime applies to what they are doing.

A panellist replied that the conduct of the armed forces will be governed by rules of engagement (ROE) which will be reflective of the circumstances and the political intent. Therefore

if there is a de-escalation, the ROE will seek to be constraining and restrained and the armed forces will not be proactive in using force. In circumstances of de-escalatory posture, the inherent right of self-defence provides quite a considerable possibility to respond to an immediate threat to life. However if the defensive posture is becoming undermined by virtue of a sustained campaign of violence towards the armed forces, it is for the armed forces on the ground to articulate that through the chain of command up to the political masters so they can assess what is required in order to deal with that particular threat. It is a two-way process of constant communication. The soldiers on the ground are always operating within the framework of the legal regime as directed or interpreted by their political masters.

3. The impact on status of a change in qualification of a conflict

One speaker asked how the temporal scope of application impacts on the personal scope of application if there is a change in qualification of the conflict. More specifically, what happens if, in an IAC, prisoners of war (POW) have been removed from the conflict area and taken out of the country and the conflict subsequently turns into a NIAC? Does that mean that the obligation to release and repatriate comes into play?

One of the panellists replied that one should treat this situation on the basic principle that one assesses the legality of an action according to the law that applied at the time it was conducted. Therefore, if a POW was taken out of the country at the time when the law of IAC applied, the law of IAC would govern that particular situation. The fact that *post facto*, the nature of the conflict changed does not necessarily matter. What would matter, however, is the need for the States that continues to exercise detention authority to adopt the required legislation or legal basis needed to maintain detention authority in a NIAC. If the conflict has in fact not ended but its legal characterisation has changed, one should be wary of drawing the same conclusions one would if the conflict had completely ended.

Another panellist raised the concern that the European Court of Human Rights (ECtHR) would not share the same pragmatism and would look at the situation in a rather restrictive manner.

4. The end of a non-international armed conflict

A more general discussion about the end of a NIAC was raised during the debate.

One of the participants raised the issue of Additional Protocol (AP) II conflicts turning into common Article 3 (CA3) conflicts, giving the example of Mali, a conflict to which arguably APII applies. Article 1 of APII provides that the latter applies to ‘organised armed groups which,

under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'. Following the short period of hostilities in Mali, armed groups had consolidated control over a very large part of the country. That factual situation raises the question whether what we ought to be looking at, instead of the intensity of violence, is perhaps the territorial control and the organised armed group's capability and whether that continues.

One of the panellists agreed that for APII it is less about intensity and more about the structure of the non-State actors. Is it administrating territory? Is it conducting hostilities in a sustained way that requires control over the territory? Once we fall below that threshold, one must consider that the conflict has stopped. At what point exactly is hard to tell but the important thing to note is that the fact that the conflict has stopped does not mean that all IHL application has ended. Humanitarian provisions which relate to the people detained by the enemy continue to apply even if the conflict has ended.

The chair of a previous session disagreed with this analysis on the end of a NIAC. He pointed to the situation of non-State parties exercising control over part of the territory with the Government armed forces deciding to elaborate a new strategy or regroup in a different way in order to resume hostilities at a later stage. Obviously, there would be a longer period of relative calm in terms of hostilities but there is an intention to resume hostilities at a certain point. Stating that the threshold went down and therefore the NIAC has ceased to exist would not be a correct analysis.

One speaker noted that the above-mentioned example also raises questions regarding the start of a NIAC. If an armed group takes control of a territory but there are no hostilities, does the situation qualify as a NIAC? He argued that the criteria used to determine the beginning of a NIAC – and more particularly the 'protracted armed violence' criteria – cannot be used in reverse to determine the end of a NIAC. If we measure 'protracted' in terms of duration of time for the start of a NIAC, do we require the same reverse element of 'protracted' for the end of a NIAC so that if the violence completely stops, we still do not say 'it's over', we have to wait for some time?

Commenting on the *Gotovina* case in which the Trial Chamber stated that an armed conflict ends when a peaceful settlement is reached, one of the speakers stressed that this should not be the standard for NIAC. It should be when there is no intensity anymore or not enough organisation.

Session 4
Geographic Scope of Application of IHL

Chairperson: **Paul Berman**, *Director, Council of the EU Legal Service*

THE GEOGRAPHIC REACH OF IHL: THE LAW AND CURRENT CHALLENGES

Tristan Ferraro

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Résumé

1. Champ d'application géographique du droit international humanitaire (DIH) dans des situations de conflit armé international (CAI)

Pour ce qui est des CAI, il communément admis que le DIH s'applique sur l'ensemble du territoire des Etats belligérants. Cette formulation ne peut être interprétée, a contrario, comme impliquant une exclusion de l'application du DIH au-delà du territoire des Etats belligérants. En effet, des personnes capturées et détenues loin des zones de combat pourront néanmoins bénéficier de la protection garantie par le DIH pour autant qu'un lien soit établi entre le CAI et la privation de liberté.

Selon une vision traditionnelle, la zone de guerre ne s'étend pas au delà des frontières d'Etats neutres et non-belligérants et,de manière générale, aucune hostilité n'est permise sur leurs territoires respectifs. Cependant, le DIH n'exclut pas toujours la possibilité que certaines de ses dispositions s'appliquent sur le territoire de ces Etats. De manière générale, la plupart des protections conférées par le DIH aux personnes affectées par un CAI ne sont pas basées sur des considérations territoriales. C'est ainsi, par exemple, que l'article 4B2 de la troisième Convention de Genève prévoit l'application de certaines protections de DIH dans l'hypothèse d'internement de forces armées, milices et de membres de mouvements de résistance sur le territoire d'Etats neutres ou non belligérants. L'article 49 du premier Protocole additionnel (PAI) dispose quant à lui que « les dispositions du présent Protocole concernant les attaques s'appliquent à toutes les attaques, quel que soit le territoire où elles ont lieu (…) ». Une lecture littérale de cet article semble confirmer que des attaques menées par les belligérants sur le territoire d'Etats non belligérants seraient régies par le DIH. Une interprétation aussi large du champ d'application territorial du DIH a cependant un sérieux effet pervers : le monde entier pourrait devenir le champ de bataille d'un conflit armé spécifique. Ceci pourrait être contre-productif en termes de protection de la population civile contre les effets des conflits armés, dès lors que, par exemple, des dommages collatéraux seraient permis sur le territoire d'Etats non-belligérants.

En ce qui concerne l'application territoriale du DIH aux situations d'occupation, l'article 42 des Conventions de la Haye de 1907 définit l'occupation de la manière suivante : « Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie. L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer ». Cette définition est particulièrement vague et ne délimite pas précisément le champ géographique du droit d'occupation. Si tout un pays peut être occupé, il n'est pas contesté qu'une occupation pourrait être limitée à certaines parties d'un pays. Cependant, dans une telle situation d'occupation partielle, la délimitation exacte du territoire occupé peut s'avérer particulièrement ardue.

2. Champ d'application géographique du DIH dans des situations de conflits armés non internationaux (CANI)

S'agissant des CANI, le DIH s'applique sur l'ensemble du territoire sous le contrôle de l'Etat partie au conflit. Bien que les CANI ont généralement lieu sur le territoire d'un seul Etat, il existe des CANI qui débordent sur le territoire d'Etats limitrophes ou qui revêtent une dimension transfrontalière. Pour cette raison, il est soutenu que l'aspect territorial n'est pas un élément constitutif de la notion de CANI. Les CANI se distinguent des CAI par la nature ou la qualité des parties au conflit plutôt que par leur champ d'application territorial limité. Les travaux préparatoires de l'article 3 commun aux Conventions de Genève n'indiquent nullement que le libellé de cet article exprime la volonté des Etats de limiter son application au territoire d'un seul Etat. A cet égard, l'article 3 devrait être lu comme s'appliquant pour autant que le CANI ait son origine dans le territoire d'une des Parties Contractantes aux Conventions de Genève. Le DIH s'appliquera dès lors aux CANI débordant sur le territoire d'Etats voisins. Une telle application soulève cependant de nombreuses questions liées à sa portée territoriale : la contiguïté de l'Etat voisin dans lequel le conflit déborde constitue-t-elle un prérequis pour l'application extraterritoriale du DIH ? Le DIH s'applique-t-il à l'ensemble du territoire de cet Etat ou est-il limité aux zones de combat ou zones situées à proximité de la frontière ? Où trace-t-on la limite du champ géographique du DIH dans de telles circonstances ? Ces questions restent ouvertes et méritent une analyse plus approfondie eut égard à leurs conséquences opérationnelles, légales et humanitaires.

I have been tasked today with making a presentation on the IHL's geographical scope of application of the International Humanitarian Law (IHL). This issue has a very practical and operational dimension. We, as practitioners involved in a legal dialogue with belligerents, have often been confronted with arguments stretching IHL's territorial reach almost to breaking point or, on the contrary, with positions restricting IHL applicability to specific and delimited areas.

From a legal perspective, this question is not easy to address, in particular because – with a few exceptions – IHL is almost silent on its territorial scope. While it is clear that IHL application depends primarily on the existence of an armed conflict, defining the territorial limits of its applicability is also crucial. In this regard, it is important to analyse the following key questions: Is IHL restricted to the battlefield? Does it apply to the whole territory of the parties to an armed conflict? Could IHL apply outside the territory of these parties, for instance in the territory of neutral or non-belligerent States?

For the sake of clarity, I will try to answer these questions – or at least to identify the key challenges they raise – in light of the classic dichotomy set by IHL between International Armed Conflicts (IAC) and Non-International Armed Conflicts (NIAC)

1. IHL's geographical scope of application in situation of International Armed Conflicts

A. The traditional approach: application of IHL in the territory of belligerents

When it comes to IAC, it is now uncontested that the entire territory of the belligerents – anywhere under their sovereign sway – comes within the region of war. It is clearly confirmed by many provisions of IHL as well as by a host of international tribunals' decisions. These territories include all land areas, internal waters, archipelagic water, territorial sea, the subsoil and submarine areas underneath these expanses of land and water, the continental shelf as well as exclusive economic zones and territorial airspace. It is now also well recognised that the high seas (including the airspace above and the sea floor) are also included in the IHL scope of application when a situation of IAC has been determined.

From this, it is submitted that, as a matter of law, IHL applies to these areas. However, *de facto*, IHL may not necessarily operate outside the battlefield – for instance Articles 27 to 33 of the fourth Geneva Convention (GCIV). IHL application beyond the front line will only be engaged by the relation of armed violence between the belligerents – irrespective of their location – or where protected persons find themselves in the power of the belligerents.

Indeed, individuals captured and detained far away from the combat areas would still benefit from the protection afforded by IHL, provided a nexus exists between the situation of IAC and the deprivation of liberty. Any other interpretation would defeat the protective purpose of IHL instruments.

From the perspective of the law governing the conduct of hostilities, there is no doubt that, on the territory of the parties to the IAC as well as in the other areas included in the region of war, military objectives and persons qualifying as legitimate military targets under IHL could be subject to direct attacks irrespective of the proximity with combat areas.

B. Applicability of IHL to territory of neutral and non-belligerent States

In the traditional view, the region of war does not overstep the boundaries of neutral and other non-belligerent States and, in general, no hostilities are permitted within their respective domains.

However, IHL does not always rule out the possibility that some of its provisions apply in the territory of these States. For instance, Article 4B2 of the third Geneva Convention provides for the application of the relevant IHL protections in the case of internment of armed forces, militia and resistance movements' personnel in neutral or non-belligerent States – see also Article 19 of the first Additional Protocol (API). Articles 4 of the first Geneva Convention and 5 of the second Geneva Convention follow the same line for the wounded, sick and shipwrecked members of armed forces.

From the perspective of the law governing the conduct of hostilities, article 49 of API appears quite broad from a *ratione loci* perspective. This Article reads as follows: 'The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted (…)'.

At first sight, and without prejudice to the legal entitlement to resort to force under the United Nations (UN) Charter, a literal reading of this provision seems to confirm that attacks carried out by the parties in the territory of non-belligerent States would be governed by IHL.

More generally, most of the protections conferred by IHL to persons affected by the IAC are not based on territorial considerations. Any other interpretation would entail a manifestly absurd and unreasonable result since it would suffice for instance to transfer detainees outside the territory of the belligerents to deprive them of the protection given by IHL. Avoiding such an absurd situation would require an expansive interpretation of this body of law's geographical scope of application according to which IHL goes where the belligerents and the persons affected by the IAC go.

However, this broad interpretation of IHL territorial scope of application has an important adverse effect: the whole world could become the battlefield of a specific armed conflict. This might be counterproductive in terms of protection of the civilian population against the effects of armed conflict, since for instance collateral damages under IHL meaning would be

permitted in the territory of non-belligerent States. It is unlikely that those States would accept this interpretation of the facts.

In this regard, while the application of IHL protective norms in the territory of neutral or non-belligerent States does not seem to raise problems – and is even foreseen by the law in specific circumstances –, the case is quite different for the more permissive rules of IHL pertaining to the conduct of hostilities. However, could we really distinguish between the IHL protective and permissive norms when addressing the issue of their territorial reach?

Even if one accepts that the law governing the conduct of hostilities applies in the territory of third States not party to the IAC in question, it can be argued that those rules do not apply in isolation. The other relevant branches of public international law (*jus ad bellum*, law of neutrality or Human Rights Law (HRL) for instance) might come into play in order to nuance or restrict the effects and even the application of IHL in the territory of neutral or non-belligerent States.

In this regard, the law of neutrality plays an important role as it protects the territory of neutral and other non-belligerent States from the effects of the hostilities unless those States have forfeited their status as neutral or non-belligerent. This would be the case for instance if these States violate their duty of non-participation in the IAC, which oblige them to abstain from supporting one of the parties to the IAC and avoid that their territory be used to conduct hostile actions against one of the belligerents.

What then, would be the situation in terms of IHL's territorial applicability if one of the belligerents establishes an operational military base in the territory of a non-belligerent State? Would IHL govern attacks against this military base? Would IHL apply only in the area in which the military base is set up? Would it apply in the whole territory of this third State?

None of these questions is theoretical. We were confronted with them for instance on the occasion of the 2011 North Atlantic Treaty Organization's (NATO) operation against Libya, classified as an IAC opposing NATO and troop contributing countries on the one hand and Libya on the other. Knowing that we considered that Turkey was not a party to that IAC, what was the legal status under IHL of the NATO HQ Allied Air Command in Izmir? Could it be lawfully attacked by Libya under IHL while being located in a non-belligerent State? These are operational issues and as such extremely important, and I will be delighted to hear your views in this respect.

Even if it can be affirmed that IHL territorial reach in a situation of IAC is quite expansive, this does not mean that the law governing IAC will apply in full in those situations. Indeed,

some of the provisions set out in that body of law contain specific territorial restrictions. That is the case for instance for the law of occupation that applies only within the territorial limits of the occupied territory.

C. IHL's territorial reach in situation of occupation

Under IHL, the definition of occupation can be found in Article 42 of The Hague Regulations of 1907, which reads as follows: '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'.

This definition is rather vague and does not precisely delimit the geographical scope of occupation law. If a whole county can be occupied, it is also not contested that occupation could be limited to very small places (such as villages or small islands). However in such a situation of partial occupation, delimiting the exact boundaries of the occupied territory might prove extremely complicated. In this regard, the difficulty encountered by the International Court of Justice (ICJ) in setting the territorial limits of the Ugandan occupation in the Democratic Republic of Congo was emblematic.

This is due to the fact that under occupation law, the notion of effective control – which is core to the concept of occupation – does not oblige the foreign forces to inhabit every square meter of the occupied territory. Indeed, under IHL, effective control can be exerted by positioning troops in strategic positions in the occupied territory, provided this would make it possible for the occupying power to dispatch troops, within a reasonable period of time, to make its authority felt throughout the area in question. But, to what extent would this rapid deployment of armed forces still allow the occupier to enforce effective control over the concerned area? Where do we draw the line beyond which the authority of the foreign forces is not felt anymore? This is an important issue since the related uncertainty concerning the territorial reach of occupation law will result in the existence of grey areas where the protection granted to the affected persons remains undefined.

2. IHL's geographical scope of application in a NIAC situation

The issues relating to the definition of IHL geographical scope of application are even more complex in situations of NIAC.

A. A narrow reading of IHL's territorial reach?

Within the framework of its legal dialogue with States and international organisations involved in NIAC (in Afghanistan or the Democratic Republic of the Congo (DRC) for instance),

the International Committee of the Red Cross (ICRC) has been facing arguments according to which IHL would not apply outside the strict boundaries of the battlefield. The rationale behind these arguments was twofold. First such a position would permit – according to its promoters – the view that troop contributing countries operating outside the areas of combat should not be considered parties to the ongoing NIAC. Second, the argument was developed with the view to ensuring that military personnel finding themselves outside the battlefield would regain or continue to enjoy the protection afforded to civilians under IHL.

Needless to say, such a position is not shared by the ICRC.

First of all, a review of the *travaux préparatoires* of the relevant provisions of IHL shows that there is nothing in the drafting history of IHL on the basis of which it may be concluded that a territorial clause was deliberately formulated to link IHL's geographical scope to the battlefield.

A careful examination of the IHL provisions applicable to NIAC proves that they are drafted in a way that justifies the application of IHL – at least – to the whole territory of the parties to a NIAC. This expansive view has been also endorsed by the international tribunals.

With reference to the argument sustaining that the law governing NIAC could be restricted to certain specific places, I would like to dispel a misconception concerning the ICRC's public communication on the legal classification of the situation prevailing in Syria.

It has been indeed interpreted – wrongly – as giving rise to a new category of "localised NIAC" (i.e. NIAC occurring only in certain parts of a country). Let us be very clear here: as a matter of law, when a NIAC occurs, the geographical scope of application of IHL covers the whole territory of the affected States. Hostilities between the parties to the NIAC are governed by IHL wherever they may take place in the affected States. The protection afforded to persons deprived of their liberty in relation to the NIAC kicks in regardless of the location of the detention facility. In a situation of collective hostilities, IHL applies even to military engagements taking place away from the main battlefield.

However, it is clear that the applicability of IHL to the whole territory of the parties does not mean that the belligerents can treat every incident involving armed violence under the conduct of hostilities paradigm. This paradigm applies only to the belligerent relationship between the parties to the NIAC. Use of force against individuals without nexus with the NIAC will not be governed by IHL but rather by HRL and the related law enforcement paradigm.

B. Applicability of IHL to the territory of states not involved in the NIAC?

In addressing the IHL territorial reach in NIAC situations the most complex issues lie in the determination as to whether IHL applies in the territories of States not involved in the NIAC.

For many, a NIAC usually occurs in portions of one single State where control is disputed or where the opponents' actions and forces are concentrated. However, it has also been submitted that different types of NIAC do exist, some of which spill over into the territory of neighbouring States or present a cross-border dimension.

It is therefore submitted here that the territorial aspect is not a constitutive element of the notion of NIAC. NIACs are distinguished from IACs by the nature or the quality of the parties involved rather than by their limited territorial scope.

The drafting history of common Article 3 to the Geneva Convention (GC) does not indicate that its current wording expresses the willingness of States to limit its application to the territory of a single country. In this regard, Article 3 should be read as applying so long as the NIAC originated in the territory of one of the High Contracting Parties to the Geneva Conventions.

IHL will thus be relevant for spill-over NIACs. This expansive reading is also grounded on humanitarian considerations. It would be illogical to deprive the persons affected by the NIAC of the basic protection afforded by IHL by the simple fact that the belligerents have taken refuge in a neighbouring country from which they might still continue to conduct hostilities. To deprive a person of common Article 3 protections because its application as treaty law must stop at a border is simply inconceivable from the perspective of ensuring the protection of the victims of armed conflicts.

That said, the application of IHL to spill-over NIACs raises other issues in relation to its territorial reach: does the contiguity of the neighbouring State in which the conflict spills over constitute a prerequisite for the extraterritorial application of IHL? Does IHL apply to the whole territory of that State or would it be restricted to combat areas or to areas located in the vicinity of the border? Where do we draw the line of IHL's geographical scope in such circumstances? These are still open questions deserving further analysis in light of their operational, humanitarian and legal consequences.

Additionally, some may argue that if one accepts that IHL applies extraterritorially for spill-over NIACs, why shouldn't it apply to the territory of other States not involved in the NIAC if fighters or military objects are located therein?

Yesterday, our Vice-President Madam Beerli presented the ICRC's position in relation to the extraterritorial targeting of persons qualifying as fighters under IHL. Would this position be different if the person concerned is actually engaged – or not – in hostile actions? What if the State in which the individual stands is unable or unwilling to put a stop to these hostile activities?

What would the legal assessment in terms of IHL geographical scope be if the threat to one of the belligerents emanates not from a single person but from an organised armed group? Would IHL govern for instance the bombing of a belligerent's training camp or a military base established in a non-belligerent State but used in support to military operations conducted within the framework of a NIAC (e.g. of a US base in Qatar or a French air base in Djibouti used for air operations to Afghanistan)? If IHL is deemed applicable in such situations, how does it interplay with other applicable legal frameworks? Could these other applicable bodies of law restrict or even impede IHL applicability in these cases?

In trying to answer these difficult questions, one should also wonder whether there is any alternative to IHL and the related conduct of hostilities paradigm in order to quell the threat emanating from such situations.

Considering that those military objects could not be subject to IHL rules would *de facto* create incentives for the parties which have the means and logistic capabilities to "delocalise" their military assets and render them immune from direct attack under IHL by simply transferring them in a non-belligerent State. This would defy IHL logic and could in a way be interpreted as running against the principle of equality of belligerents underpinning this body of law.

Once again, I hope the identification of such challenges will trigger many comments and I look forward to listening to your views in the forthcoming discussions.

TRANSNATIONAL ARMED CONFLICT: DOES IT EXIST?

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Résumé

Les conflits armés transnationaux existent-ils ? La réponse à cette question est, oui en tant que phénomène, mais pas en tant que catégorie légale.

Les conflits armés transnationaux peuvent être décrits comme des conflits armés transfrontaliers entre, d'une part, un groupe armé non étatique et, d'autre part, les forces armées d'un Etat. Bien que ne constituant pas un phénomène nouveau, ce type de conflit est devenu de plus en plus fréquent ces dernières années et n'entre dans aucune des deux catégories traditionnelles de conflits reconnues par le droit international humanitaire (DIH), à savoir les conflits armés internationaux (CAI) et les conflits armés non internationaux (CANI). Parce que ces conflits ne sont pas régulés par le DIH, les personnes affectées semblent également tomber en dehors des protections garanties par cette législation. En effet, telle a été la position prise par le Gouvernement des Etats-Unis avant que la Cour suprême ne décide que l'article 3 commun aux Conventions de Genève, qui offre des garanties minimales de traitement humain et qui, à l'origine, était destiné à ne couvrir que les conflits de nature interne, devait s'appliquer à ce type de conflits.

La question qui se pose alors est la suivante : devrait-il exister une troisième catégorie légale dotée d'un régime juridique propre régissant ce type de conflit ? Une telle création n'est ni désirable ni nécessaire et risquerait en outre d'avoir un impact négatif sur la protection de ceux affectés par de tels conflits et plus particulièrement ceux se trouvant dans l'Etat territorial concerné. Les règles actuelles du DIH peuvent être appliquées aux conflits armés transnationaux sans qu'il soit nécessaire de les adapter ou d'en atténuer les protections qu'elles garantissent. Il convient de se baser non pas sur la nature des parties au conflit, mais sur les frontières territoriales d'un Etat afin de caractériser le conflit comme international ou interne. Partant, le droit des CANI régulerait le recours à la force par un Etat contre un groupe armé sur son propre territoire. Le recours transnational à la force par un Etat contre un groupe armé se trouvant sur le territoire d'un autre Etat ne consentant pas à ce recours à la force serait, quant à lui, régulé par le droit des CAI.

A l'heure actuelle, la majorité des conflits armés transnationaux sont régis par le droit des conflits armés internationaux. En pratique, des difficultés surgissent lorsque ce n'est que le droit des conflits armés non-internationiaux qui s'applique aux situations transnationales. Ces difficultés se manifestent principalement dans les domaines de la privation de liberté et de vie.

Introduction

Transnational armed conflict: does it exist? The short answer is yes, it does exist as a phenomenon, but it does *not* exist as a legal category. The follow-up question then becomes: should it exist as a separate category for the purposes of identification of the applicable legal regime?

Transnational armed conflicts can be loosely described as transboundary armed conflicts between a non-State armed group on the one hand, and the armed forces of a State, on the other. Confusion as to the applicable legal regime has arisen because non-State entities operate beyond the borders of a single State. Although not a new phenomenon, these types of conflicts have become increasingly prevalent in recent years, and do not fit neatly into either of the two traditional existing types of armed conflict contemplated by International Humanitarian Law (IHL): (1) international armed conflicts between States and (2) non-international armed conflicts between a State and a non-State party or between two non-State parties, within the territory of a State.[1] Such non-traditional conflicts all share what can be called an 'extra-State' element[2] and raise issues to international law because traditionally, the reference point for distinguishing between the international and non-international armed conflicts was a State's internationally recognised border. As a result, in the past decade, there has been an extensive discussion in academic literature, judicial decisions, and in the policy positions of States concerning the specific characteristics of such conflicts and the legal regime under IHL applicable to them. The debate as to whether these transnational armed conflicts should be considered as one of the traditional types of armed conflict, or perhaps as a new third type, is ongoing.

One may wonder whether there is a need at all to distinguish between the types of armed conflict. Indeed, in recent years calls have been made for the exclusion of the traditional dichotomy between international and non-international armed conflicts.[3] However, today the distinction is still relevant. The *Hamdan* case, for example, in which the United States' Supreme Court identified the international fight against *Al-Qaida* (not limited to Afghanistan or Iraq) as covered by common Article 3 to the Geneva Conventions,[4] which originally was meant to cover only conflicts of an internal nature, is a striking example of the problems the present classification poses not only to lawyers, but also to policymakers and to members

1 Although academic disciplines other than law have a variety of names for the situations of armed conflict, International Humanitarian Law only acknowledges these two types.

2 'Extra-State' in this context means that the conflicts take place in the territory of more than one State, or that one of the parties has to cross a State border in order to engage in hostilities with the other party or parties.

3 For example, Emily Crawford, "Unequal before the law: The case for the elimination of the distinction between international and non-international armed conflict", in: *Leiden Journal of International Law*, Vol. 20, Issue 2, 2007.

4 United States Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

of the military. Major General (ret.) Anthony Rogers notes, for example, that the division of particular situations into international and non-international armed conflicts is important for the 'military lawyer who has to advise a commander or the military chain of command [on the] applicable law'.[5] The qualification is relevant also 'after the fact', namely in (international) criminal trials. The International Criminal Tribunal for the former Yugoslavia (ICTY) has held that the grave breaches regime of the Geneva Conventions only applies to international armed conflicts,[6] and the Rome Statute of the International Criminal Court retains the divide between international and non-international armed conflicts.[7]

As mentioned above, IHL recognises only two types of armed conflict. And although the IHL instruments from before the Second World War did not specify their scope of application, it was clear that they applied only to wars between States. Unless a non-State party was recognised as a belligerent, the laws of war did not apply to the fighting between a State's armed forces and such a belligerent armed group. The division was created in 1949 with the inclusion of common Article 3 into the four Geneva Conventions that were adopted that year.[8] Thereafter, all instruments of IHL, such as the 1977 Additional Protocols, distinguish between international and non-international armed conflicts by specifically prescribing which rules apply in which type of armed conflict or whether the rules apply to both types. Today, the rules governing international armed conflicts are vastly more elaborate and detailed than those governing non-international armed conflicts.

When one considers the (current) material scope of application of IHL, it becomes clear that transnational armed conflicts do not seem to fall under any of the "definitions" given in treaty

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5 Anthony P.V. Rogers, "International humanitarian law and today's armed conflicts", in: Cindy Hannard, Stephanie Marques dos Santos and Oliver Fox (eds), *Proceedings of the Bruges Colloquium: Current Challenges in International Humanitarian Law*, Collegium No. 21 (ICRC/College of Europe, Bruges, 2001, p. 20.

6 ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 81.

7 Article 8(2)(a) and (b) contains provisions for war crimes committed in international armed conflicts, whilst 8(2)(e) applies to violations committed in non-international armed conflicts. The charges against Thomas Lubanga Dyilo, the first accused before the International Criminal Court, were confirmed under Article 8(2)(b)(xxvi) to the conscription/enlistment and use in hostilities of child soldiers in an international armed conflict, but the Trial Chamber re-qualified the situation in Ituri, at the time, as constituting a non-international armed conflict. Lubanga was subsequently convicted under Article 8(2)(e)(vii). See ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, paragraphs 566-67.

8 On the creation of the distinction between international and non-international armed conflicts and the influence of State sovereignty on the ensuing legal regimes, see Rogier Bartels, "Timelines, borderlines and conflicts: The historical evolution of the legal divide between international and non-international armed conflicts", in: *International Review of the Red Cross*, Vol. 91, No. 873, 2009.

law, literature, or jurisprudence. They seem to fall outside the established categories of armed conflict. Because these conflicts appear not to be regulated by IHL, those affected by them would also seem to fall outside the protection afforded by this body of law. Indeed, this was exactly the position held by the US Government before the US Supreme Court ruled that as a minimum, common Article 3, which gives certain minimum standards of humane treatment, should be applied in these situations.

What sort of situations could be called transnational armed conflicts?

The opening contribution of this publication mentions the seven categories of non-international armed conflicts that are distinguished by the International Committee of the Red Cross (ICRC).[9] Only the seventh type is referred to as "transnational", but of course a few of the other six types involve some crossing of State borders, as well as the participation of non-State entities. Namely, 'cross-border', 'spill-over', and 'multinational' non-international armed conflicts, as well as the subset of the latter type in situations where United Nations forces (or those of a regional organisation), are involved.[10] The 'multinational' situations will not be discussed in this paper, as they could be divided into either a situation where the territorial State is assisted, such as the International Security Assistance Force (ISAF) in Afghanistan, and which is generally viewed as constituting a non-international armed conflict, or a situation where the armed group is assisted by a State, which would then internationalise the conflict. Another category could be added to the ICRC's list, where the fighting is definitely transnational in nature: when armed groups fight each other whilst crossing State borders, such as often happens in the Great Lakes region. However, it is clear that in such a situation, the fighting is covered by common Article 3 (as long as the organisation and intensity has passed the lower threshold).

So what situations of conflict then, would fall under the heading of 'transnational armed conflict'? I identify four situations that could each be called a transnational armed conflict whose qualification under IHL is currently unclear:

1) The government forces of State A are engaged in fighting with organised armed group Z (of which the members have the nationality of State B) that operates from the territory

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9 See "Opening address" by Christine Beerli. The seven categories are identified in ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts*, a report prepared for the 31st International Conference of the Red Cross and Red Crescent, 2011, pp 9-11; and in Jelena Pejic, "The protective scope of Common Article 3: more than meets the eye", in: *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp 193-195.

10 The sixth, third, fourth and fifth type mentioned by the ICRC, respectively.

of State B. The fighting takes place on both the territory of State A and on that of State B. A real-life example would be the 2006 Israel-Hezbollah conflict.

2) The 'foreign' organised armed group Z is engaged in fighting with the government forces of State A, on the territory of State A. Examples would include the foreign Islamist groups currently fighting in Syria against the government.

3) The government forces of State A are engaged in fighting with organised armed group Z (which came from State A, but has taken refuge on the territory of State B), on the territory of State B. This would be similar to the conflict between Turkey and the PKK in northern Iraq.

4) The government forces of State A make use of the territory of State C to engage in fighting with organised armed group Z (of which the members are not linked to one of the concerning States), which is residing on the territory of State B. The US making use of the territory in Afghanistan in its fight against the Taliban (or *Al-Qaeda*) in Pakistan comes to mind in this regard.

The above four situations do not include accidental border incursion or accidental bombings of another State. Neither can they be seen as international armed conflicts because there is no intent to attack the other State.[11] In situations 1, 2 and 4, for the purposes of this paper, the territorial State B does not consent to the use of force by State A on its territory. Only in situations without consent, and without a link between the territorial State and the armed group, is the use of force by State A transnational in nature.

In situations where an armed group can be seen as 'belonging to' State B's armed forces for the purposes of Article 4(2) of the third Geneva Convention, there clearly is an international armed conflict. When an armed group residing in State B launches attacks on neighbouring State A, but the government of State B has overall (or effective) control over the armed group,[12] the situation should obviously qualify as an international armed conflict, as two States are pitted against each other. Indeed, this would be no different if the armed group, whilst being controlled by State B, resided on the territory of State A (thereby not themselves crossing any State border), and was engaged in fighting the government of State A. The real difficulty, however, is qualifying the situations where the territorial State does not give consent to the attacking State.

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11 See United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, Oxford University Press, 2004, p. 29.

12 The effective control test, as set out in *Nicaragua*, is advocated by the International Court of Justice. The overall control test is used by the ICTY since *Tadić*, and adopted by the International Criminal Court in *Lubanga*.

Currently, four approaches to the qualification of transnational conflict situations can be distinguished:

1) These situations should be considered as non-international armed conflicts;
2) These situations should be considered as international armed conflicts;
3) A combination of 1 and 2, namely, transnational conflict situations can be divided into two parallel armed conflicts: a non-international armed conflict between the attacking State and the armed group, and an international armed conflict between the fighting State and the territorial State;
4) Transnational conflict situations cannot adequately be qualified as either international or non-international conflict situations. Therefore, a third regime developed for this type of armed conflict should govern these situations.

As I will explain in more detail below, the majority of transnational armed conflicts are not regulated by the law on non-international armed conflict, but are governed by the law on international armed conflict. Before I explain why, I will argue that, in any case, a new regime for a third category is neither necessary nor desirable.

A new category is not necessary

Some scholars consider transnational conflict situations to be significantly different from classic international and non-international armed conflicts, and propose that a third legal type of conflict be added.[13] This third type should then be covered by a new legal regime, which would take into account the special features of such conflicts. For example, with regard to detention in such a third conflict, Roy Schöndorf proposes a legal framework where the attacking State can take the best of both worlds:

> 'One possibility is to afford battlefield detainees the (non-political) privileges regarding conditions of detention that are afforded to prisoners of war under the legal regime regulating inter-state armed conflicts, as this legal regime is designed to hold combatants in detention for long period of times. At the same time, with regard to the more political aspects of detention, one could rely on the analogy between extra-state armed

13 See, for example, Roy S. Schöndorf, "Extra-state armed conflicts: Is there a need for a new legal regime?", in: *New York University Journal of International Law and Politics*, Vol. 37, No. 1, 2004; Geoffrey S. Corn, "Hamdan, Lebanon, and the regulation of hostilities: The need to recognise a hybrid category of armed conflict", in: *Vanderbilt Journal of Transnational Law*, Vol. 40, No. 2, 2007; and Robert D. Sloane, "Prologue to a voluntarist war convention", in: Michigan Law Review, Vol. 106, 2007.

> conflicts and intra-state armed conflicts, which allows prosecution of detainees for their participation in hostilities'.[14]

Why would the attacking State have the "right" to detain captured members of the armed group longer than normal, whilst at the same time being allowed to use aspects of the more limited law on non-international armed conflict? When an attacking State is attacking citizens (or persons residing in the territory) of another State, or otherwise violating the sovereignty of the territorial State, why would it then, in addition, be allowed to benefit from rules that only assist States and not non-State actors? The usual basis for such disparity (e.g. national law, a State's sovereignty over own territory) is lacking in transnational situations.

A third legal type of armed conflict with a separate corresponding legal regime would likely have a negative impact on the protection of those affected by such conflicts, especially those who find themselves in the territorial State. IHL is based on a subtle balance between humanity and military necessity. The proposed rules for a third type appear to be mainly based on military necessity. As will be explained below, the current rules of IHL can be applied to transnational situations without needing to adapt or to water down the protections contained presently in IHL.

Transnational armed conflicts are to be qualified as non-international armed conflicts

The majority of academics propose the first approach, outlined above, that is, they view transnational armed conflicts as non-international armed conflicts between the fighting State and the armed group. This view considers that non-international armed conflicts are distinguished from international armed conflicts by the parties involved rather than by the territorial scope of the conflict.[15] I see several problems with this approach, however.

First of all, if transnational situations were non-international armed conflicts, the lower threshold of non-international armed conflicts would also apply. This would mean that attacks against an armed group in another State would not be governed by IHL unless the criteria of organisation and intensity are fulfilled. Using the wording 'armed group' seems to presuppose that the organisation criterion is met. Actually, though, in the situation that triggered the debate about the existence of transnational armed conflict (i.e. the conflict between the US and Al Qaeda), it may be questioned whether the relevant group, Al-Qaida, is (or ever was)

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14 Schöndorf, ibid. p. 72.

15 See Noam Lubell's contribution.

sufficiently organised.[16] So, if IHL does not apply, what then regulates the attacks? I will not go into the discussion on extraterritorial law application and enforcement of human rights law, but suffice it to say that according to those States that deny the extraterritorial application of International Human Rights Law, no law at all would govern the attacks, or at least, no law would work in a limiting and thus protecting way. A law enforcement paradigm does not work when use is made of, for example, drones equipped with Hellfire missiles. Compliance with the Human Rights standard of proportionality is then difficult to achieve.

My main concern with the 'non-international armed conflict only' approach is that a body of law is said to apply that is far more limited in both quantitative and qualitative terms. Specifically, the law applicable to international armed conflicts is far clearer and more developed than the law applicable to non-international armed conflicts. The traditional dichotomy of international and non-international armed conflicts was based on sovereignty. States were unwilling to allow for international regulation of their internal matters. They wanted to be able to deal with insurgents or rebels in a way of their own choosing. In 1949, when common Article 3 saw the light as the first application of IHL to internal matters, there were no other international instruments that laid down protectionary rules for States about how to deal with their own citizens.

States made the importance of sovereignty very clear during the negotiations of the 1949 Geneva Conventions and again during the negotiations of the Additional Protocols. As a result, there are far fewer treaty rules regulating non-international armed conflicts. In addition, because States were not willing to extend the combatant privilege to members of armed groups, such members can still be tried for treason or murder, even if they fought in accordance with the law of non-international armed conflict. Notwithstanding the foregoing, the fact that a traditional non-international armed conflict takes place within the territory of a sovereign State also means that there are additional national laws that supplement the limited number of black letter rules of IHL applicable to non-international armed conflicts. I have already mentioned the difficulties with extraterritorial application of Human Rights. Also, when a State acts outside its own borders, the national laws allowing the government to detain and covering such detention, for example, cannot apply.

Nowadays, States appear to be quicker to accept the application of common Article 3 because it enables the use of force, like in the fight against terrorism. Interestingly, the situations

16 See Kai Ambos and Josef Alkatout, "Has 'Justice Been Done'? The Legality of Bin Laden's Killing Under International Law", in: *Israel Law Review*, Vol. 45, No. 2, 2012, pp 347-350; and Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, Oxford, Oxford University Press, 2010, p. 96.

where States seem eager to accept the application of IHL are often the transnational cases.[17] I agree that we should not too easily consider that IHL applies, but in case of attacks on an armed group residing outside a State's own territory, the attacking States will be carrying out these attacks irrespective of whether or not it would be governed by common Article 3. Would it then not be best to make sure that the highest standard of conduct and protection, i.e. the law on international armed conflict, applies? Moreover, whereas reciprocity may have diminished as a reason for States to adhere to IHL, it still plays a role. But in case of attacks against an armed group that cannot strike back – at least not by legitimate[18] means – because the attacking State's territory is thousands of kilometres away, there is little fear for reciprocal behaviour against citizens of its own.

In practice, problems arise when it is only the law of non-international armed conflict that applies to transnational situations. These problems become manifest most predominantly in the areas of deprivation of liberty and life. Targeting rules can be applied via custom, but detention is not regulated. This makes perfect sense in internal situations, i.e. in classic civil wars, because the government obviously wants to be the only party that is allowed to detain. Indeed, the government can detain rebels on the basis of national criminal law, but it would be undesirable for States to allow rebels to legally hold captured members of the State's armed forces. When acting extraterritorially within the legal framework of non-international armed conflict, no right to detain exists. In support operations, such as ISAF, this right could be derived via the detaining rights of the host State, whose government is assisted or, arguably, via a UN Security Council Resolution. In a transnational situation, this would not be the case, however. It can be argued that the right to detain is inherent to IHL, as there is also a right to kill. But if a State were to detain a member of an armed group in another State without the latter's consent, it would actually violate the laws of the territorial State that has the monopoly on law enforcement on its own territory.

Moreover, a "right to kill" does not actually exist under the law of non-international armed conflict. These rules do not contain combatant immunity. Again, this makes perfect sense in a classic non-international armed conflict, where the State, on the basis of its national laws, will be allowed to use lethal force against those rising up against its government, yet wants to be able to punish members of the opposition when they kill government soldiers. The State thus does not need the combatant privilege. However, when acting transnationally, it would require this privilege; otherwise, the members of its armed forces would be subject to domestic prosecution for crimes like murder in the territorial State. In addition to the use of force for

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17 Such as the US drone strikes in Pakistan and Yemen. See, e.g., The White House, Office of the Press Secretary, "Remarks by the President on National Security", 21 May 2009.

18 Legitimate for the purposes of IHL or International Human Rights Law.

ad bellum reasons then, the armed forces of the attacking State are also using force without any authority to do so under the territorial State's domestic law.

Problems thus arise when trying to apply the law of non-international armed conflict to transnational situations, and it does not stop at the detention issue and the use of force. It also has effects on what happens next. After someone is captured, it makes sense that this person is brought back to the territory of the attacking State.[19] But if this member of the armed group is brought to the attacking State, this would, in case of a non-international armed conflict, amount to rendition.[20] It would then lead to subsequent problems in a criminal process. Whilst in certain States, like the US, *male captus bene detentus* is accepted, this is not the case in the majority of civil law States. The detained person could then not be prosecuted.

Although in non-international armed conflicts, the rules for targeting derived from custom would be similar to those in international armed conflict, and States will likely apply Additional Protocol I by analogy, it would (in retrospect) still be impossible for the International Criminal Court in such situations to prosecute drone attacks that violated the principle of proportionality.[21] Under the Rome Statute, the causing of excessive collateral damage is only a crime in international armed conflicts.[22]

Transnational armed conflicts are to be qualified as international armed conflicts

In light of the problems discussed hitherto, I propose a different way of conceptualising transnational situations: by looking not only at the nature of the parties to the conflict as a determinative factor in the identification of the applicable regime, but also at the territory. This would lead to the qualification of at least some of the four situations presented above as international armed conflicts. This is a minority view, however. For example, in the recent Tallinn Manual on Cyber Warfare, it is mentioned that

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19 After all, if the attacking State had a sufficient military presence in the territorial State to allow for detention facilities, it would probably be in control of territory, and could be regarded as an occupier. This would then transform the conflict into an international armed conflict.

20 Naturally, rendition would also be possible in cases of international armed conflicts, but it would not cover the moving of captured members of the opposing forces (who would be prisoners of war) outside the territory of a State, as this is legal under IHL.

21 Obviously, this would only concern situations during which war crimes can occur, i.e during an armed conflict. The lower threshold for non-international armed conflict would thus have to be reached.

22 Article 8(2)(b)(iv) of the Rome Statute.

> '[s]ome members of the International Group of Experts took the position that an international armed conflict can also exist between a State and a non-State organised armed group operating transnationally even if the group's conduct cannot be attributed to a State (…) The majority of the experts rejected this view on the ground that such conflicts are non-international in character'.[23]

I tend to agree with the minority of the Manual's experts and consider these situations as international armed conflicts. Let me use an example. If a State launches an attack against Costa Rica, a nation without armed forces, and takes control over part of its territory, it would be an international armed conflict, even though Costa Rica would not be able to defend itself. Common Article 2 is clear that no armed resistance is required. Another example would be Iceland, a nation with no real military, but that has an armed coast guard of 170 men strong. Imagine all 170 coast guards being out at sea, say for a naval exercise. If strikes were to be launched on Icelandic territory by the British Royal Air Force, for example, surely no one would contest that this would be an international armed conflict, also even if the strikes were not actually directed at government buildings, but only hit infrastructure and civilian objects.

This is so because the attacks on Costa Rica and on Iceland would violate the territorial integrity of these States. A State is not merely made up of a government. The main criteria for Statehood are a territory, a population, and a functioning government. At least one of these, the territory, but more often two, the territory and the population, are made object of attack in transnational armed conflicts.

If we look at Article 2(4) of the UN Charter, it is clear that it is not only the government that can be the object of the use of force (albeit for *jus ad bellum* purposes). It is prohibited to use force against the political independence or against the territorial integrity of another State. If objects are destroyed by missiles, for example, territory is obviously affected. Also, when persons are attacked, however precise the conducted attacks are, it will always similarly affect the territory. It makes no difference whether it is a piece of desert in Yemen, for example, or the heart of the capital that is attacked. Moreover, in such a situation, in addition to affecting the territory, one or more members of the territorial State's population are also killed or injured.

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23 Mike N. Schmitt (ed.), *The Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge, Cambridge University Press, 2013 (forthcoming). To give another example of just how much of a minority view it is, only one of the authors in Elizabeth Wilmhurst (ed.), *International Law and the Classification of Conflicts*, Oxford, Oxford University Press, 2012, namely Dapo Akande, advocates a similar view to that which I have put forward in this paper. The other eleven contributors to that book disagree with Akande's view.

It is proposed by some that when transnational attacks[24] constitute an international armed conflict, there could still also exist a parallel non-international armed conflict with the armed group.[25] I am not in favour of such a combined approach, though. Apart from the fact that every shot fired at the armed group would, in my view, still be part of the (single) international armed conflict and would thus need to be conducted in accordance with the law governing that type of conflict, such a combined approach would create unnecessary confusion. Why could it not just be considered as an international armed conflict only? Clarity is key in IHL and having only one conflict is undoubtedly far more clear than two parallel conflicts with separate legal regimes.

This would be the case also when the drone strikes on Al-Qaeda in Pakistan,[26] even if Al-Qaeda cannot be considered as sufficiently organised, are part of one international armed conflict against the State of Pakistan. I do consider this to be problematic and taking this approach does not enable States to use force more easily. Firstly, that what they would engage in would be called an international armed conflict and might actually restrain States. Secondly, whoever was targeted would still have to be a legitimate target.

Of course, the main critique against considering transnational situations as international armed conflicts concerns the latter observation (i.e. the question of when members of an armed group can be targeted). However, the existence of organised armed groups in the context of an international armed conflict is well known. Consider the Partisans in the Second World War, for example. Normally, such groups belong to the armed forces of a party to the conflict and as such, become targetable as combatants. However, the 'continuous combat function', as proposed by the ICRC's Interpretive Guidance on Direct Participation in Hostilities[27], does not apply to international armed conflicts. Consequently, the members of the armed group residing on the territory of another State could not yet be directly participating in hostilities (against the attacking State) before the first strike.[28] They might not even get the chance to fight back because the targeting is done with drones or fighter jets.

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24 Irrespective of whether the missile is launched from within the territory of the attacking State into the territory of the territorial State or whether it is fired by troops on or above the territory of the territorial State.

25 Approach number 3, mentioned above.

26 Assuming for the sake of argument that Pakistan does not consent to such strikes.

27 Nils Melzer, *Interpretive Guidance on the notion of direct participation in hostilities under international humanitarian law*, Geneva, ICRC, 2009.

28 Naturally, if the armed group is engaged in a non-international armed conflict in the territorial State (against the government of the territorial State or against another armed group), its members could be directly participating in hostilities as part of that conflict. If the attacking State were to assist the territorial State, it can attack such directly participating members. However, it is submitted here that direct participation of certain persons in an unrelated armed conflict does not make these persons targetable by an attacking State, because the "threshold of harm" would not be met as the hostilities in which the persons participate are not directed at the attacking State (see the first criterion in *ibid*, p. 16).

However, in a transnational situation, there may well first have been attacks conducted on the territory of the attacking State. One may assume, at least, that the attacking State has a reason to go after the armed group. Provided the threshold is met, such attacks by an armed group are part of a non-international armed conflict, because it was a situation of State versus an armed group, on its own territory. I do not see a problem in a continued direct participation (by means of a continuous combat function) whilst the members of the armed group withdraw onto the territory of another State. This might require an adaptation of the Interpretive Guidance, but it being an interpretation, it could just be re-interpreted.

Another way of looking at it would be to consider the armed group as a party to the international armed conflict. Such would not be inconceivable under IHL, as Article 1(4) of Additional Protocol I, although never applied in practice, allows for a non-State actor to become a party to an international armed conflict, provided the conditions laid down in the article are met. It is quite inconceivable that States would be willing to take this view, however, as this would allow for the possibility of the members of the armed group to enjoy combatant privilege. In practice, it is very unlikely that armed groups would qualify as armed forces as meant by Article 43 of Additional Protocol I. But would creating an option for armed groups to attain combatant status not actually be a good incentive? After all, to achieve the status of armed forces of a party to the conflict, the armed groups would have to internally enforce compliance with IHL. Attacking States would not have to fear such combatant status as any combatant privilege would only apply to the actions on the territory of the territorial State, as explained further below. As with the "non-international armed conflict only" approach, the attacking State would not, or at least should not, be able to prosecute members of the armed group anyway, so in practice there is no difference there.

The problems highlighted above as linked to the "non-international armed conflict only" approach do not exist when the transnational situation is qualified as an international armed conflict. Detention or internment is allowed and is covered by an extensive set of rules. Also, the attacking State's armed forces would have combatant privilege and thus be immune from prosecution by the territorial State, as long as they adhere to IHL of course. But again, that is exactly what we want the participants in armed conflicts to do.

I mentioned above that the armed group would only have combatant privilege for their actions in the territorial State and hence only for their actions that are part of the international armed conflict. This would be the case because in the framework that I propose, the fighting between that same armed group and the attacking State on the territory of that State would still be seen as a regular (internal) non-international armed conflict. This would in some situations result then in two conflicts, but these are a lot more clearly defined than would be the case

in the parallel approach (where an international and a non-international armed conflict take place simultaneously on the territory of the territorial State), for it would exactly follow the territory. Attacks against members of the armed forces of the State on its own territory would, as part of a non-international armed conflict, not fall under the combatant privilege and be subject to prosecution. Attacks on civilians would, as always, be unlawful, and could also be prosecuted in the regular way.

So to conclude, I would propose not to focus on the nature of the parties to the conflict, but rather to use the territorial borders of a State as guidance to characterise a conflict as international or as non-international. In the end, what determines whether there is an international or a non-international armed conflict is whether a State uses force against another State. The law of non-international armed conflict would regulate a State's use of force against an armed group on its own territory, because the conflict itself is non-international in character. However, that same State's transnational use of force against an armed group on the territory of another State that does not (explicitly) consent to such force is regulated by the law of international armed conflict, because such use of force itself amounts to an international armed conflict.

The four situations identified above can then be qualified as follows:

- In Situation 1,[29] the fighting in State B would then be an international armed conflict and regulated as such, as would any responses by Z, so long as these responses take place on the territory of B. Any fighting between A and Z on the territory of A would be a non-international armed conflict.
- Situation 2[30] would then be qualified as a non-international armed conflict as the fighting fully takes place on the territory of State A. That Z actually comes from State B is not relevant, because B is not actually controlling Z. Hence, there is no force between two States.
- Situation 3[31] would be an international armed conflict, at least insofar as all the fighting done on the territory of State B is concerned. Any fighting on, or attacks launched against, the territory of State A would be governed by the law of non-international

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29 The government forces of State A are engaged in fighting with organised armed group Z (of which the members have the nationality of State B) that operates from the territory of State B. The fighting takes place on both the territory of State A and on that of State B.

30 The 'foreign' organised armed group Z is engaged in fighting with the government forces of State A on the territory of State A.

31 The government forces of State A are engaged in fighting with organised armed group Z (which came from State A, but has taken refuge on the territory of State B) on the territory of State B.

armed conflict, even if Z fired across the border. Although the force would derive from the territory of State B, it would not be a use of force of State B against State A.

- Lastly, situation 4[32] is an international armed conflict, as State A fights outside its own borders and thus uses force against another State that has not consented. If armed group Z fights back, it would be part of the same international armed conflict, both on the territory of State B and/or the territory of State C.

32 The government forces of State A make use of the territory of State C to engage into fighting with organised armed group Z (of which the members are not linked to one of the concerning States), which is residing on the territory of State B.

SESSION 4 – GEOGRAPHIC SCOPE OF APPLICATION OF IHL

During the debate following the presentations of the fourth session, the audience raised three main issues:

1. The question of neutrality

One of the participants wondered whether military objects or the North Atlantic Treaty Organization (NATO) personnel, located and based in the territory of non-belligerent States, could be qualified as a legitimate military target under International Humanitarian Law (IHL). He gave the example of the Libya air campaign during which NATO established its operational headquarters in Izmir. Did the fact that Turkey did not participate in Operation Unified Protector mean that it was neutral and therefore could not be the object of attack by Libya? The participant also wondered whether States, such as Turkey or Germany, who did not directly participate in the armed attacks against Libya but supported or participated in the implementation of Operation Unified Protector decided by NATO, could be considered as party to the international armed conflict (IAC) that occurred in Libya.

A panellist replied that the International Committee of the Red Cross's (ICRC) position has been that only NATO itself and the troop contributing countries or countries having participated in the collective conduct of hostilities were considered as parties to the IAC. The question of whether States which have not been qualified as parties to the IAC but which let other States involved in the IAC use their territory for the purpose of conducting military operations – for instance by using a base located on their own territory – could be considered as legitimate military targets under IHL, is a difficult one on which the ICRC is still reflecting.

One of the speakers wondered about the potential applicability and usefulness of the law of neutrality in situations of non-international armed conflict (NIAC).

A panellist replied that, on several occasions, the ICRC has applied, by analogy and with the necessary adjustment, the law of neutrality as laid down in the fifth Hague Convention of 1907 to NIAC. The ICRC has, for instance, recommended the use of Article 11 of the fifth Hague Convention for the internment of fighters within the framework of the conflict in Sierra Leone where those fighters were located in neighbouring States.

2. Nexus

Recalling the *Tadic* decision in which the Appeals Chamber developed the argument that some of the provisions of IHL are bound up with the hostilities and therefore their geographical scope should be limited while others are not so limited, a participant asked on which criteria the distinction can be made between rules bound up with hostilities and others that are not.

A panellist answered that when distinguishing between the rules governing the conduct of hostilities, which only apply to the battlefield, and the rules relating to the protection of prisoners of war and civilians, which apply to the whole territory, the Appeals Chamber only made a *de facto* observation and one should not overstate and draw too far-reaching conclusions from this distinction.

3. Extraterritorial attacks in NIAC

One of the speakers questioned the relevance of differentiating between an extra-territorial attack directed against a training camp or military base established in a non-belligerent State as opposed to targeting individuals.

A panellist answered that when it comes to the targeting of individuals, applying the law enforcement paradigm makes perfect sense based on pragmatism. He expressed doubt as to whether a non-belligerent State, in the territory of which a person clearly qualifying as a fighter under IHL would be located, would accept that an attack against that individual be made according to a conduct of hostilities paradigm.

Panel Discussion: Current and Future Challenges to the Scope of Application of IHL?

A wide range of questions and remarks followed this last session.

I. The relationship between Human Rights Law and International Humanitarian Law (IHL).

One of the speakers stressed that the overarching issue that needs to be addressed is the interplay between IHL and Human Rights Law. There is an ambiguous methodology for dealing with the question of the interplay resulting in uncertainty. Solving this will require the integration of the two bodies of rules rather than making a choice between one or other of them. In order to deal with this issue in a coherent way, the speaker argued that three players will need to address some issues:

Firstly, the European Court of Human Rights (ECtHR). The ECtHR should announce clearly that it recognises IHL as a separate and relevant area of international law simply by virtue of its status as international law and without the need for derogation. The ECtHR should make clear that States can derogate with regard to situations falling outside their national territory. Where a State does not invoke or denies the applicability of IHL, the ECtHR should clearly state that IHL is applicable but that the State has chosen to be judged by a higher standard. The ECtHR should use Human Rights Law to identify questions or issues which States need to address but when looking at what is militarily feasible in a particular situation, it should refer to what is contained in IHL. Furthermore, the ECtHR should apply the prohibitions contained in IHL because the odds are that anything prohibited under IHL will also be prohibited under Human Rights Law. The main problem for human rights bodies would be where IHL, in the context of an armed conflict, allows a certain conduct which wouldn't be allowed in other circumstances. There, human rights bodies will need to make clear at what point they will switch from a law and order paradigm to an IHL paradigm. In a situation of belligerent occupation, there should be a sliding scale of human rights obligations depending on the degree and length of control after day one. Finally, the ECtHR should ensure that at least one judge per chamber is trained in IHL in order to be cognizant of what the law of armed conflict encompasses.

Secondly, States. States should seek to derogate with regard to relevant situations falling outside their national territory. States should furthermore expressly rely on the authority of IHL even if in an alternative pleading they also argue for a United Nations (UN) Security Council

authorisation. Finally, States should, as do the courts, use Human Rights Law to identify the issues and questions at stake and then look at what is militarily feasible.

Thirdly, civil society. The speaker highlighted the need for a coherent guide containing detailed provisions and indicating the parameters for what might be reasonable in a particular situation. The document, to which civil society could refer, should be distributed as widely as possible and serve as a tool to assist Human Rights bodies.

II. Classification of armed conflicts

Purpose and Motive

The moderator of the panel recalled that one of the issues raised in a previous session was the question of purpose and motive. On the one hand, there were the "bad motives" of criminal and drug organisations and the question whether criminal motives could declassify a situation which would otherwise be characterised as an armed conflict. On the other hand we had the "pure motives" of multinational forces with a Security Council mandate and the question whether a "pure motive" could declassify what would otherwise be considered as an armed conflict. Is the classification of a conflict affected by either of these two kinds of motives? If not, does that give rise to any kind of problem?

One of the panellists replied that from a protection standpoint it should not give rise to any problems. It will however be problematic from a public relations perspective. He argued that what emerges in discussions based on the involvement of a UN Security Council mandate is a mixing up of questions related to *jus ad bellum* and *jus in bello*. Obviously the resort to the use of force based on a Security Council mandate is legitimate. If it leads to an armed confrontation that would cross the threshold of an armed conflict, IHL is probably the most appropriate legal framework to apply. When it comes to the "bad motives", why would they be excluded? The panellist recalled that during the negotiations surrounding common Article 3 to the Geneva Conventions, the proposal to speak of 'political non-international armed conflicts' was rejected. What comes out of the international jurisprudence is that the two single criteria are intensity and organisation. One motivating factor for States not to recognise the existence of a NIAC is perhaps the perception that if they do, they grant a certain legitimacy to the parties involved. However, by making this argument States defeat what is said in common Article 3, namely that the application of IHL has no bearing on the status of the parties. Therefore, if IHL applies it does not mean that the State would be limited in taking action against the group based on domestic law, it simply means the State has to respect the limitations imposed by IHL.

On the dichotomy of “good motives” and “political motives”, a panellist added that armed groups may have an array of motives. He gave the example of the Revolutionary United Front (RUF) in Sierra Leone who had partly criminal motives, and partly political motives. In such circumstances it becomes difficult to draw the line as to what the appropriate motive is.

Another panellist suggested that it might be possible to take into account criminal motives versus political motives but not in a decisive way. If criminal gangs are using equipment that is only associated with an armed conflict, such as mortars or tanks, then the key consideration should be the level of disruption. The fact that they arguably do not have a political motive would not be relevant. At a lower level of disruption, it may be relevant to decide whether it is a political or military motive but it should not however be decisive.

The moderator noted that whilst most of us would have classified the North Atlantic Treaty Organization’s (NATO) intervention in Libya as an international armed conflict, NATO did not classify the conflict as such and applied certain laws as a matter of policy. Are there difficulties in classifying a Security Council mandate with a supposedly humanitarian objective as an IAC in that sort of situations?

One of the panellists replied that the campaign in Libya was clearly an IAC. When the military forces of a State or of a coalition are dropping bombs on an opposing State’s armed forces, that falls squarely within the definition of an IAC, he argued. In letters exchanged between the UN Independent Commission of Inquiry on Libya and the NATO legal advisor, the latter clearly expressed NATO’s position on Libya by qualifying it as an IAC. An area of confusion results from the fact that NATO is primarily a political organisation composed of 28 sovereign States. Each sovereign State will classify the legal situation according to its own definition of what constitutes an armed conflict and according to its degree or lack of participation and where it is geographically situated within the zone of operations.

The different thresholds for non-international armed conflicts

Regarding the common Article 3 threshold, a panellist noted that the elements of intensity and organisation of the armed group have been discussed but far less attention has been paid as to why those are the constituent elements of a NIAC. For the intensity requirement, it may be that at a certain point in time the applicable law is no longer appropriate to govern the situation and therefore the applicable law needs to be modified. For the organisation element, there seem to be a number of different reasons for why it is required. Firstly, there need to be “parties” to an armed conflict rather than a random group of individuals or protestors. Secondly, in order to reach the requisite level of intensity, it requires a certain degree of organisation of the armed group. A third aspect seems to be that the armed group has to be able

to apply and enforce IHL. The indicia that tell us that the violence or organisation elements have reached the requisite threshold may differ. Most of the indicia set out by the ICTY, in particular regarding the organisation of the armed group, seem to relate to the ability of that armed group to conduct the requisite level of violence. The indicia therefore include elements such as the ability to transport weapons. According to the panellist, perhaps more attention should be paid to the other aspect of organisation, namely the ability of the armed group to actually apply and enforce the law. As for the threshold provided for in the second Additional Protocol (APII), the panellist recalled that the Protocol states that the armed group has to exercise such territorial control as to enable the group to conduct sustained and concerted military operations and to implement the Protocol. The orthodox interpretation of the APII threshold focuses on the notion of "territorial control" and argues that the armed group has to control a certain proportion of the State territory. However, this is not what APII says. APII uses the phrase 'such territorial control as to enable the armed group to conduct' those operations and 'to enable the armed group to implement the Protocol'. The focus of APII therefore actually lies in the ability of the armed group to carry out the operations and to implement the Protocol and not on the actual amount of territorial control. When read in that way, there is arguably not much difference between the common Article 3 threshold and the APII threshold.

The moderator asked whether these questions of threshold and exactly what they mean are only of interest to academics or if they also have an impact on military lawyers on the ground.

One of the panellists replied that, based on his experience, it is mainly an academic issue because most States are dealing with NIACs that would easily fall within an APII classification – regardless of whether that State ratified the Protocol or not – or at least fall within the definition that has come out of the International Criminal Tribunal for the former Yugoslavia's (ICTY) jurisprudence. He added that States have not been confronted with many real operational issues forcing them to ask themselves whether there is a distinction between the two thresholds.

Another panellist argued that the problem is not classification per se but the fact that, under customary law, there is a huge reliance on alleged custom. Customary law is inherently uncertain. Indeed, one can argue as to whether a customary rule exists, as to its scope and whether it is applicable in a particular situation. If military lawyers want certainty, then coping with a huge volume of alleged customary law and States taking different views as a matter of law on it is problematic. It leads to States making decisions as a matter of policy as to which rules are going to apply.

The process of classification

Recalling that the process of classification is meant to be an objective assessment in accordance with objective criteria, the moderator wondered whether classification has degenerated into a mere political process. Are political factors too present? What are the dangers of allowing the process of classification to be a political process? Recalling that many Human Rights bodies are able to both monitor situations of human rights abuses while they are ongoing and judge them after they have been committed, the moderator asked if equivalent IHL mechanisms and bodies exist? Who do we turn to for classification decisions? What is the role of the ICRC and should its role be increased?

A panellist replied that one of the central issues is that there is no official body that decides on the question of classification. Ultimately, it will be up to the parties themselves to make that determination and they will not necessarily do so in a purely impartial manner. While it is commonly said that governments often qualify situations in bad faith or for purely political reasons, that is not always the case. parties can genuinely disagree on the characterisation of a particular violence. Armed groups, for their part, may exaggerate the level of violence in order to make the claim that the situation amounts to an armed conflict. It seems that there is, indeed, room for the establishment of a body charged to consider issues of classification and whether a particular situation reaches the level of a NIAC. That potential new body could take the form of an *ad hoc* group of experts.

From the perspective of a government lawyer, one of the panellists noted that, regardless of how the legal advice is provided within the government of a particular country, it is crucial that the legal advice on the legal classification of a situation – be it an armed conflict or not – is an objective and independent analysis of facts.

Another panellist added that encouraging States to classify a situation in which they are not themselves involved might help generate some evidence of State practice which at the moment is lacking.

Regarding the ICRC and the question of classification, one of the panellists recalled that the ICRC was given the mandate by the international community to 'work for the faithful application of international humanitarian law'. In order to do so, the ICRC has to be as transparent as possible in its bilateral dialogue with the parties to an armed conflict because there needs to be predictability as to the legal framework that it may invoke. Obviously the ICRC has the wish to make classifications public, but its ultimate guiding line is to make sure that it can operate in a given situation and if a public pronunciation would be damaging to its capacity to act then it would refrain from doing so. The ICRC's approach regarding classification is always

based on caution and it will always strive to come to an independent factual analysis of the situation on the ground.

Concluding Remarks and Closure

CONCLUSIONS DU COLLOQUE DE BRUGES 2012

Christine Beerli
Vice-Présidente du CICR

Mesdames et Messieurs,

Nous voici arrivés à la fin de ce 13ème Colloque de Bruges qui fut très riche en idées et en débats. Il me revient maintenant de conclure et d'essayer d'en résumer l'essentiel, ce qui n'est pas chose aisée au vu de la densité et la qualité des échanges.

The first session was dedicated to the material scope of the application of International Humanitarian Law (IHL). Right from the beginning differences in interpretation triggered a lively debate and showed how complex the issues are. The speakers analysed the material scope of the application of international armed conflict (IAC) and non-international armed conflict (NIAC) before going deeper into the issue of what threshold of violence should be reached to qualify a situation as an armed conflict. By taking some examples of small scale border clashes or other inter-state incidents, the first speaker highlighted the difficulties in applying the classical criteria to some situations that could be qualified as international armed conflict, for instance when both States involved are denying being in an armed conflict with each other. Some of the points reappeared in the discussion that followed, including the delicate question of the interpretation to give to the notion of *animus belligerendi*. The relevance of applying a high threshold of intensity for IAC came into debate but was dismissed by the majority of the participants. The difficulties in applying occupation law were also highlighted, in particular when a foreign force is phasing out its occupation of a territory. Reference was made to a 'sliding scale approach' which links the obligations to the level of control.
The second speaker focused on how regulations of NIAC have been approached by international law, covering the key areas of the substantive law which are linked to the material scope of application. As he underlined, the International Criminal Tribunal for the former Yugoslavia (ICTY) has given considerable substance to IHL in NIAC, basing its reasoning on customary law and making an analogy between the law applicable in IAC and in NIAC. The speaker underlined three main difficulties and the related recent developments: first, the link between the scope of application and substantive rules, second, the principle of equality of obligation of belligerents and third, conflation between the law regulating IAC and NIAC in the sense that,

occasionally, the law of NIAC requires more rigorous standards than the law of IAC with the risk of weakening the NIAC standard by applying the same 'approach by analogy'.
The last speaker of that session analysed the level of violence that should be reached to classify a situation as an armed conflict, going further than the usual assumptions. By presenting three recent examples, he showed the dilemmas in that matter. He also discussed the issues linked to multinational operations and the challenge to define the appropriate scope of application in these cases. The situations in which criminal gangs are engaged in violence that can be qualified as an armed conflict, as the two cumulative criteria are met, was also underlined as well as the fight against piracy which raised a lively debate on the articulation between the law enforcement legal framework and the IHL legal framework. The delicate question around the subjective intention of the party also came back and was subsequently picked up during the debate but not considered a determinant criterion

The second panel raised a number of fundamental issues around the personal scope of application of IHL. The first speaker identified the ambiguous relationship between International Human Rights Law (IHRL) and IHL as the biggest source of challenge facing IHL within situations of international armed conflicts and even more so in the context of non-international armed conflicts. As was explained, there is no usable methodology to apply the *lex specialis* doctrine practically in operations and to determine specifically when IHL applies and IHRL does or does not apply. This is an important issue because, despite the significant overlap between the two bodies of law, the legal authority and scope of using deadly force and detaining people is vastly different between the two bodies of law. If there is uncertainty about when one body of law applies, civilians are potentially exposed to increased risk of loss of life and liberty due to the ambiguity of the legal framework to be applied.
The second speaker dwelled on the question of who can and who cannot be targeted during armed conflicts. She explained that while the answer to this question is straightforward for IAC, for NIAC on the contrary, there is more room for controversy and interpretation. Indeed, the protection afforded to civilians in NIAC 'unless and for such time as they take direct part in hostilities', raises a number of problems. As we have seen, the International Committee of the Red Cross (ICRC) has suggested a clarification on these issues in its Interpretative Guidance on the Notion of Direct Participation in Hostilities by clarifying these vague terms.
In this session, another interesting and highly relevant question was raised, namely 'does IHL protect unlawful combatants?' The answer to this question was on the one hand, 'no' because technically, there is no such thing as an 'unlawful combatant'. Under the traditional binary IHL construction, there are merely combatants and civilians. But on the other hand, 'yes', because the people referred to as 'unlawful combatants' are protected by the Geneva Conventions, their Additional Protocols and by customary IHL applicable to both international and non-international armed conflicts. The danger of this notion, as we have seen with the position

of the US following the 9/11 attacks, is to create a 'legal black hole' leading to deny people falling under this category the protections guaranteed by IHL.

The third session focused on the temporal scope of application. The three speakers addressed respectively the beginning of application, the end of it, and the need for some clarification of the temporal scope. It was interesting to hear the criteria at our disposal to tackle this issue, to see that the criteria to be used to determine when a conflict starts are not always the same to refer to when looking at the end of it. The speakers also underlined the differences that appear between the scope of application of an IAC, a NIAC or a situation of occupation. As was recalled, a dose of common sense is useful. On the practical side, it was also very informative to hear the constraints that the military have to face, both because of political limitations imposed on them, or by the evolving reality on the ground. The debate led us then to address what was called the 'warming up' phase and the 'cooling down' phase surrounding a conflict with all the challenges that they create. Is the warming up phase already an armed conflict? Does IHL continue to apply during the cooling down phase? The general position was in favour of some clarification, although no real consensus emerged on what that clarification should cover in practice.

I will not recall the discussions of the last panel as the debates are still fresh in your mind. But I will briefly come back to the first morning session that was devoted to the geographical scope of application of IHL. As we have seen with the two speakers and the debate that followed, a number of important questions remain open. This is of particular concern as the aim of IHL, the protection of those affected by armed conflict, should be preserved. At the same time, we have to ensure that IHL will apply where necessary, but not extend the battlefield beyond reason, which would be counter-productive. This is particularly true for the conflicts that are spilling over to a third State, or to what is sometimes called 'transnational armed conflict' with all the haziness that comes with that notion.

Je suis très heureuse de la qualité des débats que nous avons eus, qui démontre l'importance du sujet traité.

Je vous remercie de votre attention et vous invite d'ores et déjà au 14$^{\text{ème}}$ Colloque de Bruges qui aura lieu la troisième semaine d'octobre 2013.

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Scope of Application of International Humanitarian Law

13th Bruges Colloquium – October 18 and 19, 2012

Simultaneous translation into French and English will be provided
Traduction simultanée anglais/français

DAY 1: Thursday, 18 October

9:00 – 9:30 **Registration and Coffee**

9:30 – 9:40 **Welcome address by Prof. Paul Demaret**, Rector of the College of Europe

9:40 – 9:50 **Welcome address by Mr. François Bellon**, Head of Delegation, ICRC Brussels

9:50 – 10:10 **Keynote address by Ms. Christine Beerli**, Vice-President of the ICRC

10:10 – 10:30 Coffee break

Session One: MATERIAL SCOPE OF APPLICATION OF IHL
Chairperson: **Navy LCDR Elizabeth Josephson**, Legal Adviser, USEUCOM

10:30 – 10:50 **What does IHL regulate and is the current armed conflict classification adequate?**
Speaker: **Noam Lubell**, University of Essex

10:50 – 11:10 **Non-international armed conflicts: the applicable law**
Speaker: **Sandesh Sivakumaran**, Nottingham University Law School

11:10 – 11:30 **When does violence cross the armed conflict threshold: current dilemmas**
Speaker: **Paul Berman**, Director, Council of the EU Legal Service

11:30 – 12:30 Discussion

12:30 – 14:00 Sandwich lunch

Session Two: PERSONAL SCOPE OF APPLICATION OF IHL
Chairperson: **Knut Doermann**, Head of ICRC Legal Division

14:00 – 14:20 **Persons protected by IHL in IAC: the law and current challenges**
Speaker: **Kirby Abbott**, SHAPE Assistant Legal Advisor

14:20 – 14:40 **Personal scope of IHL protection in NIAC: legal and practical challenges**
Speaker: **Françoise Hampson**, University of Essex

14:40 – 15:00 **Does IHL protect "unlawful combatants"?**
Speaker: **Gabor Rona**, Human Rights First

15:00 – 15:45 Discussion

15:45 – 16:00 Coffee break

Session Three: TEMPORAL SCOPE OF APPLICATION OF IHL
Chairperson: **Frederik Harhoff**, Judge, ICTY

16:00 – 16:20 **Beginning of IHL application: overview and challenges**
Speaker: **Louise Arimatsu**, Chatham House

16:20 – 16:40 **End of IHL application: overview and challenges**
Speaker: **Marko Milanovic**, Nottingham University Law School

16:40 – 17:00 **Is there a need for clarification of the temporal scope of IHL?**
Speaker: **Lieutenant Colonel David Frend**, Legal Advisor of the British Army Chief of Staff

17:00 – 18:00 Discussion

19:30 – 22:30 Dinner

DAY 2: Friday, 19 October

Session Four: GEOGRAPHIC SCOPE OF APPLICATION OF IHL
Chair person: **Paul Berman**, Director, Council of the EU Legal Service

9:00 – 9:20 **The geographic reach of IHL: the law and current challenges**
Speaker: **Tristan Ferraro**, ICRC Legal Division

9:20 – 9:40 **Transnational armed conflict: does it exist?**
Speaker: **Rogier Bartels**, Netherlands Defence Academy

9:40 – 10:10 Discussion

10:10 – 10:40 Coffee break

10:40 – 12:30 **PANEL DISCUSSION: CURRENT AND FUTURE CHALLENGES TO THE SCOPE OF APPLICATION OF IHL?**
Moderator: **Elizabeth Wilmshurst**, Chatham House

Panellists:

Sandesh Sivakumaran	University of Nottingham
Kirby Abbott	SHAPE Legal Advisor
Françoise Hampson	University of Essex
Knut Doermann	ICRC Geneva

12:30 – 13:00 **CONCLUDING REMARKS AND CLOSURE**
Ms. Christine Beerli, Vice-President of the ICRC

SPEAKERS' BIOS
CURRICULUM VITAE DES ORATEURS

Paul Demaret est Docteur en droit et Licencié en sciences économiques de l'Université de Liège, où il a également obtenu un diplôme d'études spécialisées en droit économique. Il a ensuite poursuivi ses études aux États-Unis, et est titulaire d'un Master of Law de l'Université de Columbia et d'un Doctor of Juridical Science de l'Université de Californie à Berkeley. Le Professeur Demaret a enseigné des matières juridiques ou économiques dans de nombreuses universités, notamment celles de Genève, Paris II, Pékin et Coimbra, ainsi qu'à l'Académie de droit européen de Florence et au Colegio de Mexico. Il est actuellement Recteur du Collège d'Europe. De 1981 à 2003, il a été Directeur du Programme d'études juridiques au Collège d'Europe et Directeur de l'Institut d'études juridiques européennes à l'Université de Liège. Il a enseigné le droit à l'Université de Liège de 1982 à 2006. Spécialiste des aspects juridiques et économiques de l'intégration européenne, Paul Demaret est l'auteur de nombreux ouvrages et articles sur ces questions. Son expertise en matière de commerce international a été sollicitée par diverses institutions, dont l'Organisation mondiale du commerce, où il a servi dans deux panels.

François Bellon has been the Head of the ICRC Delegation to the European Union, NATO and the Kingdom of Belgium, in Brussels since August 2010. Mr Bellon joined the ICRC in 1984, and has occupied numerous positions within the ICRC. Prior to Brussels, he was Head of the ICRC Regional Delegation for the Russian Federation (2006-2010), the Head of Delegation in Israël (2002-2005), in Georgia (1999-2002), in Budapest (1997-99), and in the Federal Republic of Yougoslavia (1994-97). Previously, Mr Bellon undertook several ICRC field missions in Azerbaijan (Nagorni Karabakh), Moldova, Bosnia-Herzegovina, Sri Lanka, Pakistan, Iraq and Lebanon. He also served at the ICRC Headquarters at the Middle East and North Africa Desk as well as in the Legal Division. He holds a Master in Law from the University of Lausanne in Switzerland and completed a Postgraduate course in conflict management and emergency response at the Complutense University in Madrid.

Christine Beerli is the Vice-President of the International Committee of the Red Cross. A member of a law firm in Biel, Ms Beerli began her political career on that city's Municipal Council, where she served from 1980 to 1983. From 1986 to 1991 she was a member of the Legislative Assembly of the Canton of Bern. In 1991 she was elected to the Upper House of the Swiss Parliament, where she remained until 2003, chairing the Foreign Affairs Committee (1998-99) and the Committee for Social Security and Health (2000-01). Ms Beerli chaired the caucus of the Free Democratic Party in Switzerland's Federal Assembly from 1996 to 2003. She also served on committees dealing with security policy and economic and legal affairs. She

retired from politics in 2003. Since 1 January 2006, she has headed Swissmedic, the Swiss supervisory authority for therapeutic products. She is a former Director of the School of Engineering and Information Technology at Bern University of Applied Sciences.

Elizabeth Josephson is a commissioned officer (LCDR) in the U.S. Navy's Judge Advocate General Corps. She holds a J.D. from Boston University and a Master of Law in international law from Columbia Law School. Presently, she is assigned as an Assistant Staff Judge Advocate and Operational Law Planner on the U.S. European Command staff. She has served with the U.S. military in Afghanistan with responsibilities including operational, international and intelligence law for NATO Training Mission – Afghanistan. In the Pacific, she served as Military Prosecutor, a Special Assistant U.S. Attorney for the District of Hawaii and as the Staff Judge Advocate for an afloat Amphibious Readiness Group. She has also been assigned as the Deputy Staff Judge Advocate for the Combined Joint Task Force – Horn of Africa with responsibilities including developing international humanitarian law training for militaries in the region.

Noam Lubell is a Reader in the School of Law, University of Essex. Prior to this he was a Lecturer at the National University of Ireland, Galway, the Co-Director of an International Law Amicus Curiae Clinic at the Concord Research Centre in Israel, and a Visiting Research Fellow at the Hebrew University, Jerusalem. He holds a Ph.D in Law and an LL.M, as well as a B.A. in philosophy. He has taught courses on the laws of armed conflict in a number of academic institutions, including the University of Oxford, and as a Visiting Professor at Case Western Reserve University. In addition to his academic work, Dr. Lubell has worked for various organisations including human rights NGOs dealing with the Israeli/Palestinian conflict, as International Law Advisor, and Director of a Prisoners & Detainees Project. He has provided consultancies and training in human rights law and the laws of armed conflict for international bodies such as Amnesty International, government bodies, and the BBC. He has taught, researched and published on a variety of topics, including the book *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press). Dr. Lubell is the Rapporteur of the International Law Association's Committee on the Use of Force.

Sandesh Sivakumaran is Associate Professor and Reader in Public International Law at the School of Law, University of Nottingham. He is the author of *The Law of Non-International Armed Conflict* (OUP, 2012) and co-editor of *International Human Rights Law* (OUP, 2010). He advises and acts as expert for a range of States, inter-governmental organisations and non-governmental organisations. Prior to entering academia, he worked at the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia. For his research, Sandesh has been awarded the Journal of International Criminal Justice Giorgio La Pira Prize and the Antonio Cassese Prize.

Paul Berman joined the Legal Service of the Council of the European Union in February 2012 where he is the Director responsible for Institutional issues. After his studies at Oxford and Geneva, Mr Berman qualified as a Barrister (advocate) and joined the legal cadre of the UK Diplomatic Service in 1991. As well as working as a legal adviser at the Foreign and Commonwealth Office in London, he has served as Legal Adviser to the Advisory Service on International Humanitarian Law at the International Committee of the Red Cross in Geneva (1996 to 1998), Senior Adviser to the UK Attorney General on international, ECHR and EU law (2000 to 2002), Legal Counsellor and Head of the Legal Section at the United Kingdom Permanent Representation to the European Union in Brussels (2002 to 2007) and as Director of the UK Cabinet Office European Law Division (2008 to 2012). His work has covered legal advice on a wide range of international, EU and public law issues including multilateral and bilateral negotiations and litigation before international, European and domestic courts. He was closely involved in promoting the adoption of the EU Guidelines on International Humanitarian Law. He represented the United Kingdom in the Intergovernmental Conference Legal Experts Groups for the Constitutional Treaty and the Treaty of Lisbon.

Knut Dörmann has been Head of the Legal Division of the International Committee of the Red Cross (ICRC), since December 2007. He was Deputy Head of the Legal Division between June 2004 and November 2007 and Legal Adviser at the Legal Division between December 1998 and May 2004. He was a member of the ICRC Delegation to the Preparatory Commission of the International Criminal Court. He holds a Doctor of Laws (Dr. Iur.) from the University of Bochum in Germany (2001). He was Managing Editor of *Humanitäres Völkerrecht - Informationsschriften* (1991-1997). Prior to joining the ICRC, he was Research Assistant (1988-1993) and Research Associate (1993-1997) at the Institute for International Law of Peace and Armed Conflict, University of Bochum. Dr. Dörmann is a member of several groups of experts working on the current challenges of international humanitarian law. He has extensively presented and published on international law of peace, international humanitarian law and international criminal law. He received the 2005 Certificate of Merit of the American Society of International Law for his book *Elements of War Crimes under the Rome Statute of the International Criminal Court*, published by Cambridge University Press.

Colonel Kirby Abbott, O.M.M, C.D. B.A. (Hons, first class, SMU), M.A. (distinction, Carleton), LL.B. (Dalhousie), LL.M. (distinction, Public International Law Program Prize, LSE). Colonel Abbott has been a Canadian Forces (CF) legal officer and barrister since 1989. Currently assigned as Assistant Legal Advisor to NATO military headquarters, Mons, Belgium with a background primarily focused on international and operational law. He has served as Director of International Law and later led the Division responsible for the provision of all legal advice to the CF during domestic, international and Special Forces operations. Particular areas of interest

include: the use of force during military operations, interaction between IHL and human rights law and what the CF refers to as 'strategic legal engagement' (lawfare).

Françoise Hampson is a Professor of Law at the Human Rights Centre of the University of Essex. She was a member of the steering group and the group of experts for the ICRC study on customary international humanitarian law. She has taught on courses and participated in conferences for members of the armed forces in Australia, Canada, Ghana, the UK and the USA, as well as at the International Institute of Humanitarian Law in San Remo, Italy. She is a member of the IIHL Military Department Training Advisory Committee. She was a member of the UN Sub-Commission on the Promotion and Protection of Human Rights from 1998-2007. She is an expert on the European Convention on Human Rights and has been the legal representative of applicants before the European Court of Human Rights in many cases arising out of military operations. In recognition of their litigation on behalf of Turks of Kurdish origin, she and her colleague Professor Kevin Boyle were given the Human Rights Lawyer of the Year award in 1998. She produced an expert report for the Steering Committee on Human Rights of the Council of Europe on Human Rights Protection during Situations of Armed Conflict, Internal Disturbances and Tensions. Her publications are in the fields of the law of armed conflicts and human rights law. In 2005, she was awarded an OBE for services to international law and human rights.

As the International Legal Director, **Gabor Rona** advises Human Rights First programmes on questions of international law and coordinates international human rights litigation. He also represents Human Rights First with governments, intergovernmental and non-governmental organisations, the media and the public on matters of international human rights and international humanitarian law (the law of armed conflict). Before coming to Human Rights First, Gabor was a Legal Advisor in the Legal Division of the International Committee of the Red Cross (ICRC) in Geneva, where he focused on the application of international humanitarian and human rights law in the context of counter-terrorism policies and practices. He represented the ICRC in intergovernmental, non-governmental, academic and public forums and his articles on the topic have appeared in the Financial Times, the Fletcher Forum on World Affairs and the Chicago Journal of International Law, among other publications. In addition, he represented the ICRC in connection with the establishment of international and other criminal tribunals, including the International Criminal Court. He has also taught International Humanitarian Law and International Criminal Law in several academic settings, including the International Institute of Human Rights in Strasbourg, France and the University Centre for International Humanitarian Law in Geneva, Switzerland. He now teaches IHL at Columbia Law School.

Frederik Harhoff, LL.M. from the Law Faculty of Copenhagen University (Cand. Jur.) and LL.D. from the University of Copenhagen (Dr. Juris.), has been a Judge ad litem at the ICTY since 2007. He taught International Law and International Human Rights at the University of Southern Denmark. He was a Judge in the Danish Eastern High Court in 2001. Between 1996 and 1998 he was a senior Legal Officer and Head of the Legal Section with the ICTR in Arusha, Tanzania. Between 1998 and 2002, he was a member of the Danish Delegation at the Rome Conference for the Establishment of the International Criminal Court (ICC), and of the Danish Delegation at the ICC Preparatory Committee in New York for the drafting of the ICC Rules of Procedure and Evidence and the Elements of Crimes under the Court's Jurisdiction. In 1999, he was a member of the International Law Committee of the Danish Red Cross Society. He has published and taught in Danish constitutional law, public international law, international human rights, international humanitarian law and international law of armed conflicts at the Law Faculty of Copenhagen University, Denmark, at the Raoul Wallenberg Institute in Lund, Sweden, and at the University of Southern Denmark.

Louise Arimatsu has been an Associate Fellow with the International Law programme at Chatham House since 2009. She taught Foreign Relations Law at UCL from 2009-2011. Between 2006 and 2009 she was based at the LSE where she taught International Criminal Law, International Law of Armed Conflict and the Use of Force, Refugee Law and Human Rights Law. She was also the founder and Coordinator of the International Humanitarian Law Project at the LSE. She was Managing Editor of the *Yearbook on International Humanitarian Law* from 2009 until 2012. She contributed to the *Tallinn Manual on the International Law Applicable to Cyber Warfare*.

Marko Milanovic is Lecturer in law at the University of Nottingham School of Law. He obtained his first degree in law from the University of Belgrade Faculty of Law, his LL.M from the University of Michigan Law School, and his PhD in international law from the University of Cambridge. He is Secretary-General and member of the Executive Board of the European Society of International Law, an Associate of the Belgrade Centre for Human Rights, and co-editor of *EJIL: Talk!*, the blog of the European Journal of International Law, as well as a member of the EJIL's Scientific Advisory Board. He was Law Clerk to Judge Thomas Buergenthal of the International Court of Justice in 2006/2007. He has published in leading academic journals, including the European Journal of International Law and the American Journal of International Law; his work has been cited, inter alia, by the UK Supreme Court and by the International Law Commission. He was counsel or advisor in cases before the International Court of Justice, the European Court of Human Rights, and the Constitutional Court of Serbia. His book *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* was published by Oxford University Press in 2011.

Colonel David Frend was educated at King Edward VI School Southampton, Brockenhurst College Hampshire, University of Keele, The Inns of Court School of Law and University of Bristol. He was awarded a BA (Hons) Law and Politics degree from the University of Keele in 1993, and an LLM degree in International Law from the University of Bristol in 2010. After being called to the Bar (Inner Temple) in 1994, and working as a paralegal with Freshfields Bruckhaus Deringer, he undertook pupillage in criminal and common law chambers between 1995 and 1996. Lt Col Frend commissioned into the Army Legal Services in February 1997 in the rank of Captain, was promoted Major in March 1999 and further promoted Lt Col in January 2005. During his career in the Army, Lt Col Frend has undertaken a number of legal posts: Staff Legal Adviser, Headquarters Northern Ireland, April 1997– March 1999; Staff Legal Adviser, Headquarters Directorate Army Legal Services March 1999 – March 2001; Legal Adviser Combined Counter-Narcotics Task Force, Caribbean, April/May 2001; Principal Legal Adviser, Headquarters British Forces and International Military Advisory and Training Team, Sierra Leone, May – November 2001; Prosecuting Officer, Army Prosecuting Authority (Germany), December 2001 – September 2002; Prosecuting Officer, Army Prosecuting Authority (UK), October – December 2002; Staff Legal Adviser, Headquarters 1st (UK) Armoured Division, Op TELIC, Kuwait and Iraq, January – June 2003; Prosecuting Officer, Army Prosecuting Authority (UK), July 2003 – December 2004; Staff Legal Adviser Armed Forces Bill Team, Ministry of Defence, January 2005 – June 2006; Military Operations Legal Adviser, Ministry of Defence, Iraq and Afghanistan, July 2006 – December 2008; Prosecuting Officer, Army Prosecuting Authority (UK) January - August 2009; LLM programme University of Bristol, September 2009 - August 2010; Advanced Command and Staff Course, Defence Academy, August 2010 - August 2011; Commander Legal, Headquarters 5th Division, Shrewsbury, September 2011 - December 2011; Legal Adviser, Headquarters Provost Marshal (Army), Andover, January 2012 to present.

Tristan Ferraro is thematic Legal Adviser at the International Committee of the Red Cross (HQ Geneva). He is the in-house expert on legal issues relating to multinational forces, occupation (head of the ICRC project on occupation and other forms of administration of foreign territory) and the notion of armed conflict. Before coming back to the ICRC HQ in 2007, he served with the ICRC some years in the field - in particular as Legal Coordinator - in Afghanistan, Pakistan and Israel/Palestinian occupied territories. Prior to joining the ICRC, Tristan Ferraro worked as Senior Lecturer at the University of Nice-Sophia Antipolis (France), teaching Public International Law, including International Humanitarian Law. He holds a Doctor of Laws (Dr. jur. summa cum laude) from the University of Nice-Sophia Antipolis.

Rogier Bartels, LL.M. (Utrecht), LL.M. (Nottingham) is a researcher at the Military Law Section of the Netherlands Defence Academy, and works at the International Crimes Section of the Dutch National Prosecutor's Office. As an adjunct-lecturer, he teaches the course "Enforce-

ment of IHL" at the Hague University of Applied Sciences. Prior positions include Associate Legal Officer in Chambers at the International Criminal Tribunal for the former Yugoslavia, and legal adviser at the IHL Division of the Netherlands Red Cross. His publications deal mainly with current issues of international humanitarian law and international criminal law, and with the interplay between these two fields. Rogier is one of the editors of the "Armed groups and international law" blog. Within the research programme on "Law of Armed Conflict and Peace Operations" of the Amsterdam Center for International Law (of the University of Amsterdam), he is writing a PhD thesis on the concept of "transnational armed conflicts".

Elizabeth Wilmshurst is Associate Fellow in International Law, at Chatham House (the Royal Institute of International Affairs) and a visiting professor at University College, London University. She was a legal adviser in the United Kingdom diplomatic service between 1974 and 2003. She is a co-author of *An Introduction to International Criminal Law and Procedure* (2nd ed. Cambridge, 2010), a co-editor of *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge, 2007), and the editor of *International Law and the Classification of Conflicts* (Oxford, 2012).