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**International Humanitarian Law and  
the challenges of contemporary armed conflicts**

**Report**

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**INTERNATIONAL HUMANITARIAN LAW  
AND  
THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS**

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## EXECUTIVE SUMMARY

This is the third report on "International Humanitarian Law (IHL) and the Challenges of Contemporary Armed Conflicts" prepared by the ICRC for an International Conference of the Red Cross and Red Crescent, the first two having been submitted to the 28<sup>th</sup> and 30<sup>th</sup> International Conferences in Geneva, in December 2003 and November 2007, respectively. These reports aim to provide an overview of some of the challenges posed by contemporary armed conflicts for IHL, to generate broader reflection on those challenges and to outline ongoing or prospective ICRC action, positions and interest.

This report, like its predecessors, can only address a part of the ongoing challenges to IHL. The ICRC therefore selected a number of issues which were not addressed in previous reports but which are increasingly the focus of interest among States and for the ICRC, such as new technologies in warfare or the drafting of the new Arms Trade Treaty. At the same time, the report seeks to give an update on some of the issues that had been addressed in the previous reports and remain of ongoing interest.

Another report submitted to the Conference, entitled "*Strengthening Legal Protection of Victims of Armed Conflict*", summarizes the results of a process of research and reflection conducted by the ICRC since 2008 on the adequacy of existing IHL to protect the victims of contemporary armed conflicts. The analysis identifies four areas of IHL in which, in the view of the ICRC, humanitarian concerns are not adequately addressed by existing IHL and where IHL should therefore be strengthened - namely the protection of detainees, of internally displaced persons and of the environment in armed conflict, and the mechanisms of compliance with IHL.

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The *introduction* to this report provides a brief overview of current armed conflicts and of their humanitarian consequences, and thus of the operational reality in which challenges to IHL arise.

Chapter II focuses on the *notion and typology of armed conflicts*, issues that have been the subject of ongoing legal debate over the past several years. It addresses, *inter alia*, the question of criteria for the determination of an international armed conflict (IAC) and of whether the IHL classification of armed conflicts into international and non-international is sufficient to encompass the types of conflicts taking place today. It also provides a typology of non-international armed conflicts (NIAC) governed by Common Article 3 of the 1949 Geneva Conventions, and examines the application, as well as the applicability of IHL to contemporary forms of armed violence.

Chapter III is devoted to the *interplay of IHL and human rights law*, which is an area of abiding legal interest because of the practical consequences that this relationship may have on the conduct of military operations. It first provides a general overview of some of the differences between IHL and human rights law, highlighting, in particular, the differences in the binding nature of IHL and human rights law on organized non-state armed groups. It then discusses the specific interplay between these two branches of international law in relation to detention, and the use of force, in international and non-international conflicts, respectively. The extraterritorial targeting of persons is also briefly dealt with.

The first section of Chapter IV, on the protective scope of IHL, aims to highlight a range of issues related to *humanitarian access and assistance*, including the legal framework applicable to humanitarian action, as well as the practical constraints that may hamper the

delivery of humanitarian relief. The section on the *law of occupation* discusses salient legal questions that have arisen in the application of this part of IHL, such when occupation begins and ends, the rights and duties of an occupying power, the use of force in occupied territory, and the applicability of occupation law to UN forces. These questions were, among others, explored in an expert process organized by the ICRC between 2007 and 2009, and resulted in the preparation of report that will be published before the end of 2011.

The next section is devoted to *IHL and multinational forces*, whether under UN auspices or otherwise, and examines the legal challenges posed in the spectrum of operations in which such forces may be involved. Relevant queries pertain, *inter alia*, to the applicability of IHL to such forces, the legal classification of situations in which they take part, detention by multinational forces, interoperability, and others. It is submitted that multinational forces, regardless of their specific mandate, are bound by IHL when the conditions for its application have been met. The last section of the Chapter sheds light on the humanitarian challenges posed by the use of *private military and security companies* and surveys recent and ongoing international initiatives aimed at ensuring that their activities comply with IHL and other relevant bodies of international law.

Chapter V, on means and methods of warfare, first addresses new technologies of warfare, including, in the first section, “*cyber warfare*”. This section discusses the specificity of cyberspace as a potential war fighting domain and the particular challenges posed by cyber operations to the observance of the IHL prohibitions of indiscriminate and disproportionate attacks, as well as the obligation to take feasible precautions in attack. The section also reviews some of the legal challenges posed by remote controlled weapons systems, as well as automated and autonomous weapons systems. It recalls that new technologies must abide by existing IHL rules, while recognizing that existing norms do not respond to all the legal and practical challenges posed by new technologies.

The *use of explosive weapons in densely populated areas* is the focus of the next section of the Chapter, which outlines both the human costs and the challenges of respecting IHL rules involved in the use of such weapons. As a result of these factors it is believed that explosive weapons with a wide impact area should generally not be used in densely populated areas.

The section on *direct participation in hostilities* recapitulates the process leading to and the main recommendations contained in the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL which was published in 2009, and reflects solely the ICRC’s views. Different positions expressed in relation to some of the recommendations made in the Interpretive Guidance are also briefly discussed.

The last section of the Chapter examines the process leading to current work within the UN on drafting an *Arms Trade Treaty*, one of the most important objectives of which should be to reduce the human cost of the availability of weapons by setting clear norms for the responsible transfer of conventional arms and their ammunition. The ICRC supports the elaboration of a comprehensive, legally binding Arms Trade Treaty that establishes common international standards in this area.

Chapter VI addresses the current *conflation of armed conflict and terrorism* by unpacking the distinctions between the legal frameworks governing these types of violence. It elaborates on both the legal and policy effects of blurring armed conflict and terrorism, as well as the disadvantages caused by such blurring particularly for the observance of IHL by non-state parties to NIACs. The practical effects of the conflation, that is the potential for curtailing the work of humanitarian organizations in NIACs, is also discussed.

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**I. INTRODUCTION**

This is the third report on "International Humanitarian Law (IHL) and the Challenges of Contemporary Armed Conflicts" prepared by the ICRC for an International Conference of the Red Cross and Red Crescent, the first two having been submitted to the 28<sup>th</sup> and 30<sup>th</sup> International Conferences in Geneva, in December 2003 and November 2007, respectively. These reports aim to provide an overview of some of the challenges posed by contemporary armed conflicts for IHL, to generate broader reflection on those challenges and to outline ongoing or prospective ICRC action or interest. The goal of this section is to briefly outline the operational reality in which those challenges arise.

In the last four years, well over 60 countries were the theatre of armed conflicts - whether inter-state or non-international - with all the devastation and suffering that these entailed, chiefly among civilian populations. Indeed, civilians continued to be the primary victims of violations of IHL committed by both state parties and non-state armed groups. Recurring violations in hostilities include deliberate attacks against civilians, destruction of infrastructure and goods indispensable to their survival, and forcible displacement of the civilian population. Civilians have also suffered from indiscriminate methods and means of warfare, especially in populated environments. Fighters have not taken all feasible precautions - both in attack and against the effects of attack - as required by IHL, with the consequent unnecessary loss of civilian life and destruction of civilian property. Individuals deprived of their liberty have also been the victim of serious violations of IHL such as murder, forced disappearance, torture and cruel treatment, and outrages upon their personal dignity. Women in particular have been victim of rape and other forms of sexual violence, in some contexts on a massive scale. Health care providers, services and facilities have come under direct attack or been severely obstructed in attempting to carry out of their duties. Abuses of the protective emblems have also occurred, ultimately endangering all Movement actors in the accomplishment of their humanitarian mission. General insecurity in the field and the ensuing lack of access to non-state armed groups to gain acceptance and security guarantees, and often deliberate targeting or kidnapping of aid workers or of aid convoys, have prevented humanitarian assistance to reach those in need, leaving the fate of tens of thousands of civilians uncertain.

Against this backdrop, some governments continue to deny that there are NIACs occurring within their territory and therefore that IHL applies, rendering difficult or impossible a dialogue with the ICRC on respect for their obligations under IHL. Certain governments have also been reluctant to acknowledge the need for the ICRC and other components of the Movement to engage non-state armed groups on issues relating to their security and access to victims, as well as to disseminate IHL and humanitarian principles, on the grounds that the armed groups in question are "terrorist organisations" or are otherwise outlaws.

In the intervening years since the last report, the ICRC has observed two main features of armed conflicts. The first is the *diversity* of situations of armed conflict, which range from contexts where the most advanced technology and weapons systems were deployed in asymmetric confrontations, to conflicts characterised by low technology and a high degree of fragmentation of the armed groups involved.

While the last years have seen the emergence of a number of new IACs, including the recent conflict between Libya and a multinational coalition under NATO command, NIACs remained the predominant form of conflict. This has been generated primarily by state weakness that

has left room for local militias and armed groups to operate, leading to environments where looting and trafficking, extortion and kidnapping have become profitable economic strategies sustained by violence and national, regional and international interests, with all the consequent suffering on civilians. These low-intensity conflicts are often characterised by brutal forms of preying and violence primary targeting civilians, to instil fear, ensure control and obtain new recruits. Direct clashes between the armed groups and the governmental forces tend to be occasional.

Hostilities pitting non-state armed groups operating within populated areas against government forces using far superior military means were also a recurring pattern, exposing civilians and civilian dwellings to the confrontations taking place in their midst. The co-mingling of armed groups with civilians, in violation of IHL, has by some armies been used as a justification to by-pass the taking of all possible precautions to minimise risks to civilians, as required by IHL. Urban warfare has posed particular challenges to government forces, which often continue to employ means and methods of warfare designed for use in an open battlefield and ill-adapted to populated environments, such as certain forms of air power and artillery. In this regard, the effects of the use of explosive force in populated areas on civilians and civilian structures, which in such environments have borne the brunt of the hostilities, has been of increasing concern.

Another notable trend of contemporary NIACs is that the lines of distinction between ideological and non-ideological confrontations have gradually blurred, with non-state armed groups arising from organised criminal activity. It must be recalled that, despite some views to the contrary, the underlying motivations of these groups are irrelevant to the legal determination of whether they are involved in a NIAC as defined by IHL.

The recent situations of civil unrest in North Africa and the Middle East have in contexts such as Libya degenerated into NIACs, opposing government forces to organised armed opposition movements. In other contexts such as Iraq and Yemen, civil unrest has occurred against the backdrop of pre-existing armed conflicts, thereby raising questions regarding which international legal framework – IHL or human rights rules and standards -- governs particular events of violence. This crucial question has also been recurrent in many other situations of armed conflict around the globe.

The second main feature of armed conflicts in recent years has been the *duration* of armed conflicts. In this regard, it is worth noting that the majority of ICRC operations are taking place in countries where the organisation had been present for two, three or four decades, such as for example Afghanistan, Colombia, DR Congo, Israel and the occupied territories, the Philippines, Somalia and Sudan. These enduring situations of armed conflict, which are often fuelled by economic motivations linked to access to natural resources, fluctuate between phases of high and low intensity and instability, without solutions for lasting peace. Some armed conflicts, such as that in Sri Lanka, have ended with the military victory of one party against the other, but this has been by far the exception rather than the rule. Few if any armed conflicts have been definitively resolved through peace negotiations, with in several cases armed conflicts starting up again between old foes despite ceasefires and peace agreements in place.

Moreover, unresolved inter-state disputes have led to enduring situations of occupation governed by the Fourth Geneva Convention and customary IHL, although few if any occupying powers acknowledge the application to them of the law of occupation. Unless political solutions are found to address the underlying causes of these prolonged occupations, they will continue to inflict dispossession, violence, and consequent suffering on the affected civilian populations.

## II. THE NOTION AND TYPOLOGY OF ARMED CONFLICTS

Along with the increasing complexity of armed conflicts in practice - as described in the previous section - legal issues related to the notion and typology of armed conflicts have arisen over the past several years as well. In particular, questions have been asked about the adequacy:

- 1) of the current criteria for determining the existence of an IAC,
- 2) of existing armed conflict classifications, in particular the criteria for determining the existence of an NIAC, and,
- 3) of the applicable IHL, as well as its applicability in certain cases.

### 1) Criteria for the Determination of an International Armed Conflict

Under IHL, IACs are those waged between states (or between a state and a national liberation movement provided the requisite conditions have been fulfilled<sup>1</sup>). Pursuant to Common Article 2 of the 1949 Geneva Conventions, they 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 recognized by one of them.<sup>2</sup> 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”.<sup>3</sup> 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 armed conflict, the implication being that the fulfilment of an intensity criterion is necessary before an inter-state use of force may be classified as an IAC. Pursuant to this view, a number of 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 designate them as such.

It is submitted that, in addition to prevailing legal opinion which takes the contrary view, the absence of a requirement of threshold of intensity for the triggering of an IAC should be maintained because it helps avoid potential legal and political controversies about whether the threshold has been reached based on the specific facts of 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, including the fact that a POW may not be prosecuted by the detaining state for lawful acts of war. 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.

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<sup>1</sup> Additional Protocol I, articles 1(4) and 96 (3).

<sup>2</sup> Under IHL belligerent occupation is considered a species of international armed conflict. The challenges raised in relation to the criteria for determining the existence of an occupation are explored further in this report.

<sup>3</sup> Commentary to the Third Geneva Convention, J. Pictet (ed.), ICRC, 1960, p. 23.

The fact that a state does not, for political or other reasons, explicitly refer to the existence of an IAC in a particular situation does not prevent its being legally classified as such. The application of the law of IAC was divorced from the need for official pronouncements many decades ago in order to avoid cases in which states could deny the protection of this body of rules. It is believed that that rationale remains valid today.

## 2) Classification of Armed Conflicts

Many queries have 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 - 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 NIAC is the quality of the parties involved: while an IAC presupposes the use of armed force between two or more states,<sup>4</sup> a NIAC involves hostilities between a state and an organized non-state armed group (the non-state party), or between such groups themselves. There does not appear to be, in practice, any current situation of armed violence between organized parties that would not be encompassed by one of the two classifications mentioned above. What may be observed is a prevalence of NIACs, the typology of which has arguably expanded, as will be discussed below.

By way of reminder, at least two factual criteria are deemed indispensable for classifying a situation of violence as a Common Article 3 NIAC:<sup>5</sup>

- i) the parties involved must demonstrate a certain level of organization, 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 organization. International jurisprudence has developed indicative factors on the basis of which the "organization" criterion may be assessed. They include the existence of a command structure and disciplinary rules and mechanisms within the armed group, the existence of headquarters, the ability to procure, transport and distribute arms, the group's ability to plan, coordinate and carry out military operations, including troop movements and logistics, its ability to negotiate and conclude agreements such as cease-fire or peace accords, etc. Differently stated, even though the level of violence in a given situation may be very high (in a situation of mass riots for example), unless there is an organised armed group on the other side, one cannot speak of a NIAC.

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. Pursuant to international jurisprudence, indicative factors for assessment include the number, duration

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<sup>4</sup> Except as mentioned above, see note 1.

<sup>5</sup> Given that NIACs under Additional Protocol II have to fulfil certain conditions not found in Common Article 3 and that they are not as common, they will not be further discussed in this section.



and intensity of individual confrontations, the type of weapons and other military equipment used, the number and calibre of munitions fired, the number of persons and types of forces partaking in the fighting, the number of casualties, the extent of material destruction, and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict. The International Criminal Tribunal for the former Yugoslavia (ICTY) has deemed there to be a NIAC in the sense of Common Article 3 whenever there is *protracted* (emphasis added) armed violence between governmental authorities and organized armed groups or between such groups within a state. The Tribunal's subsequent decisions have relied on this definition, explaining that the "protracted" requirement is in effect part of the intensity criterion.

In this context it should be mentioned that a 2008 ICRC Opinion Paper<sup>6</sup> defines NIACs as "*protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State (party to the Geneva Conventions). The armed confrontation must reach a *minimum level of intensity* and the parties involved in the conflict must show a *minimum of organization*".

#### a) *Typology of Common Article 3 NIACs*

NIACs falling within the Common Article 3 threshold have involved different factual scenarios, particularly over the past decade. A key development has been an increase in NIACs with an extraterritorial element, due to which questions about the sufficiency of the current classification of armed conflicts have been posed. Provided below is a brief typology of current or recent armed conflicts between states and organized non-state armed groups, or between such groups themselves which may be classified as NIACs. While the first five types of NIAC listed may be deemed uncontroversial, the last two continue to be the subject of legal debate.

First, there are ongoing traditional or "classical" Common Article 3 NIACs in which government armed forces are fighting against one or more organized armed groups within the territory of a single state. These armed conflicts are governed by Common Article 3, as well as by rules of customary IHL.

Second, an armed conflict that pits two or more organized armed groups between themselves may be considered a subset of "classical" NIAC when it takes place within the territory of a single state. Examples include both situations where there is no state authority to speak of (i.e. the "failed" state scenario), as well as situations where there is the parallel occurrence of a NIAC between two or more organized armed groups alongside an IAC within the confines of a single state. Here, too, Common Article 3 and customary IHL are the relevant legal regime for the NIAC track.

Third, certain NIACs originating within the territory of a single state between government armed forces and one or more organized armed groups have also been known to "spill over" into the territory of neighbouring states. Leaving aside other legal issues that may be raised by the incursion of foreign armed forces into neighbouring territory (violations of sovereignty and possible reactions of the armed forces of the adjacent state which could turn the fighting into an IAC), it is submitted that the relations between parties whose conflict has spilled over remain at a minimum governed by Common Article 3 and customary IHL. This position is based on the understanding that the spill over of a NIAC into adjacent territory cannot have the effect of absolving the parties of their IHL obligations simply because an international

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<sup>6</sup> "How is the term "Armed Conflict" defined in international humanitarian law?" (17-03-2008) available at: <http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm>.

border has been crossed. The ensuing legal vacuum would deprive of protection both civilians possibly affected by the fighting, as well as persons who fall into enemy hands.

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 organized armed groups. As the armed conflict does not oppose two or more states, i.e. as all the state actors are on the same side, the conflict must be classified as non-international, regardless of the international component, which can at times be significant. A current example is the situation in Afghanistan (even though that armed conflict was initially international in nature). The applicable legal framework is Common Article 3 and customary IHL.

Fifth, a subset of multinational NIAC is one in which UN forces, or forces under the aegis of a regional organization (such as the African Union), are sent to support a "host" government involved in hostilities against one or more organized armed groups in its territory (see also infra section IV. 3)). This scenario raises a range of legal issues, among which is the legal regime governing multinational force conduct and the applicability of the 1994 Convention on the Safety of UN Personnel. It is submitted that if and when UN or forces belonging to a regional organization become a party to a NIAC such forces are bound by the rules of IHL, i.e. Common Article 3 and customary IHL, an issue explored further in this report.

Sixth, it may be argued that a NIAC ("cross border") exists when the forces of a state are engaged in hostilities with a non-state party operating from the territory of a neighbouring host state without that state's control or support. The 2006 war between Israel and Hezbollah presented a particularly challenging case both factually and legally. There was a range of opinion on the legal classification of the hostilities that occurred, which may be encapsulated in three broad positions: that the fighting was an IAC, that it was a NIAC, or that there was a parallel armed conflict going on between the different parties at the same time: an IAC between Israel and Lebanon and a NIAC between Israel and Hezbollah. The aim of the "double classification" approach was to take into account the reality on the ground, which was that the hostilities for the most part involved an organized armed group whose actions could not be attributed to the host state fighting across an international border with another state. Such a scenario was hardly imaginable when Common Article 3 was drafted and yet it is submitted that this Article, as well as customary IHL, were the appropriate legal framework for that parallel track, in addition to the application of the law of IAC between the two states.

A final, seventh type of NIAC believed by some to currently exist is an armed conflict taking place across multiple states between Al Qaeda and its "affiliates" and "adherents" and the United States ("transnational"). It should be reiterated that the ICRC does not share the view that a conflict of global dimensions is or has been taking place. Since the horrific attacks of September 11<sup>th</sup> 2001 the ICRC has referred to a multifaceted "fight against terrorism". This effort involves a variety of counter-terrorism measures on a spectrum that starts with non-violent responses - such as intelligence gathering, financial sanctions, judicial cooperation and others - and includes the use of force at the other end. As regards the latter, the ICRC has taken a case by case approach to legally analyzing and classifying the various situations of violence that have occurred in the fight against terrorism. Some situations have been classified as an IAC, other contexts have been deemed to be NIACs, while various acts of terrorism taking place in the world have been assessed as being outside any armed conflict. It should be borne in mind that IHL rules governing the use of force and detention for security reasons are less restrictive than the rules applicable outside of armed conflicts governed by other bodies of law. As noted in the ICRC's report on *IHL and the Challenges of Contemporary Armed Conflicts* submitted to the International Conference in 2007, it is

believed to be inappropriate and unnecessary to apply IHL to situations that do not amount to armed conflict.<sup>7</sup>

*b) Classification of Situations of Violence Resulting from Organized Crime*

The phenomenon of organized crime as such, which is complex and multifaceted, is beyond the scope of this report, but is mentioned because of the ongoing queries surrounding its legal nature. For the purposes of this report organized crime is understood to encompass the totality of unlawful activities carried out by criminal organizations and territorial gangs, including activities that result in resort to armed violence.<sup>8</sup> The armed violence is in some cases caused by criminal groups fighting each other to gain control of markets and/or territory in order to pursue unlawful activities. It may in other cases be the result of actions undertaken by governments to suppress criminal organizations or to regain control of territory by means of police or military forces. In certain contexts both types of armed confrontations have been known to reach a high level of intensity, involving the use of heavy weapons and causing numerous casualties. The question that arises is whether organized crime and the responses thereto may be deemed an armed conflict within the meaning of IHL and in particular whether armed groups engaged in organized crime can be parties to an armed conflict.

The query should be answered by reliance on the two main criteria used to determine the existence of a NIAC outlined above, namely the level of organization of the forces involved and the intensity of violence. In many contexts, the first criterion may be said to be fulfilled. Criminal groups often have a command structure, headquarters, the ability to procure arms, to plan operations, etc. As for the criterion of intensity of violence, it is sometimes more difficult to establish in practice whether the required threshold for a NIAC has been reached. This must be assessed on a case-by-case basis by weighing up a host of indicative data. Relevant elements are, for example, the collective nature of the fighting or the fact that the state is obliged to resort to its armed forces to deal with the situation. The duration of armed confrontations and their frequency, the nature of the weapons used, displacement of the population, territorial control by armed groups, the number of victims caused and other similar elements may also be taken into account.

Pursuant to some views, the specific characteristics of the groups involved in purely criminal activities militate against considering that organized crime and the responses thereto may be deemed a NIAC. Under these views, situations involving purely criminal organizations such as “mafias” or criminal gangs cannot be classified as a NIAC because only organized armed groups with explicit or implied political objectives could be a legitimate party to a NIAC. It should be pointed out that this position is not borne out by a strictly legal reading. Under IHL, the motivation of organized groups involved in armed violence is not a criterion for determining the existence of an armed conflict. Firstly, to introduce it would mean to open the door to potentially numerous other motivation-based reasons for denial of the existence of an armed conflict. Secondly, political objective is a criterion that would in many cases be difficult to apply as, in practice, the real motivations of armed groups are not always readily discernible; and what counts as a political objective would be controversial. Finally, the distinction between criminal and political organizations is not always clear-cut; it is not rare for organizations fighting for political goals to conduct criminal activities in parallel and vice versa.

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<sup>7</sup> See ICRC Report on *IHL and the Challenges of Contemporary Armed Conflicts* presented to the 30<sup>th</sup> International Conference of the Red Cross and Red Crescent, Geneva, October 2007, 30IC/07/8.4, p. 8.

<sup>8</sup> It should be noted that all acts of violence perpetrated in a NIAC by an organized non-state armed group are regularly prohibited under domestic law, thus it is difficult to make a distinction based on the unlawfulness of the activities.

Needless to say, the legal classification of violence has important consequences in practice as it determines the applicable legal framework, in particular the rules to be observed in the use of force. If a situation is considered to reach the threshold of a NIAC, IHL governing the conduct of hostilities applies and both governmental forces and criminal organizations party to the NIAC are bound by it. Below the level of NIAC state authorities must respect human rights law norms governing law enforcement operations. Criminal organizations are not bound by these norms, but by domestic law, including the relevant criminal law. Further details on the differences between the rules on the use of force under IHL and human rights law are provided in the sections related to the interplay of IHL and human rights law.

### 3) Applicable Law

The adequacy of IHL has on occasion been challenged not only in terms of its ability to encompass new realities of organized armed violence within existing classifications, but also in terms of the existence of a sufficient body of substantive norms and its applicability in a given situation. The issue is more relevant in the case of non-international than international armed conflicts.

It is generally uncontroversial that the Geneva Conventions of 1949 and Additional Protocol I for states party to it, as well as rules of customary IHL, remain a relevant frame of reference for regulating the behaviour of states involved in an IAC. As noted in the ICRC's 2007 Report to the International Conference on *IHL and the Challenges of Contemporary Armed Conflicts*, the basic principles and rules governing the conduct of hostilities and the treatment of persons in enemy hands (the two main areas of IHL), continue to reflect a reasonable and pragmatic balance between the demands of military necessity and those of humanity. The rules are detailed and time-tested and are also widely accepted, as evidenced by the fact that every country in the world today is a party to the Geneva Conventions and that the vast majority of states are also party to Additional Protocol I. The core treaties have continued to be supplemented by further codifications, particularly in the weapons area. This does not, of course, mean that the law governing IACs cannot be further improved by means of clarification and/or interpretation. Efforts to this end are being conducted by states, international organizations, the ICRC, expert groups and other bodies, including international and domestic courts and tribunals.

It is well-known that treaty rules governing NIACs are far fewer than those governing IAC and that they cannot adequately respond to the myriad legal and protection issues that arise in practice. It has even been suggested that NIACs are not really substantively regulated because the application of Common Article 3 is geographically limited to the territory of the state party to the armed conflict. It is submitted that this view is not correct given that the provisions of that article undoubtedly constitute customary law and because of the significant number of other customary IHL rules applicable in NIAC. The ICRC's 2005 Study on Customary International Humanitarian Law (CLS) - requested by the International Conference held a decade earlier - concluded that 148 customary rules out of a total of 161 identified applied in NIACs as well. These rules serve as an additional source for determining the obligations of both states and organized non-state armed groups.

Customary IHL rules are of particular significance because they provide legal guidance for parties to all types of NIACs, including the NIACs with an extraterritorial element outlined above. As a matter of customary law, the basic IHL principles and rules governing the conduct of hostilities are, with very few exceptions, essentially identical regardless of the conflict classification. The same may be said with respect to rules governing most aspects of detention, except for procedural safeguards in internment in NIACs, as will be explained below. The ICRC's views on how the law on detention may be strengthened are the subject

of a separate report on *Strengthening Legal Protection for Victims of Armed Conflict* that is being presented to the 31<sup>st</sup> International Conference, which identifies other areas of the law that should likewise be further elaborated.

While determining the applicable law is clearly important, it is even more important that states acknowledge its applicability when the requisite factual criteria have been fulfilled. In its 2007 report on *IHL and the Challenges of Contemporary Armed Conflicts*, the ICRC had noted a tendency by some states to broaden the application of IHL to situations that did not in fact constitute an armed conflict. Nowadays, another trend of equal concern is in evidence. This trend takes two forms. First, some states reject the applicability of IHL to situations that on the facts may be said to constitute a NIAC, designating them instead as “counter-terrorist” operations subject to other bodies of law. Second, in other cases, states that previously acknowledged they were engaged in a NIAC against a particular non-state armed group have repudiated that classification, likewise declaring that they are henceforth applying a counter-terrorist framework.

In both scenarios the approach seems to be based primarily on the assumption that recognizing the existence of a NIAC (or its continuation) legitimizes the non-state party by granting it a particular legal status. It must be stressed that this is not borne out by IHL given that Common Article 3 clearly provides that the application of its provisions “shall not affect the legal status of the Parties to the [non-international armed] conflict”.<sup>9</sup>

The purpose of Common Article 3 is to regulate the treatment of persons in the hands of the adversary, while, as just mentioned, other customary IHL rules applicable in NIAC govern the conduct of hostilities. By denying the applicability of IHL in a NIAC states are depriving civilians, and their own personnel that may be detained by a non-state party, of the protection of the only body of international law that unequivocally binds non-state armed groups and for whose violations they may be internationally sanctioned. As will be further discussed below non-state armed groups are generally considered not to be bound by human rights law and their unwillingness to apply domestic law as a practical matter may be inferred from their having taken up arms against the state. However, the applicability of IHL to a given situation in no way detracts from the fact that members of the non-state party remain legally subject to domestic law and prosecutable under it for any crimes they may have committed. That is what the drafters of Common Article 3 had in mind when they determined that the application of its provisions does not affect the legal status of the parties to the conflict and what is overlooked when its applicability is denied, to the detriment of victims of armed conflict.

### III. THE INTERPLAY BETWEEN IHL AND HUMAN RIGHTS LAW

The interplay between IHL and HR law is an issue of abiding legal focus because *inter alia* of the practical consequences it may have on the conduct of military operations. This report can by no means provide an adequate overview of the relationship between these two branches of international law, but aims to highlight some salient points.

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<sup>9</sup> See also the Commentary to the Fourth Geneva Convention, Article 3, J. Pictet (ed.), ICRC, 1956, p. 44: "Consequently, the fact of applying Article 3 does not in itself constitute any recognition by the de jure Government that the adverse Party has authority of any kind; it does not limit in any way the Government's right to suppress a rebellion by all the means - including arms - provided by its own laws; nor does it in any way affect that Government's right to prosecute, try and sentence its adversaries for their crimes, according to its own laws. In the same way, the fact of the adverse Party applying the Article does not give it any right to special protection or any immunity, whatever it may be and whatever title it may give itself or claim."

## 1) On Interplay in General

There is no doubt that IHL and human rights law share some of the same aims, that is to protect the lives, health and dignity of persons. It is also generally accepted that IHL and human rights law are complementary legal regimes, albeit with a different scope of application. While human rights law is deemed to apply at all times (and thus constitutes the *lex generalis*), the application of IHL is triggered by the occurrence of armed conflict (thus constituting the *lex specialis*).

While the meaning and even the utility of the doctrine of *lex specialis* have been called into question, it is believed that this interpretive tool remains indispensable for determining the interplay between IHL and human rights law. While these two branches of international law are complementary as a general matter, the notion of complementarity does not provide a reply to the sometimes intricate legal questions of interplay that arise on the ground in concrete cases. Situations of armed conflict cannot be equated to times of peace, and some IHL and human rights rules produce conflicting results when applied to the same facts because they reflect the different reality that each body of law was primarily developed for. Examples for this practical scenario, as well as for cases in which the application of IHL and human rights law produces similar results, will be outlined further below.

There are, however, important differences of a general nature related to the interplay between IHL and human rights law that should be mentioned. The first is that human rights law *de iure* binds only states, as evidenced by the fact that human rights treaties and other sources of human rights standards do not create legal obligations for non-state armed groups.<sup>10</sup>

Human rights law explicitly governs the relationship between a state and persons on its territory and/or subject to its jurisdiction (an essentially “vertical” relationship), laying out the obligations of states *vis à vis* individuals across a wide spectrum of conduct. By contrast, IHL governing NIACs expressly binds both states and organized non-state armed groups, as evidenced by Common Article 3 whose provisions enumerate the obligations of the “parties” to a NIAC. IHL establishes an equality of rights and obligations between the state and the non-state side for the benefit of all persons who may be affected by their conduct (an essentially “horizontal” relationship). This does not, of course, mean that the state and non-state side are equal under domestic law, as members of non-state armed groups, as already mentioned, remain bound by such law and may be prosecuted for any crime they may have committed pursuant to domestic law.

Aside from purely legal aspects, there are practical considerations that restrict the ability of non-state armed groups to apply human rights law. Most such groups do not have the capacity to comply with the full range of human rights law obligations because they cannot perform government-like functions on which the implementation of human rights norms is premised. In most NIACs the non-state party lacks an adequate apparatus for ensuring the fulfilment of human rights treaty-based and non-treaty standards (“soft law”). In any event, the vast majority - and probably all - of the human rights obligations that an unsophisticated non-state armed group would be capable of implementing in practice are already binding on it under a corresponding rule of IHL. It should, however, be noted that the exception to what has just been said are cases in which a group, usually by virtue of stable control of territory,

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<sup>10</sup> While UN Security Council resolutions occasionally “call on” a particular non-state party to a NIAC to respect human rights, the legal affect of such calls cannot be to alter the edifice of human rights law, which explicitly imposes obligations only on states. It is submitted that the exact legal import of this aspect of the relevant Council resolutions remains unclear, also given that states are otherwise reluctant to recognize the applicability of human rights law to non-state armed groups.

has the ability to act like a state authority and where its human rights *responsibilities* may therefore be recognized *de facto*.

The second major difference between IHL and human rights law is the extraterritorial reach of the respective bodies of rules.

It is not controversial that IHL governing IACs applies extraterritorially given that its very purpose is to regulate the behaviour of one or more states involved in an armed conflict in the territory of another. It is submitted that the same reasoning applies in NIACs with an extraterritorial element: the parties to such conflicts cannot be absolved of their IHL obligations when a conflict reaches beyond the territory of a single state if this body of norms is to have a protective effect.

Despite the views of a few important dissenters, it is widely accepted that human rights applies extraterritorially based, *inter alia*, on decisions by international and regional courts. The exact extent of such application, however, remains a work in progress. The jurisprudence is most developed within the European human rights system, but there too it is still evolving: while Council of Europe states have been determined to “carry” their obligations abroad when they engage in detention, based either on effective control over persons or the relevant territory, the case law is unsettled as regards the extraterritorial application of human rights norms governing the use of force.

In this context it should be reiterated that the issue of the extraterritorial application of human rights law is relevant for states only. It has not been suggested that non-state armed groups have extraterritorial human rights obligations when they cross an international border, due to the legal and other reasons described above.

The third major difference between IHL and human rights law regards the issue of derogation. While IHL norms cannot be derogated from, under the explicit terms of some human rights treaties states may derogate from their obligations provided therein subject to the fulfilment of the requisite conditions.

## **2) Specific Interplay: Detention and the Use of Force**

For the purposes of this report, the specific interplay of IHL and human rights law will be briefly examined in relation to two groups of norms that are of central interest in situations of armed conflict - rules on the detention of persons and on the use of force.

### *a) Detention*

Detention is an inevitable and lawful incidence of armed conflict regulated by a large number of IHL provisions that seek to give specific expression to the overarching principle of humane treatment. By way of simplification, these rules may be divided into four groups.

#### *i) Rules on the treatment of detainees (in the narrow sense)*

These are norms that aim to protect the physical and mental integrity and well-being of persons deprived of liberty, whatever the reasons may be. They include the prohibition of murder, torture<sup>11</sup>, cruel, inhuman or degrading treatment, mutilation, medical or scientific

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<sup>11</sup> Under IHL torture is prohibited whether committed by a state or a non-state party to an armed conflict, whereas under human rights law torture is defined as severe physical or mental pain or suffering committed by state agents or by persons whose actions can be attributed to the state. However, the Rome Statute of the International Criminal Court dropped the requirement of state

experiments, as well as other forms of violence to life and health. All of the acts are prohibited under both IHL and human rights law.

*ii) Rules on material conditions of detention*

The purpose of these rules is to ensure that detaining authorities adequately provide for detainees' physical and psychological needs, which means food, accommodation, health, hygiene, contacts with the outside world, religious observance, and others. Treaty and customary IHL provide a substantial catalogue of standards pertaining to conditions of detention, as do 'soft law' human rights instruments. A common catalogue of standards could even be derived from both bodies of law.

*iii) Fair trial rights*

Persons detained on suspicion of having committed a criminal offence are guaranteed fair trial rights. The list of fair trial rights is almost identical under IHL and human rights law. Unlike the fair trial provisions of the Third and Fourth Geneva Conventions, Common article 3 does not, admittedly, provide specific judicial guarantees, but it is generally accepted that article 75 (4) of Additional Protocol I - which was drafted based on the corresponding provisions of the 1966 International Covenant on Civil and Political Rights (ICCPR) - may be taken to reflect customary law applicable in all types of armed conflict. IHL reinforces the relevant human rights provisions as it allows no derogation from fair trial rights in situations of armed conflict.

*iv) Procedural safeguards in internment*

For the purposes of this report, internment is defined as the non-criminal detention of a person based on the serious threat that his or her activity poses to the security of the detaining authority in an armed conflict. It is in the area of procedural safeguards in internment that differences emerge between IHL applicable to international and NIACs and the corresponding rules of human rights law and where the question of interplay between the two branches of international law thus arises.

Outside armed conflict, non-criminal (i.e. administrative) detention is highly exceptional. In the vast majority of cases, deprivation of liberty occurs because a person is suspected of having committed a criminal offense. The ICCPR guarantees the right to liberty of person and provides that anyone detained, for whatever reason, has the right to judicial review of the lawfulness of his or her detention. This area of human rights law is based on the assumption that the courts are functioning, that the judicial system is capable of absorbing whatever number of persons may be arrested at any given time, that legal counsel is available, that law enforcement officials have the capacity to perform their tasks, etc.

Situations of armed conflict constitute a different reality, due to which IHL provides for different rules.

**Internment in IAC**

In IAC, IHL permits the internment of prisoners of war (POWs) and, under certain conditions, of civilians.

POWs are essentially combatants captured by the adverse party in an IAC. A combatant is a member of the armed forces of a party to an IAC who has "the right to participate directly in

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involvement in torture in its definition of torture as a crime against humanity, but it still requires an organizational policy.



hostilities". This means that he or she may use force against, i.e. target and kill or injure other persons taking a direct part in hostilities and destroy other enemy military objectives. Because such activity is obviously prejudicial to the security of the adverse party, the Third Geneva Convention provides that a detaining state "may subject prisoners of war to internment". It is generally uncontroversial that the detaining state is not obliged to provide review, judicial or other, of the lawfulness of POW internment as long as active hostilities are ongoing, because enemy combatant status denotes that a person is *ipso facto* a security threat.<sup>12</sup> POW internment must end and POWs must be released at the cessation of active hostilities, unless they are subject to criminal proceedings or are serving a criminal sentence.

Under the Fourth Geneva Convention, internment and assigned residence are the most severe "measures of control" that may be taken by a state with respect to civilians whose activity is deemed to pose an imperative threat to its security. It is uncontroversial that civilian direct participation in hostilities falls into that category. (Despite the fact that only combatants are explicitly authorized under IHL to directly participate in hostilities, the reality is that civilians often do so as well, in both international and NIACs.<sup>13</sup>)

Apart from direct participation in hostilities, other civilian behaviour may also meet the threshold of posing an imperative threat to the security of a detaining power. In terms of process, the Fourth Geneva Convention provides that a civilian interned in IAC has the right to submit a request for review of the decision on internment (to challenge it), that the review must be expeditiously conducted either by a court or an administrative board, and that periodic review is thereafter to be automatic, on a six-monthly basis. Civilian internment must cease as soon as the reasons which necessitated it no longer exist. It must in any event end "as soon as possible after the close of hostilities".

It is submitted that the interplay of IHL and human rights rules governing procedural safeguards in internment in IAC must be resolved by reference to the *lex specialis*, that is the relevant provisions of IHL that were specifically designed for it.

#### Internment in NIAC

Common Article 3 does not contain rules on procedural safeguards for persons interned in NIAC even though internment is practiced by both states and non-state armed groups. Additional Protocol II explicitly mentions internment, thus confirming that it is a form of deprivation of liberty inherent to NIAC, but likewise does not list the grounds for internment nor the procedural rights. Due to IHL's lack of specificity and to some of the unresolved issues related to the application of human rights law outlined below, a case-by-case analysis of the interplay of IHL and human rights is necessary. Only a few legal challenges that arise will be mentioned.

In a traditional NIAC occurring in the territory of a state between government armed forces and one or more non-state armed groups, domestic law, informed by the state's human rights obligations and IHL, constitutes the legal framework governing the procedural safeguards that must be provided by the state to detained members of such groups. It must be noted that, under some views, domestic law cannot allow non-criminal detention in armed conflict without derogation from the ICCPR even if the relevant state provides judicial review as required under article 9 (4) of the Covenant. Pursuant to other views, derogation would be necessary if the state suspended the right to *habeas corpus* and provided only administrative review of internment in NIAC (as would be allowed under IHL). According to still other

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<sup>12</sup> Judicial review under the domestic law of the detaining state could, however, be sought to obtain the release of a POW who is detained despite the end of active hostilities (which is a grave breach of IHL).

<sup>13</sup> See section on Direct Participation in Hostilities further below.

positions, the right to *habeas corpus* can never be derogated from, an approach, it is submitted, that is appropriate in peacetime, but cannot always accommodate the reality of armed conflict.<sup>14</sup>

Identifying the legal framework governing internment is even more complicated in NIACs involving states fighting alongside a host state's forces in the latter's territory (e.g. a "multinational" NIAC). In addition to the issue mentioned above, others arise: states members of a coalition may not all be bound by the same human rights treaties; the extent of the extraterritorial reach of human rights law remains unclear, and the question of whether the intervening states must derogate from their human rights obligations in order to detain persons abroad without *habeas corpus* review is unresolved (in practice, no state has ever done so).

Leaving aside state obligations, it should be recalled that the other party to a NIAC is one or more organized non-state armed groups. Domestic law does not allow them to detain or intern members of a state's armed forces (or anyone else), and human rights law likewise does not provide a legal basis for detention by non-state armed groups. As a result, a non-state party is not legally bound to provide *habeas corpus* to persons it may capture and detain/intern (nor could it do so in reality, except in cases in which a group, usually by virtue of stable control of territory, has the ability to act like a state authority and where its human rights *responsibilities* may therefore be recognized *de facto*). Thus, the suggestion that human rights law must be resorted to when IHL is silent on a particular issue - such as procedural safeguards in internment - overlooks the legal and practical limits of the applicability of human rights law to non-state parties to NIACs.

The legal and practical challenges posed by detention in NIACs remain the subject of much legal debate, as well as discussion on the way forward. In order to provide guidance to its delegations in their operational dialogue with states and non-state armed groups, in 2005 the ICRC adopted an institutional position entitled "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence". This document, which is based on law and policy, was annexed to the ICRC's report on *IHL and the Challenges of Contemporary Armed Conflicts* presented to the 2007 International Conference. The question remains, however, whether it might be necessary to elaborate rules governing detention, including those on procedural safeguards in internment in NIAC, by means of further IHL development. The ICRC believes this to be the case, as outlined in its report on *Strengthening Legal Protection for Victims of Armed Conflict* which has been submitted to the 31<sup>st</sup> International Conference.

#### *b) Use of Force*

Among issues that are regulated by both IHL and human rights law the greatest differences are found in the respective rules governing the use of force.

IHL rules on the conduct of hostilities recognize that the use of lethal force is inherent to waging war. This is because the ultimate aim of military operations is to prevail over the enemy's armed forces. Parties to an armed conflict are thus permitted, or at least are not legally barred from, attacking each other's military objectives, including enemy personnel. Violence directed against those targets is not prohibited as a matter of IHL regardless of whether it is inflicted by a state or a non-state party to an armed conflict. Acts of violence against civilians and civilian objects are, by contrast, unlawful because one of the main purposes of IHL is to spare them from the effects of hostilities. The basic rules governing the conduct of hostilities were crafted to reflect the reality of armed conflict. First among them is the principle of distinction, according to which parties to an armed conflict must at all times

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<sup>14</sup> This is particularly the case in a "multinational NIAC", see next paragraph in text.

distinguish between civilians, civilian objects and military objectives and direct their attacks only against the latter. In elaboration of the principle of distinction, IHL also *inter alia* prohibits indiscriminate attacks, as well as disproportionate attacks (see below), and obliges the parties to observe a series of precautionary rules in attack aimed at avoiding or minimizing harm to civilians and civilian objects.

Human rights law was conceived to protect persons from abuse by the state and does not rely on the notion of the conduct of hostilities between parties to an armed conflict, but on law enforcement. Rules on the use of force in law enforcement essentially provide guidance on how life is to be protected by the state when it is necessary to prevent crime, to effect or assist in the lawful arrest of offenders or suspected offenders and to maintain public order and security. The bottom line, as regards the use of lethal force under law enforcement principles governed by human rights law, is that intentional lethal force may be used only as last resort in order to protect life when other means are ineffective or without promise of achieving the intended result (but such means must always be available). Human rights soft law standards and jurisprudence have also clarified that a “strict” or “absolute” necessity standard is attached to any use of lethal force, meaning that intentional use of lethal force may not exceed what is strictly or absolutely necessary to protect life.

The principle of proportionality, whose observance is crucial to the conduct of both military and law enforcement operations, is differently conceived in IHL and human rights law. IHL prohibits attacks against military objectives that “may be expected to cause incidental death, injury to persons or damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. The main distinction between the relevant IHL and human rights rules is that the aim of the IHL principle of proportionality is to limit incidental ('collateral') damage to protected persons and objects, while nevertheless recognizing that an operation may be carried out even if such damage may be caused, provided that it is not excessive in relation to the concrete and direct military advantage anticipated. By contrast, when a state agent is using force against an individual under human rights law, the proportionality principle measures that force taking into account the effect on the individual him or herself, leading to the need to use the smallest amount of force necessary and restricting the use of lethal force.

This very brief overview permits the conclusion that the logic and criteria governing the use of lethal force under IHL and human rights law do not coincide, due to the different circumstances that the respective norms are intended to govern. The key issue therefore is the interplay of these particular norms in situations of armed conflict. The answer is clearer in IAC than in NIAC and also turns on the issue of *lex specialis*.

#### *i) Interplay in IAC*

In its very first statement on the application of human rights in situations of armed conflict, the 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice observed that the protection of the ICCPR does not cease in times of war and that, in principle, the right not to be arbitrarily deprived of one's life applies also in hostilities. The Court added that test of what is an arbitrary deprivation of life is to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. It further explained that “whether a particular loss of life [...] is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not be deduced from the terms of the Covenant itself”. The Court has since not indicated a change to its approach on this issue.

It is submitted that IHL constitutes the *lex specialis* governing the assessment of the lawfulness of the use of force in an IAC - when, of course, lethal force is resorted to against

combatants and other persons directly participating in hostilities. This body of rules was specifically designed for the conduct of hostilities in such conflicts and regulates the use of force in sufficient detail. It should not, however, be implied from the above that determining whether a conduct of hostilities or a law enforcement framework should be resorted to in an IAC is an easy task. For example, the challenges posed to the application of the two frameworks in situations of occupation are dealt with further in this report. There are likewise instances of violence in IACs, such as riots or civil unrest, to which the application of an IHL conduct of hostilities framework would clearly not be appropriate.

*ii) Interplay in NIAC*

The interplay of IHL rules and human rights standards on the use of force is less clear in NIAC for a range of reasons, only some of which will be briefly mentioned here.

The first is the existence and operation of the *lex specialis* principle in NIAC. While, as already mentioned, IHL applicable in IAC provides a range of rules on the conduct of hostilities, the general lack of corresponding treaty rules in NIAC has led some to argue that there is no *lex specialis* in NIAC and that human rights law fills the gap. This position, it is submitted, is not borne out by facts. The great majority of IHL rules on the conduct of hostilities are customary in nature and are applicable regardless of conflict classification, as determined by the ICRC's 2005 Customary Law Study. Relevant IHL thus exists.

The issue of who may be targeted under IHL, i.e. how to interpret the rule that civilians are protected from direct attack unless and for such time as they take a direct part in hostilities remains the subject of much legal debate, particularly as regards situations of NIAC. The ICRC expressed its views on the subject with the issuance, in 2009, of an *Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL* (see further below). It should be recalled, however, that the Guidance deals with direct participation in hostilities under an IHL lens only, without prejudice to other bodies of law - particularly human rights law - that may concurrently be applicable in a given situation.

International and regional jurisprudence is not uniform in its approach to the relationship between IHL and human rights, particularly in respect of the scope of protection of the right to life in NIAC. Most cases have dealt with violations of the right to life of civilians in which application of either IHL or human rights law would have essentially produced the same result. Courts have yet to conclusively address the interplay of IHL and human rights law involving the targeting and killing of persons who were directly participating in hostilities.

Last, but by no means least, is the issue of the legal framework applicable to the use of force by non-state armed groups. What has been said above in relation to the (non)applicability of human rights law to organized armed groups is equally valid in this area and will not be repeated.

What can essentially be concluded from the above is that the use of lethal force by states in NIAC requires a fact-specific analysis of the interplay of the relevant IHL and human rights rules. For states, the legal result reached will depend on the treaties they are party to, customary law, and of course the relevant provisions of domestic law. It is also evident that in NIAC - as well as in IAC - state armed forces must be trained to distinguish and switch between a war-fighting and a law enforcement situation and be provided with clear rules of engagement on the use of force. As regards non-state armed groups, they are clearly legally bound by the relevant IHL rules.

The ICRC plans to further explore the challenges surrounding the interface of IHL and human rights law rules on the use of force in situations of armed conflict.

### 3) Extraterritorial Targeting of Persons

The extraterritorial targeting of persons has become a prominent legal and policy issue over the past several years due, *inter alia*, to questions that have been raised about the lawfulness of this practice. For the purposes of this report, extraterritorial targeting is understood as the use of lethal force against a specific person - or persons - by agents of one state in the territory of another (the "territorial" or "host" state). It cannot be emphasized enough that a large part of the difficulty in coming to appropriate legal and policy conclusions in most actual cases lies in the insufficiently known factual circumstances surrounding them and in the fact that states rarely, if ever, justify their extraterritorial actions in advance or provide accounts of operations after the fact.

From a legal point of view, the extraterritorial targeting of a person 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 i) take place within an ongoing armed conflict or ii) have no link to an armed conflict.

i) In a situation of armed conflict, IHL rules on the conduct of hostilities mentioned above apply. This means that lethal force may be used against combatants, that is persons who have the right to take a direct part in hostilities (a legal status inherent only to IAC), as well as against other persons taking a direct part in hostilities, including civilians when they do so. Who is deemed to be a civilian taking a direct part in hostilities and is therefore not protected from direct attack during such time as he or she takes a direct part in hostilities was elaborated in the ICRC's 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL* (see further below). Pursuant to the Guidance:

- members of armed forces,<sup>15</sup> or of organized armed groups of a party to the conflict who perform a continuous combat function are not considered civilians for the purpose of the conduct of hostilities and are thus not protected against direct attack for the duration of their performance of such a function.

- civilians are persons who take a direct part in hostilities on a merely spontaneous, sporadic or unorganized basis, and are subject to targeting only for the duration of each specific act of direct participation.

It should be noted that the Interpretive Guidance provides the ICRC's view on the restraints applicable to the use of force in direct attack. Pursuant to Recommendation IX, "[T]he kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances". This does not imply a "capture rather than kill" obligation in armed conflict, which is a law enforcement standard, but is aimed at providing guiding principles for the choice of means and methods of warfare based on a commander's assessment of a particular situation. By way of reminder, the targeting of persons under IHL is subject to further important rules, that of the prohibition of indiscriminate and disproportionate attacks and of the obligation to take feasible precautions in attack.

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. A non-belligerent state is one that is not involved in an ongoing armed

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<sup>15</sup> As well as participants in a *levée en masse*. See section on Direct Participation in Hostilities further below.

conflict itself against a non-state armed group in its territory and/or is not involved in a NIAC with such a group that has spilled over from the territory of an adjacent 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 with him to a non-belligerent state by virtue of continued direct participation (the nexus requirement) and remains targetable under IHL. In other words, provided the requisite *ius ad bellum* test has been satisfied, he or she can be targeted under IHL rules on the conduct of hostilities. These include the principle of proportionality, under which harm to civilians and damage to civilian objects, or a combination hereof, is not deemed unlawful if it is not excessive in relation to the direct and concrete military advantage anticipated from the attack.

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 he is 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(s). 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 and when 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 (see also below).

ii) There have 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 under human rights law standards on law enforcement. As outlined above, the application of a law enforcement framework means *inter alia* that lethal force may be used only if other means are "ineffective or without promise of achieving the intended result" and that the planning and execution of any action has to be carried out pursuant to the human rights law principles of necessity and proportionality.

A legal issue that could be posed in this scenario is the extraterritorial applicability of human rights law based on the fact that the state using force abroad lacks effective control over the person (or territory) for the purposes of establishing jurisdiction under the relevant human rights treaty. It is submitted that customary human rights law prohibits the arbitrary deprivation of life and that law enforcement standards likewise belong to the corpus of customary human rights law.

It is important to underline that the application of law enforcement rules does not turn on the type of forces or equipment used in a given operation (police or military), but on the fact that human rights law is the governing legal regime, given the absence of armed conflict. The Basic Principles on the Use of Force and Firearms reflect that approach: "The term 'law enforcement officials' includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by state security forces, the definition of law enforcement officials shall be regarded as including officers of such services".

## IV. THE PROTECTIVE SCOPE OF IHL: SELECT ISSUES

### 1) Humanitarian Access and Assistance

Armed conflicts, whether international or non-international, generate significant needs for humanitarian assistance. As practice has unfortunately demonstrated, civilian populations are often deprived of essential supplies in war, including food, water and shelter, and are unable to access health care and other essential services. The reasons vary. Property may be destroyed as a result of combat operations and farming areas may be unusable due to the dispersion of landmines or other explosive remnants of war. Entire populations may be forced to leave their homes, thus abandoning habitual sources of income. In addition, economic and other infrastructure may be damaged or disrupted affecting, as a result, the stability of entire counties or regions for a prolonged period of time.

Under international law, states bear the primary responsibility for ensuring the basic needs of civilians and civilian populations under their control. However, if states are unable or unwilling to meet their responsibilities, IHL provides that relief actions by other actors, such as humanitarian organizations, shall be undertaken, subject to the agreement of the concerned state.<sup>16</sup> In order to perform their mission, humanitarian organizations must be granted rapid and unimpeded access to affected populations. Humanitarian access is a precondition for the conduct of proper assessments of humanitarian needs, for the implementation and monitoring of relief operations and for ensuring appropriate follow-up. In practice, however, humanitarian access remains a significant challenge for a number of reasons which, in certain cases, may overlap.

#### *a) Constraints on Humanitarian Access*

Constraints on humanitarian access may be of a political nature. When relief actions are perceived as a threat to the sovereignty of a state *per se* or because of the perceived “legitimization” of a non-state group as a result of engagement with it for humanitarian purposes, or are perceived as a threat to the dominant position of a non-governmental armed group in a specific region, access by humanitarian organizations to civilian populations in need may be denied. In such cases the relevant authorities often argue that they have the capacity to handle the situation themselves, without external support.

They may also claim that proposed relief actions do not meet the conditions of being exclusively humanitarian and impartial, and conducted without any adverse distinction, as required by IHL. This belief may on occasion be brought on by the involvement of military forces in relief operations and the consequent blurring of lines between humanitarian and military actors. If, however, the parties to armed conflicts unjustifiably perceive humanitarian operations as instruments of military or political agendas, access to populations in distress becomes difficult or impossible and the security of humanitarian workers is seriously jeopardized.

In some cases, denial of humanitarian access may also be part of a military strategy. When parties to an armed conflict believe that opposing forces are receiving support from the civilian population, they may seek to deprive the population of essential supplies in order to weaken their adversary’s capacity to mount military operations.

Political constraints on humanitarian access are often complicated by administrative barriers and restrictions, as well as logistical problems. In some instances, access of humanitarian organizations is hampered by difficulties in obtaining visas for their personnel and import

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<sup>16</sup> The obligations of an occupying power are dealt with further below in this section.

authorisations for relief supplies. Complex procedures and repeated controls may also contribute to delaying the entry and distribution of humanitarian goods. In addition, essential infrastructure, such as roads or railways, may have been destroyed or damaged as a result of conflict, making it difficult to reach affected populations.

Security-related concerns are also among the main reasons limiting humanitarian access in practice. It may be extremely difficult for humanitarian actors to reach populations situated in areas where hostilities are ongoing. When the risk of casualties is assessed to be significant, relief operations have to be cancelled or suspended. In yet other cases, humanitarian actors have been deliberately threatened or attacked by armed actors, either for criminal purposes or political reasons, or both. This trend has certainly become more problematic in recent years, as many of today's armed conflicts are more fragmented and complex, involving multiple actors, including semi-organized armed groups and purely criminal organizations. It has therefore become more difficult to enter into contact and engage in a regular security dialogue with all those who have the capability of potentially disrupting humanitarian operations in order to prevent or eliminate the security risk. Due to their vulnerability to attack, many humanitarian organizations have on occasion either withheld from or scaled down their operations in specific contexts or have been obliged to hire security providers.

The complexity and consequences of constraints on humanitarian access thus remain, with good reason, a growing focus of international concern.

#### *b) Legal Framework Applying to Humanitarian Access and Assistance*

While access constraints are often related to political, administrative, logistical, or security challenges, they are rarely the result of purely legal obstacles. It should be noted that reliance on the relevant provisions of IHL may, in practice, prove to be a useful tool to secure access to affected populations and to conduct effective humanitarian operations. This implies that practitioners should have a clear understanding of this legal framework and be trained to use it in efforts to ensure that their activities are accepted and respected.

IHL rules on humanitarian access and assistance may be grouped depending on whether they relate to: a) IACs, other than occupied territories; b) NIACs; and c) occupied territories. In each case IHL establishes, first, that relief actions may be authorized - and in a situation of occupation shall be authorized - when civilian populations suffer from lack of adequate supplies. Second, it defines under what conditions such operations must be conducted, providing further prescriptions aimed at facilitating the delivery of humanitarian relief to affected populations. It may be observed that, on both counts, there would be benefit from clarification of some of the rules.

IHL applicable to humanitarian access and assistance is mainly based on the Fourth Geneva Convention relative to the Protection of Civilians in Time of War and the 1977 Additional Protocols. The Fourth Convention regulates the humanitarian obligations of states parties in relation to the evacuation of or access to besieged or encircled areas (article 17) and the obligations of the parties to allow the free passage of medical supplies, as well as of certain other goods to groups of beneficiaries (article 23). It also enumerates the rights of aliens in the territory of a party to the conflict, including to individual and collective relief (article 38), and prescribes the obligations of an occupying power as regards relief schemes for the benefit of the population of an occupied territory (articles 59-62). The provisions of the Fourth Convention were complemented and reinforced by Additional Protocol I (articles 68-71) and, for NIAC, Common Article 3 of the Geneva Conventions by Additional Protocol II (article 18).

In addition to treaty law, some obligations have also crystallized into international customary law. These include rules on the rapid and unimpeded passage of humanitarian relief and the freedom of movement of humanitarian relief personnel (CLS, rules 55-56). Rules of



customary law also provide protection applying specifically to humanitarian relief personnel and objects (CLS, rules 31-32).

*c) Obligation to Undertake Relief Actions*

It is not clear to what extent parties to both international and NIACs are bound to accept the deployment of relief actions in territories under their control. While the relevant provisions of the two Additional Protocols stipulate that relief actions "shall be undertaken" when the population lacks supplies essential for its survival, thereby clearly establishing a legal obligation, they further provide that such obligation is subject to the agreement of the state concerned.<sup>17</sup> It would thus appear that a balance has to be found between two apparently contradicting requirements: a) that a relief action must be undertaken, and b) that the agreement of the state concerned must be obtained. The question therefore arises as to how to strike this balance in practice.

Part of the answer is to be drawn from the generally accepted view that consent cannot be arbitrarily refused, i.e. that any impediment(s) to relief action must be based on valid reasons. In extreme situations, where a lack of supplies would result in starvation, it should be deemed that there is no valid reason justifying a refusal of humanitarian assistance. IHL, applicable in both international and NIACs, strictly prohibits starvation of civilians as a method of warfare. This is, of course, subject to the assumption that a relief operation meets the three conditions provided for under IHL, namely that it is humanitarian and impartial in character, and conducted without any adverse distinction.

With regard to occupied territories, there is no legal uncertainty as to the nature of the obligation of the occupying power to allow and facilitate relief operations. The Fourth Geneva Convention and Additional Protocol I explicitly impose on the occupying power the duty to ensure, to the fullest extent of the means available to it, the provision of food and medical supplies, clothing, bedding, means of shelter and other supplies essential to the survival of the civilian population, as well as objects necessary for religious worship. If the occupying power is not in a position to fulfil its duty, the Convention clearly provides that it is bound to accept humanitarian aid on behalf of the affected population. This obligation is not subject to its consent. Thus, in occupied territories, the obligation to accept relief operations is unconditional.

*d) Delivery of Humanitarian Relief*

The conditions for the delivery of humanitarian relief are also an area where further clarification is needed, especially with regard to NIACs, as there are very few rules of treaty or customary IHL that regulate this issue. With regard to IACs, the relevant legal framework is more detailed. For example, it defines the types of goods that may be distributed, allows for the prescription of technical arrangements, restricts the possibility of diverting relief consignments and regulates the participation of the personnel involved in relief operations.

However, the concrete implications of the rights and obligations of the parties to an armed conflict, whether international or non-international, are not sufficiently defined. It would be helpful, for instance, to have a better understanding of the scope and limitations of the right of control that the parties are allowed to exercise on relief operations. While such control may include the search of relief consignments or the supervision of their delivery, it must not impede the rapid deployment of a relief operation. Linked to this, it would also be useful to further elaborate the concrete implications of the parties' obligation to "facilitate" the passage of humanitarian relief. Best practices in this regard could be shared among all those concerned as well.

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<sup>17</sup> There is no requirement of consent in situations of occupation, as explained below.

It is submitted that the questions raised above should be examined with regard both to state and non-state parties to armed conflicts. It is an underlying principle of IHL that all belligerents are bound by the same obligations. Therefore, rules on humanitarian access and assistance applying in NIACs should be interpreted and applied in the same way for state and non-state parties. There is however an exception to this principle. Under Additional Protocol II, the consent required for undertaking a relief action is that of the state concerned, and not of the other party, or parties, to the conflict.

The rights and obligations of actors providing assistance is also an issue that warrants further analysis. For instance, the extent to which humanitarian organizations are entitled to enjoy freedom of movement in their activities and the correlative right of the parties to armed conflicts to temporarily restrict their freedom for reasons of imperative military necessity should be explored.

Lastly, the role of third states, including states whose territory is used for the transit of relief operations, should also be examined. In an IAC, Additional Protocol I provides that "each High Contracting Party", meaning not only those participating in a conflict, must allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel. A similar obligation does not appear in the law governing NIACs.

Access to populations in need of assistance and protection in times of armed conflicts depends first and foremost on the degree of acceptance of humanitarian and impartial relief actions by those exercising territorial control. Humanitarian organizations must be able to communicate with all parties involved in situations of armed conflict and explain the reasons and purpose of their activities in a consistent and coherent way. They should also be able to explain that these activities are based on IHL. While the legal framework cannot be the only consideration that should be taken into account in the dialogue, it may certainly be used as a tool facilitating the deployment of humanitarian operations. It should therefore be known and disseminated by all those involved in such operations.

## **2) The Law of Occupation**

As mentioned in the report submitted to the 30<sup>th</sup> International Conference, recent years have been characterized by an increase in extraterritorial military interventions. Along with the continuation of more classical forms of occupation, some of these interventions have given rise to new forms of foreign military presence in the territory of a state, on occasion consensual, but more often not. These new forms of military presence have - to a certain extent - refocused attention on occupation law. Outlined below are some legal questions that have been generated in relation to this specific area of IHL.

### *a) Beginning and End of Occupation*

To begin with, it should be noted that renewed international attention on the law of occupation has essentially been focused on the substantive rules of occupation law rather than on issues surrounding the conditions that must be established for the beginning and end of occupation. In other words, relatively little attention has been paid to the standards on the basis of which the existence of a state of occupation may be determined. This is unfortunate given that the question of whether there is occupation or not is central to the application of the relevant body of IHL and needs to be answered before any substantive question of occupation law can be addressed.

Practice has demonstrated that many states put forward claims of inapplicability of occupation law even as they maintain effective control over foreign territory or a part thereof,

due to a reluctance to be perceived as an occupying power. Their assertions are partly facilitated by the fact that IHL instruments do not provide clear standards for determining when an occupation starts and terminates. Not only is the definition of occupation vague under IHL, but other factual elements - such as the continuation of hostilities and/or the continued exercise of some degree of authority by local authorities, or by the foreign forces during and after the phase out period - may render the legal classification of a particular situation quite complex.

In addition, recent military operations have underlined the necessity of more precisely defining the legal criteria on the basis of which a state of occupation may be determined to exist when it involves multinational forces. Are the criteria for the beginning and end of occupation the same in such a case? Who are the occupying power(s) when a coalition of states is involved? Can all the troop contributing countries be considered occupying powers for the purposes of IHL?

Linked to the issue of the applicability of occupation law is the question of the determination of the legal framework applicable to invasion by and the withdrawal of foreign forces. It is submitted that a broad interpretation of the application of the Fourth Geneva Convention during both the invasion and withdrawal phases - with a view to maximizing the legal protection conferred on the civilian population - should be favoured. An issue that would benefit from elaboration in the invasion and withdrawal phase is the exact legal protections enjoyed by those who are in the power of a belligerent, but are neither on territory occupied by it nor on its own territory.

It is submitted that the range of questions posed above raise important humanitarian challenges and would deserve appropriate legal clarification.

#### *b) The Rights and Duties of an Occupying Power*

The law of occupation has also faced recurrent challenges on the basis that it is ill-suited for contemporary occupation. The reluctance of some states to accept its application is often justified by claims that situations in which they are or might be involved in differ considerably from the classical concept of belligerent occupation. In other words, it has been argued that current occupation law is not sufficiently equipped to deal with the specificities of the new features of occupation.

Recent occupations have, in particular, triggered much legal commentary about the failure of occupation law to authorize the introduction of wholesale changes in the legal, political, institutional and economical structure of a territory placed under the under effective control of a foreign power. It has been contended that occupation law places an undue emphasis on preserving the continuity of the socio-political situation of an occupied territory. It has also been claimed that the transformation of an oppressive governmental system or the rebuilding of a society that has completely collapsed could be achieved during an occupation, and be in the interest of the international community, as well as authorized by the *lex lata*.

The far-reaching political and institutional changes undertaken in recent occupations have thus generated tension between the requirement of occupation law that the occupying power respects the laws and institutions in place and the perceived need to fundamentally alter the institutional, social or economic fabric of an occupied territory. It has been contended that, to reduce this tension, IHL should permit certain transformative processes and recognize the occupying power's role in fostering them. Such a position, however, raises the question of the validity of limitations posed by IHL on an occupying power's rights and duties as reflected in article 43 of the 1907 Hague Regulations and article 64 of the Fourth Geneva Convention. Given that occupation law does not expressly give "carte blanche" for various transformations that might be desired by an occupying power, some contemporary

interpretations have aimed to achieve that result by granting an occupying power increasing leeway in the administration of an occupied territory. It is submitted that the limits to an occupying power's freedom - or not - to effect changes in an occupied territory need to be identified more clearly.

Prolonged occupation raises a whole set of legal questions in itself. Even though IHL contemplates the possibility that occupation may be of a protracted nature, none of the relevant IHL instruments place limits on the duration of effective control over a foreign territory. However, prolonged occupations place IHL under considerable strain insofar as they call into question some of the underlying principles of occupation law, in particular the provisional character of occupation and the necessity to preserve the *status quo ante*. As neither the 1907 Hague Regulations nor the Fourth Geneva Convention specify any lawful deviations from existing law in this scenario, many have argued that prolonged occupation necessitates specific regulations in response to the practical problems arising in such cases. The other view is that occupation law is sufficiently flexible to accommodate the humanitarian and legal concerns arising in prolonged occupation.

In addition to the issues raised above, it should be noted that human rights law may play an important role in delimiting an occupying power's rights and duties. This body of law is widely recognized as applicable in situations of occupation and, consequently, may impose formal obligations on an occupying power, or serve as a basis for altering existing local laws. The International Court of Justice has pointed to the relevance of human rights law in times of occupation and to an occupying power's legal obligation to take this body of norms into account in both its conduct and in the policies it develops in an occupied territory.<sup>18</sup> It is therefore necessary to identify how, and to what extent, human rights law applies in occupied territory and to explore the interplay between human rights law and the law of occupation.

### *c) The Use of Force in Occupied Territory*

Another challenge raised by recent examples of occupation is the identification of the legal framework governing the use of force by an occupying power. Occupation is often characterized by the continuation or resumption of hostilities between, on the one hand, the occupying forces and, on the other, the armed forces of the occupied territory and/or other organized armed groups more or less affiliated to the ousted government. Force might also be used by an occupying power within the framework of its obligation to restore and maintain public order in an occupied territory. Even though article 43 of the 1907 Hague Regulations has always been interpreted as a central provision of occupation law, its implementation still raises important operational and legal questions, particularly when it comes to the use of force by an occupying power. As some occupations have evidenced, regulation of the use of force in cases of civil unrest and in response to ongoing armed opposition (hostilities) is not clear-cut.

Although an occupying power is meant to maintain security by means of law enforcement, uncertainty persists with regard to the applicable legal regime in situations where it is difficult to distinguish civil unrest from hostilities or where an occupying power is confronted by both at the same time in the entirety, or parts of, an occupied territory. The law of occupation is silent on the separation or interaction between law enforcement measures and the use of military force under a conduct of hostilities paradigm, thus leaving a significant degree of uncertainty regarding identification of the relevant legal regime(s) governing the use of force in occupied territory. This inevitably opens the door to different interpretations on how force may be resorted to in an occupied territory, in what circumstances and according to which body of law. Ultimately, uncertainty over the applicable legal regime may affect the protection

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<sup>18</sup> ICJ, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 2005.

afforded to an occupied population. It is believed that there is a need to clarify how the rules governing law enforcement and those regulating the conduct of hostilities interact in practice in the context of an occupation.

*d) The Applicability of Occupation Law to UN Operations*

Aside from the various challenges posed by contemporary occupations, another set of questions arises in relation to the applicability of occupation law to operations under the command and control of the UN. In the course of its field deployments, the UN may find itself in a position to assume governmental functions in lieu of the relevant territorial sovereign. In such cases, it is critical to determine whether occupation law is applicable, the precise conditions that must be fulfilled for its applicability and, in case it is deemed applicable, whether occupation by an international organization is subject to the same legal constraints imposed on individual states exercising effective control over foreign territory.

It may be observed that operations carried out under the auspices of the UN, such as the ones in Kosovo and East Timor, shared many similarities with traditional military occupation. Consequently, where UN operations imply the international administration of a territory - and particularly when the international authorities are vested with extensive executive and legislative powers - the rules governing occupation appear relevant even if only applicable by analogy in most of the cases. In these situations, IHL might provide practical solutions to many of the problems that arise and could inform the policies undertaken by the international administration. It would thus appear that the applicability of IHL to internationally administered territories needs to be still more precisely delineated in light of the specific nature and objectives of such operations.

*e) ICRC expert process*

The range of legal challenges raised by contemporary forms of occupation outlined above have been at the core of an exploratory process undertaken by the ICRC on "Occupation and Other Forms of Administration of Foreign Territory". The purpose of this initiative, which began in 2007, was to analyse whether and to what extent the rules of occupation law are adequate to deal with the humanitarian and legal challenges arising in contemporary occupations, and whether they might need to be reinforced or clarified. Three informal meetings involving some thirty experts drawn from states, international organizations, academic circles and the NGO community were organized in 2008 and 2009 with a view to addressing, in more detail, the legal issues raised above. The meetings focused, respectively, on legal questions related to: i) the beginning and end of occupation, ii) the delimitation of the rights and duties of an occupying power/the relevance of occupation law for United Nations administration of territory and, iii) the use of force in occupied territory. The experts participated in their personal capacity and the meetings were held under the Chatham House Rule.

The publication of a report on the discussions that took place at the expert meetings is planned for the end of 2011. The report aims to give a substantive account of the main points discussed and the various positions expressed during the expert meetings. The report does not reflect the ICRC's views on the subject matter addressed, but provides an overview of the range of current legal positions on the three broad groups of questions identified. The ICRC believes that the report - which is the final outcome of the exploratory process - will serve to inform and nourish ongoing and future legal debates on the need for clarification of some of the most significant provisions of occupation law.

### 3) IHL and Multinational Forces

Over the years the responsibilities and tasks assigned to multinational forces have transcended the traditional monitoring of ceasefires and the observation of fragile peace settlements. The spectrum of operations involving multinational forces (hereafter peace operations), whether conducted under UN auspices or under UN command and control, has grown increasingly broad and has come to include dimensions such as conflict prevention, peace-keeping, peace-making, peace-enforcement and peace-building. The role of multinational forces has changed, in particular, since the conflict in the former Yugoslavia in the 1990s. The missions of multinational forces in Afghanistan, the Democratic Republic of the Congo, Somalia or Libya are not limited to ensuring cease-fires or monitoring buffer zones but are characterized by their participation in hostilities. Today, the multifaceted nature of these operations and the ever more difficult and violent environments in which their personnel operate - sometimes requiring them to fight on the side of one party to a conflict against another - highlight how important it is for the international community to develop a coherent legal framework that embraces the complexity of peace operations. Insofar as the new features of such operations render it more likely that multinational forces will become involved in the use of force, the question of when and how IHL will apply to their actions becomes all the more relevant. If, at first sight, one may think that everything on this issue has been said, it is submitted that a number of legal questions relating to peace operations remain unsettled and, in light of their importance and consequences, deserve to be closely examined.

#### *a) Applicability of IHL to Multinational Forces*

One of the most sensitive issues in relation to multinational forces is the legal classification of the situation they may be involved in under IHL. As occasionally demonstrated in practice, certain states and international organizations engaged in peace operations have been reluctant to accept that IHL is applicable to their actions, even when the criteria for its applicability have been fulfilled.

For a long time the very idea that IHL could be applicable to multinational forces was disregarded. It was often contended that multinational forces, in particular UN forces, could not be a party to an armed conflict, and consequently could not be bound by IHL. That position was justified by reference to the fact that multinational forces generally operate on behalf of the international community as a whole, thus precluding them from either being deemed a "party" to an armed conflict, or a "power" within the meaning of the Geneva Conventions. It was claimed that, based on their international legitimacy, multinational forces had to be considered to be impartial, objective and neutral given that their only interest in a particular armed conflict is the restoration and maintenance of international peace and security.

It is submitted that the above position erases the distinction between the *ius ad bellum* and the *ius in bello*. The applicability of the latter to multinational forces, similar to any other actor, depends on the factual circumstances on the ground and on the fulfilment of specific legal conditions. The nature of a situation and the correlative applicability of IHL must be determined irrespective of the international mandate assigned to multinational forces by *inter alia* the UN Security Council, and of the designation given to the parties opposed to them. The mandate and the legitimacy of a mission entrusted to multinational forces are issues which fall within the province of *ius ad bellum*, and should have no effect on the applicability of IHL to peace operations, as is the case in respect of IHL application to other situations.

The distinction between IHL and the *ius ad bellum* is also essential to preserving the aim of IHL, which is to ensure effective protection for all victims of armed conflict. Whether recourse to the use of force is legitimate or not cannot absolve a participant of his obligations under

IHL, nor deprive anyone of the protection provided by this body of rules.<sup>19</sup> Maintaining the distinction is also important in order to maintain the principle of equality of belligerents, mentioned earlier, which lies at the very heart of IHL.

Given that multinational forces are more often than not deployed in conflict zones it becomes essential to determine when a situation is an armed conflict in which IHL will constitute an additional legal framework governing a specific operation. The ICRC's view, which has been stated on various occasions, is that multinational forces are bound by IHL when conditions for its applicability have been met. It is submitted that the criteria used to determine the existence of an armed conflict involving multinational forces do not differ from those applied to more "classic" armed conflicts, whether international or non-international. Some legal debates on IHL applicability to peace operations have nevertheless been characterized by recurrent attempts to raise the bar for its threshold of applicability. It has been contended, in particular, that when multinational forces are involved, a higher degree of intensity of violence should be required before an armed conflict may be said to exist.

#### *b) Conflict Classification in Multinational Operations*

It has often been argued that the involvement of multinational forces in an armed conflict necessarily internationalizes the latter and triggers the application of the law governing IAC. However, this opinion is not unanimously accepted.<sup>20</sup> Even though attractive in terms of protective effect, as it means that persons affected would benefit from the full range of IHL rules governing IAC, it is not consistent with operational and legal reality. To give just one example, there is nothing to suggest that states involved in a NIAC would be willing to grant POW status to captured members of organized non-state armed groups, as would be required under IHL applicable in IAC.

There is thus an enduring controversy over the material field of application of IHL in peace operations. The question whether the legal frame of reference should be the law governing IAC or that applicable to NIAC remains unsettled. While with regard to rules regulating the conduct of hostilities there is probably no difference in practice because, as has been explained above, most treaty based rules applicable in IAC are also generally accepted as applying in NIAC as a matter of customary law, the issue is important when it comes, for instance, to the status of persons deprived of liberty (or the legal basis for the ICRC's activities).

In approaching this issue the ICRC has opted for an approach similar to that adopted by the International Court of Justice in its 1986 judgment in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*. It involves examining and defining, for the purposes of IHL, each bilateral relationship between belligerents in a given situation. In accordance with this approach, when multinational forces are fighting against state armed forces, the legal framework will be IHL applicable to IAC. When multinational forces with the consent of a host government are opposed to an organized non-state armed group (or groups), the legal frame of reference will be IHL applicable to NIAC.

#### *c) Determining Who Is a Party to an Armed Conflict*

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<sup>19</sup> This is not the approach taken in the 1994 UN Convention on the Safety of United Nations and Associated Personnel and its Optional Protocol of 2005. These instruments criminalize acts (such as attacks on members of United Nations operations or on other associated personnel involved in hostilities with a combat role) that are not prohibited under IHL, thereby, it may be argued, undermining the principle of equality of belligerents under IHL.

<sup>20</sup> For the ICRC's view, see section on the typology of non-international armed conflicts above.

The involvement of multinational forces in armed conflicts also raises a set of issues related to the determination of who should be considered a party to an armed conflict among the participants of a peace operation. Should it be argued that only troop contributing countries are a party to the conflict for the purposes of IHL? What about the international organization under whose command and control the multinational forces operate? How should member states of an international organization who are not participating in a military action be regarded under IHL? Can a presumption of being a party to an armed conflict be established for those participating in a coalition, irrespective of the functions they effectively perform therein?

These and other similar questions do not seem to have attracted sufficient analysis so far. This presumably results from a reluctance to acknowledge that international organizations and/or troop contributing countries acting on behalf the international community may themselves be parties to an armed conflict. Nonetheless, the issues are important and would need to be examined in more depth.

#### *d) Detention by Multinational Forces*

Peace operations today are also characterized by the recurrent involvement of multinational forces in the detention of individuals. One of the main challenges in that situation is to ensure that multinational forces meet their international obligations, including those based on IHL, when handling detainees. The challenges are particularly acute in relation to procedural safeguards for detention in NIACs, and also with regard to the transfer of detainees to local authorities or to other troop contributing countries.

These and other issues are being examined within an intergovernmental project on the "Handling of Detainees in International Military Operations", known as the Copenhagen Process, launched by the Government of Denmark in 2007. The UN Department of Peacekeeping Operations has likewise been working on its Standard Operating Procedures on "Detention in United Nations Peace Operations". Both initiatives aim to draw up common legal and operational rules governing detention in multilateral operations. This is an important and difficult task, as one of the main challenges is to develop common standards that will adequately reflect states' obligations under the applicable bodies of international law.

In light of the importance of the challenges raised by detention in armed conflict, particularly in NIAC, the ICRC - as already mentioned - believes that this is an area of IHL that should be strengthened, whether by means of treaty law or otherwise. It has been included in the ICRC's report on *Strengthening Legal Protection for Victims of Armed Conflict* submitted to the 31<sup>st</sup> International Conference.

#### *e) Legal Interoperability*

The participation of states and international organizations in peace operations not only gives rise to questions related to the applicable law, but also to its interpretation. This is because the "unity of effort" - in military parlance - sought in peace operations is often impacted by inconsistent interpretations and application of IHL by troop contributing countries operating on the basis of different legal standards. The concept of "legal interoperability" has emerged as a way of managing legal differences between coalition partners with a view to rendering the conduct of multinational operations as effective as possible, while respecting the relevant applicable law. An important practical challenge is to ensure that peace operations are conducted taking into consideration the different levels of ratification of IHL instruments and the different interpretations of those treaties and of customary IHL by troop contributing states.



Legal interoperability is not always easy to implement given the complexity of the legal framework in peace operations, which is made up of several layers. These include the UN Security Council mandate in a given situation, relevant treaty and customary law obligations, status of forces agreements, memoranda of understanding signed by coalition partners, standard operating procedures, and rules of engagement, to name the most important. The many legal sources that must be taken into account may make it objectively difficult for partners in a peace operation to reach a common understanding of their respective obligations as a precondition for enabling legal interoperability and for ensuring that a multinational operation is not carried out based on the lowest common legal denominator. Legal uncertainty, it hardly needs to be said, could ultimately impinge upon the protection afforded by IHL to the victims of armed conflicts. The ICRC is thus of the view that further analysis is needed in order to more precisely assess the overall effect of the legal interoperability question on IHL applicability, and application, in peace operations.

#### *f) Responsibility for Internationally Wrongful Acts*

It should finally be noted that the complexity inherent to peace operations has brought to the fore the question of where legal responsibility lies when internationally wrongful acts occur in the course of such operations. It has become increasingly difficult to provide an adequate legal answer. The issue remains of practical importance, however, as demonstrated by the growing number of cases being litigated in domestic and international courts, and has a direct bearing on the broader question of the relationship between state responsibility and the responsibility of international organizations.

More clarity would, for example, be necessary regarding how to determine the attribution of wrongful acts possibly committed in the course of peace operations and the responsibility that arises as a result. Many related questions would deserve to be answered, such as: does international responsibility for a wrongful act lie solely with one actor and, if so, with whom (the lead/framework state, the state whose armed forces committed the violation, the international organization under whose authority or command and control the troop contributing state operates)? Can states and international organizations bear concurrent responsibility? Under what conditions and circumstances can these responsibilities be established? Should it be considered that peace operations represent a situation in which troop contributing States have the obligation to ensure respect for IHL as set forth in common article 1 to the Geneva Conventions by preventing conduct contrary to IHL by co-belligerents?

While itself engaged in continued reflection on these issues, the ICRC is also taking part in an expert process launched in 2009 by the Swedish National Defence College which aims to provide responses to some of the questions mentioned above. Its particular focus is on "Responsibility in Multinational Military Operations".

### **4) Private Military and Security Companies (PMSCs)**

#### *a) Humanitarian Challenges of Increasing PMSC Presence*

The past decade has seen a marked trend towards the outsourcing of traditional military functions to PMSCs. The humanitarian challenges raised by the increasing presence of PMSCs in armed conflict situations were mentioned in the 2007 report to the International Conference. Most of the ongoing discussions surrounding PMSCs continue to focus on the issue of the legitimacy of the outsourcing of such functions and on whether there should be limits on the right of states to transfer their "monopoly of force" to private actors. Whatever the responses to the above dilemmas might be, it is realistic to assume that the presence of PMSCs in situations of armed conflict will continue to increase in the medium term. Many

states are in the process of downsizing their armed forces, while the growing complexity of weapons systems means that militaries are increasingly relying on outside technical expertise and training to operate them. Moreover, PMSCs clients are not only states; international organizations, non-governmental organizations and transnational business corporations have contracted their services as well, and it cannot be excluded that multinational military operations or armed opposition groups hire PMSCs to fight on their behalf in the future.

In parallel to the marked increase of the number of PMSCs present in situations of armed conflict, their activities have also become more closely related to military operations and involve, among other things, the protection of military personnel and infrastructure, the training and advising of armed forces, the maintenance of weapons systems, the guarding and interrogation of detainees. These activities have brought PMSCs into closer contact with persons protected by IHL and have also increased the exposure of their personnel to the dangers arising from the military operations.

#### *b) International Initiatives for the Regulation of PMSCs*

In response to the increased presence of PMSCs, several international initiatives have been undertaken with a view to clarifying, reaffirming or developing international legal standards regulating their activities and, in particular, ensuring their compliance with standards of conduct reflected in IHL and human rights law. They are briefly mentioned below.

##### *i) Montreux Document*

In 2005 the Swiss Federal Department of Foreign Affairs and the ICRC launched a joint initiative to promote respect for IHL and human rights law in the context of PMSC operations in situations of armed conflict. The initiative involved not only governments, but also drew on the experience and expertise of industry representatives, academic experts and non-governmental organizations. It resulted, in 2008, in the endorsement of the *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict* by 17 participating states.<sup>21</sup>

The Montreux Document refutes the misconception that private contractors operate in a legal vacuum. It does not create new law, but restates and reaffirms the existing legal obligations of states with regard to private military and security companies contracted by them, operating within their territory, or incorporated under their jurisdiction. It also recommends a catalogue of good practices for the practical implementation of existing legal obligations. As of April 2011 another 19 states had expressed their support for the Montreux Document, thus bringing the total number to 36.<sup>22</sup> The Swiss Federal Department of Foreign Affairs and the ICRC have also published a brochure introducing and explaining the Montreux Document in a manner accessible to the wider public. The text was transmitted to the UN Secretary-General by the Swiss Government in 2008 and is now also a UN document available in English, French, Spanish, Arabic, Chinese and Russian.

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<sup>21</sup> Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom, Ukraine, and the United States of America.

<sup>22</sup> With dates of endorsement: Macedonia (3 February 2009), Ecuador (12 February 2009), Albania (17 February 2009), Netherlands (20 February 2009), Bosnia and Herzegovina (9 March 2009), Greece (13 March 2009), Portugal (27 March 2009), Chile (06 April 2009), Uruguay (22 April 2009), Liechtenstein (27 April 2009), Qatar (30 April 2009), Jordan (18 May 2009), Spain (20 May 2009), Italy (15 June 2009), Uganda (23 July 2009), Cyprus (29 September 2009), Georgia (22 October 2009), Denmark (9 August 2010), Hungary (1 February 2011).

*ii) International Code of Conduct for Private Security Service Providers*

In parallel to the Montreux process, the Swiss Federal Department of Foreign Affairs facilitated a multi-stakeholder initiative aiming at producing an industry-wide code of conduct articulating principles aimed at enabling private security service providers to operate in accordance with IHL and international human rights standards. In November 2010 an *International Code of Conduct for Private Security Service Providers* was adopted in Geneva by nearly 60 private security providers and, since then, numerous other companies have also expressed their adherence.

The Code enunciates an industry commitment to strict standards of conduct both in the area of the use of force and in the treatment of detainees and other persons who find themselves in the power of, or otherwise exposed to, the activities of PMSCs. It was initially foreseen that the Code would include two parts: one describing standards of conduct, management and governance, and another providing an international governance and oversight mechanism ensuring compliance with the Code by signatory companies. As of this writing the finalized Code includes only the first part ("Principles Regarding Conduct of Personnel" and "Commitments Regarding Management and Governance"), whereas the planned oversight and governance mechanism, which should be integrated into the Code at a review conference, is in the process of being developed by a temporary steering committee composed of representatives of three stakeholder groups (industry, governments and civil society).

The ICRC welcomed the Code of Conduct as an initiative aimed at ensuring adherence by PMSCs to recognized standards of IHL and human rights law, thereby contributing to the better protection of victims of armed conflict and situations of violence below that threshold. As a co-sponsor of the Montreux Document the ICRC finds it important to recall that initiatives aimed at self-regulation by PMSCs, while undoubtedly important (particularly when they include an industry-run accountability mechanism), cannot replace the primary responsibility of states for ensuring respect for IHL by PMSCs in situations of armed conflict.

*iii) UN Working Group (Draft Convention)*

In July 2005 the UN Commission on Human Rights established a "Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of Peoples to Self-determination" composed of five experts, each drawn from one of the world's geographic regions. The Working Group reported back to the UN Human Rights Council in September 2010 on the proposed elements of a possible new international convention to regulate the activities of PMSCs and to encourage respect for human rights by such companies. That same month the UN Human Rights Council adopted a resolution creating an Open-ended Intergovernmental Working Group with a mandate to "consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies". The working group is to meet once annually for five-day sessions, the first of which was held in May 2011.

*c) The Humanitarian Goal*

The ICRC is not - and cannot be - involved in debates related to the legitimacy of the use of private military and security companies in situations of armed conflict. Its exclusively humanitarian goal is to foster observance of IHL by the personnel of such companies when they operate in armed conflict situations by, among other things, providing guidance on what their legal obligations are and, most importantly, by encouraging states to take measures to ensure respect for IHL by the companies and their personnel and hold them accountable if necessary. It is with this aim that the ICRC focuses in its operational activities on promoting existing legal obligations as reflected in the Montreux Document. The organization also

welcomes other initiatives aimed at ensuring that PMSCs and their personnel do not commit acts that would be contrary to IHL and other bodies of law. Each of the initiatives mentioned above may be deemed complementary and may serve to reinforce the protection of persons affected by armed conflict or situations of violence below that threshold.

## V. MEANS AND METHODS OF WARFARE

### 1) New Technologies of Warfare

There can be no doubt that IHL applies to new weaponry and to the employment in warfare of new technological developments, as recognized, *inter alia*, in article 36 of Additional Protocol I<sup>23</sup>. Nonetheless, applying pre-existing legal rules to a new technology raises the question of whether the rules are sufficiently clear in light of the technology's specific characteristics, as well as with regard to the foreseeable humanitarian impact it may have. In recent years a wide array of new technologies has entered the modern battlefield. Cyberspace has opened up a potentially new war-fighting domain. Remote controlled weapons systems such as drones are increasingly being used by the parties to armed conflicts. Automated weapons systems are also on the rise, and certain autonomous systems such as combat robots are being considered for future use on the battlefield. Each of these technologies raises a host of legal issues, only some of which will be briefly mentioned below.

#### a) "Cyber Warfare"

Over the last several years the interest in legal issues generated by the possible conduct of hostilities in and via cyberspace - has been particularly high. Cyberspace has opened up a potentially new war-fighting domain, a man-made theatre of war additional to the natural theatres of land, air, sea and outer space and is interlinked with all of them. It is a virtual space that provides worldwide interconnectivity regardless of borders. While these features are of great utility in peacetime, interconnectivity also means that whatever has an interface with the internet can be targeted from anywhere in the world. Interconnectivity also means that the effects of an attack may have repercussions on various other systems given that military networks are in many cases dependent on commercial infrastructure.

Cyber operations can be broadly described as operations against or via a computer or a computer system through a data stream. Such operations can aim to do different things, for instance to infiltrate a system and collect, export, destroy, change, or encrypt data or to trigger, alter or otherwise manipulate processes controlled by the infiltrated computer system. By these means, a variety of "targets" in the real world can be destroyed, altered or disrupted, such as industries, infrastructures, telecommunications, or financial systems. The potential effects of such operations in are therefore of serious humanitarian concern. For instance, by tampering with the supporting computer systems, one can manipulate an enemy's air traffic control systems, oil pipeline flow systems or nuclear plants.

The fact that a particular military activity is not specifically regulated does not mean that it can be used without restrictions. In the ICRC's view, means and methods of warfare which

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<sup>23</sup> In accordance with article 36 of Additional Protocol I on the study, development or adoption of a new weapon or method of warfare, states parties are under an obligation to determine whether their employment would, in some or all circumstances, be prohibited by the Protocol or any other rule of international law applicable to them.

resort to cyber technology are subject to IHL just as any new weapon or delivery system has been so far when used in an armed conflict by or on behalf of a party to such conflict. If a cyber operations is used against an enemy in an armed conflict in order to cause damage, for example by manipulation of an air traffic control system that results in the crash of a civilian aircraft, it can hardly be disputed that such an attack is in fact a method of warfare and is subject to prohibitions under IHL.

This being said, reconciling the emergence of cyberspace as a new war-fighting domain with the legal framework governing armed conflict is a challenging task in several respects and requires careful reflection. The ensuing is an illustration of questions that are being debated:

Firstly, the digitalization on which cyberspace is built ensures anonymity and thus complicates the attribution of conduct. Thus, in most cases, it appears that it is difficult if not impossible to identify the author of an attack. Since IHL relies on the attribution of responsibility to individuals and parties to conflicts, major difficulties arise. In particular, if the perpetrator of a given operation and thus the link of the operation to an armed conflict cannot be identified, it is extremely difficult to determine whether IHL is even applicable to the operation.

Secondly, there is no doubt that an armed conflict exists and IHL applies once traditional kinetic weapons are used in combination with cyber operations. However, a particularly difficult situation as regards the applicability of IHL arises when the first, or the only, "hostile" acts are conducted by means of a cyber operation. Can this be qualified as constituting an armed conflict within the meaning of the Geneva Conventions and other IHL treaties? Does it depend on the type of operation, i.e. would the manipulation or deletion of data suffice or is physical damage as the result of a manipulation required? It would appear that the answer to these questions will probably be determined in a definite manner only through future state practice.

Thirdly, the definition of the term "attack" is of decisive importance for the application of the various rules giving effect to the IHL principle of distinction. It should be borne in mind that Additional Protocol I and customary IHL contain a specific definition of the term which is not identical to that provided for in other branches of law. Under article 49 (1) of Additional Protocol I, "attacks" means acts of violence against the adversary, whether in offence or in defence. The term "acts of violence" denotes physical force. Based on that interpretation, which the ICRC shares, cyber operations by means of viruses, worms, etc., that result in physical damage to persons, or damage to objects that goes beyond the computer program or data attacked could be qualified as "acts of violence", i.e. as an attack in the sense of IHL.

It is sometimes claimed that cyber operations do not fall within the definition of "attack" as long as they do not result in physical destruction or when its effects are reversible. If this claim implies that an attack against a civilian object may be considered lawful in such cases, it is unfounded under existing law in the view of the ICRC. Under IHL, attacks may only be directed at military objectives, while objects not falling within that definition are civilian and may not be attacked. The definition of military objectives is not dependent on the method of warfare used and must be applied to both kinetic and non-kinetic means; the fact that a cyber operation does not lead to the destruction of an attacked object is also irrelevant. Pursuant to article 52 (2) of Additional Protocol I, only objects that make an effective contribution to military action and whose total or partial destruction, capture or neutralization offers a definite military advantage, may be attacked. By referring not only to destruction or capture of the object but also to its neutralization the definition implies that it is immaterial whether an object is disabled through destruction or in any other way.

Fourthly, when cyber operations constitute an attack, Additional Protocol I imposes: i) the obligation to direct attacks only against "military objectives" and not to attack civilians or civilian objects, ii) the prohibition of indiscriminate attacks, as well as of attacks that may be expected to cause excessive incidental civilian casualties or damages, and iii) the requirement to take the necessary precautions to ensure that the previous two rules are respected (in particular the requirement to minimise incidental civilian damage and the obligation to abstain from attacks if such damage is likely to be excessive to the value of the military objective to be attacked). It is submitted that these rules operate in the same way whether the attack is carried out using traditional weapons or by reliance on a computer network. Problems that arise in applying these rules are therefore not necessarily unique to cyber operations. Still some issues remain:

As already explained above, IHL prohibits indiscriminate attacks. Based on what is publicly known about cyber operations thus far, ensuring compliance with this rule poses very serious challenges. The question that arises is whether cyber operations may be accurately aimed at the intended target and, even if that is the case, whether effects upon civilian infrastructure could be prevented due to the interconnectedness of military and civilian computer networks. An obvious example would be the release of a virus or a range of viruses into the computer systems of a target state. Even if introduced only into its military network a sufficiently virulent virus could seep out into its civilian systems and even beyond its borders and disrupt or destroy the infrastructure that relies on them. Such viruses would be considered indiscriminate under existing IHL because they cannot be directed against a specific military objective and would be a means or method of combat the effects of which cannot be limited as required by IHL.

Cyber operations pose not only the question of how to observe the prohibition of indiscriminate attacks, but also of disproportionate attacks. A particular issue that arises, and requires careful reflection, is whether it is in practice possible to fully anticipate all the reverberating consequences/knock-on effects on civilians and civilian objects of an attack otherwise directed at a legitimate military objective.

Respect for the principles of distinction and proportionality means that certain precautions in attack, provided for in article 57 of Additional Protocol I, must be taken. This includes the obligation of an attacker to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental civilian casualties and damages. Since in certain cases cyber operations might cause fewer incidental civilian casualties and less incidental civilian damage compared to the use of conventional weapons, it may be argued that in such circumstances this rule would require that a commander consider whether he or she can achieve the same military advantage by using a means and methods of warfare which resort to cyber technology, if it is practicable.

In sum, despite the newness of the technology, legal constraints apply to means and methods of warfare which resort to cyber technology. While there is no IHL provision that explicitly bans them, it is clear that cyber operations in armed conflict may only be undertaken to the degree and in a way that respects existing law.

The ICRC has been following and will continue to closely follow developments related to the use of cyberspace for military purposes and assess their potential humanitarian impact with a view to contributing to ensure that the relevant IHL rules are observed.

#### *b) Remote Controlled Weapons Systems*

One of the main features of remote controlled weapon systems is that they allow combatants to be physically absent from a zone of combat operations. This new technology, like certain other advances in military technology can, on the one hand, help belligerents direct their attacks more precisely against military objectives and thus reduce civilian casualties and damage to civilian objects. It may, on the other hand, also increase the opportunities of attacking an adversary and thus put the civilian population and civilian objects at greater corresponding exposure to incidental harm. Despite the distance between persons operating remote control weapons or weapons systems and a battlefield, the technology requires that a human operator activate, direct and fire the weapon concerned. The responsibility for respecting IHL, including the suspension of an attack if IHL rules cannot be respected, thus clearly belongs to the individual(s) concerned and the relevant party to an armed conflict.

Remote controlled drones are a conspicuous example of a remote controlled weapons system. They have greatly enhanced real-time aerial surveillance possibilities, thereby enlarging the toolbox of precautionary measures that may be taken in advance of an attack. But remote controlled weapon systems also entail risks. Studies have shown that disconnecting a person, especially by means of distance (be it physical or emotional) from a potential adversary makes targeting easier and abuses more likely. It has also been noted that challenges to the responsible operation of such a system include the limited capacity of an operator to process a large volume of data, including contradictory data at a given time ("information overload"), and the supervision of more than one such system at a time, leading to questions about the operator's ability to fully comply with the relevant rules of IHL in those circumstances.

#### *c) Automated Weapons Systems*

An automated weapon or weapons system is one that is able to function in a self-contained and independent manner although its employment may initially be deployed or directed by a human operator. Examples of such systems include automated sentry guns, sensor-fused munitions and certain anti-vehicle landmines. Although deployed by humans, such systems will independently verify or detect a particular type of target object and then fire or detonate. An automated sentry gun may fire, or not, following voice verification of a potential intruder based on a password. How the system would differentiate a civilian from a combatant, a wounded or incapacitated combatant from an attacker or persons unable to understand or respond to a verbal warning from the system (possible if a foreign language is used), is unclear. Likewise, sensor-fused munitions, programmed to locate and attack a particular type of military object (e.g. tanks) will, once launched, attack such objects on their own if the object type has been verified by the system. The capacity to discriminate, as required by IHL, will depend entirely on the quality and variety of sensors and programming employed within the system. The central challenge with automated systems is to ensure that they are indeed capable of the level of discrimination required by IHL. Similarly, it is not clear how these weapons could assess the incidental loss of civilian lives, injury to civilians or damage to civilian objects, and therefore comply with the principle of proportionality.

#### *d) Autonomous Weapons Systems*

An autonomous weapon system is one that can learn or adapt its functioning in response to changing circumstances in the environment in which it is deployed. A truly autonomous system would have artificial intelligence that would have to be capable of implementing IHL. Such systems have not yet been weaponized although there is considerable interest within expert literature and considerable funding of relevant research. The deployment of such systems would reflect a paradigm shift and a major qualitative change in the conduct of hostilities. It also raises a range of fundamental legal, ethical and societal issues which need to be considered *before* such systems are developed or deployed.

The development of a truly autonomous weapon system that can implement IHL represents a monumental programming challenge that may well prove impossible. Developing their capacity to distinguish between a civilian and combatant, an active combatant from a wounded or incapacitated one, or a combatant and a hunter would appear to be a formidable task. It is likewise hard to imagine how autonomous systems would be able to make determinations of military advantage or judgments concerning proportionality or precautions in attack in a variety of changing circumstances.

In theory, it may be possible to program an autonomous weapon system to behave more ethically and more cautiously on the battlefield than a human being. After all, emotion, the loss of colleagues and personal self-interest is not an issue for a robot and the record of respect for IHL by human soldiers is far from perfect, to say the least. While there is no evidence yet that this is possible, the potential use of autonomous weapon systems nonetheless evokes a variety of difficult questions such as: is the delegation to machines of life and death choices morally acceptable? If the use of an autonomous weapon system results in a war crime, who would be legally, morally or politically responsible for the choices made by autonomous weapon systems: the programmer, the manufacturer, or the command that deploys them? If responsibility cannot be determined as required by IHL is it legal or ethical to deploy such systems? These queries suggest that the debate about the legal and other implications of the use of autonomous weapons systems will be complex and will need to carefully examine, among other things, their potential humanitarian consequences.

In sum, it will evidently take some time before conclusive answers can be given to many of the legal and other questions that the technological developments highlighted in this section give rise to. It may be noted that the crucial question does not seem to be whether new technologies are good or bad in themselves, but instead what are the circumstances of their use. Likewise, new technologies do not change existing law, but rather must abide by it, taking into account that current norms do not sufficiently regulate some of the challenges posed and might need to be elaborated. For the ICRC, it is important to ensure informed discussion of the issues involved, to call attention to the necessity of assessing the potential humanitarian impact and IHL implications of new and developing technologies and to ensure that they are not employed prematurely under conditions in which respect for IHL cannot be guaranteed.

## **2) Use of Explosive Weapons in Densely Populated Areas**

Armed conflicts fought in densely populated areas have been known to cause tremendous human suffering. Civilians have paid a particularly high price both directly, in terms of the death, injury and permanent disability caused, as well as indirectly, in terms of the widespread destruction of their homes, livelihoods and infrastructure. Many civilians have, in addition, suffered less measurable but long-term psychological effects as a result of the use of explosive weapons in densely populated areas over extended periods of time. Even without scientific data it would appear safe to say that people who live in densely populated areas are likely to be more adversely affected by aerial bombardments, shelling, and the use of other explosive weapons than those who live in rural areas and are not subject in close proximity to the effects of explosive weapons in built up or urban spaces.

The humanitarian and other consequences of military operations in densely populated areas were recalled by the ICRC President in a 2009 statement:

*"It is not only types of weapons that are changing, but also the environments in which they are often used. The debate has been prompted in part by the growing number of military operations conducted in densely populated urban areas, often using explosive force delivered by heavy weapons, which can have devastating humanitarian consequences for*



*civilian populations in such environments. [...] But various crucial questions remain with regard to the conduct of hostilities. Are applicable IHL rules sufficient to identify under which circumstances explosive force delivered by heavy weapons might be used in densely populated areas, for example? Should a higher standard be required for the verification of targets and their surroundings or for the issuance of warnings to the civilian population? Perhaps further legal development is required, but if so, how can it feasibly be monitored and enforced?"*

#### *Legal Constraints on the Use of Explosive Weapons in Densely Populated Areas*

There are many types of explosive weapons, ranging from grenades to aerial bombs weighing hundreds of kilos. A number of legal instruments define explosive devices, but the definitions tend to be tailored to the purposes of the relevant treaty. It may nevertheless be observed that a recurring element in all conventional definitions of explosive weapons is the requirement that such weapons be activated by the detonation of a high explosive substance creating a blast and fragmentation effect.

The use of explosive weapons in densely populated areas exposes the civilian population and infrastructure to heightened - and even extreme - risks of incidental or indiscriminate death, injury or destruction. Their employment is not, however, prohibited by IHL as such. The permissibility of reliance on them must therefore be determined on a case-by-case basis, taking into account IHL rules prohibiting indiscriminate and disproportionate attacks, and imposing obligations to take feasible precautions in attack.<sup>24</sup>

For the purposes of this discussion it must in particular be reiterated that indiscriminate attacks are those that are not directed at a specific military objective, that employ a method or means of combat which cannot be directed at a specific military objective, or that employ a method or means of combat the effects of which cannot be limited as required by IHL. Explicitly prohibited as a type of indiscriminate attack is "an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village, or other area containing a similar concentration of civilians or civilian objects". Equally prohibited is an attack that would violate the IHL principle of proportionality, i.e. "an attack which 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".

It must be noted that the prohibition of indiscriminate attacks was "intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the [First Additional] Protocol, in which event their use in those circumstances would involve an indiscriminate attack".<sup>25</sup>

A circumstance that could make the use of a certain weapon indiscriminate is certainly its use in a densely populated area. To be sure, the concept of explosive weapons encompasses a great variety of weapons with varying impact areas so that not all use of explosive weapons in a densely populated area is indiscriminate by definition. While the characterization of a weapon as "explosive" indicates the specific manner in which it affects its target, the decisive criterion for its lawfulness under the prohibition of indiscriminate

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<sup>24</sup> In this context it must be recalled that the co-mingling of combatants with civilians is a feature of warfare in densely populated areas, which means that the Party under attack also has the obligation to take (to the maximum extent feasible) the precautions against the effects of attack - on civilians and civilian objects - prescribed by IHL.

<sup>25</sup> Diplomatic Conference (1974-77), O.R. XV, p. 274, para. 55, CDDH/215/Rev.1, Annex.

attacks will be whether it is able, in light of its impact range and considering the density of the surrounding civilian population and infrastructure, to distinguish between the military objective targeted and civilian persons and objects and to limit its effects as required under IHL.

In the same vein, throughout the planning and conduct of military operations involving the use of explosive weapons in densely populated areas the general obligation of the belligerents to take all feasible precautions with a view to sparing the civilian population, civilians and civilian objects must be applied in a particularly careful manner. In particular, all feasible precautions must be taken to verify that targets are military objectives and in the choice of means and methods of attack with a view to avoid and, in any event, minimize incidental harm. It also means that an attack must be cancelled or suspended if it may be expected to violate the principles of distinction or proportionality.

In sum, due to the significant likelihood of indiscriminate effects and despite the absence of an express legal prohibition for specific types of weapons, the ICRC considers that explosive weapons with a wide impact area should be avoided in densely populated areas.

### **3) The Notion of Direct Participation in Hostilities under IHL**

As mentioned in the reports to the 28<sup>th</sup> and 30<sup>th</sup> International, the operational environment of contemporary armed conflict is changing. It is characterized, among others, by a shift of military operations into civilian population centres, by ever more involvement of civilians in military action (both on the side of States and organized armed groups), and by increasing practical difficulties in distinguishing between fighters and civilians. In light of this reality, from 2003 to 2008 the ICRC worked with a group of some 50 international legal experts - participating in their personal capacity - on a project aimed at clarifying the notion of "direct participation in hostilities" under IHL. Based on a thorough evaluation of the expert discussions and on further internal research and analysis, the ICRC finalized an outcome document entitled *Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL* which reflects solely the ICRC's views.

The primary purpose of the Interpretive Guidance is to enhance the protection of the civilian population by clarifying the distinction between civilians and combatants, as well as between civilians who are and, respectively, are not "directly participating in hostilities" under IHL. The Interpretive Guidance does not endeavour to change binding rules of IHL, rather it presents the ICRC's recommendations as to how IHL relating to the notion of direct participation in hostilities should be interpreted in contemporary armed conflicts. It is not meant to be applied on the ground as such, but to be further operationalized by military commanders and others responsible for the conduct of military operations. The text was published in June 2009, along with the proceedings of the expert process. It has been translated into French, Spanish, Chinese and Arabic in the meantime. The ICRC has also engaged in a proactive dialogue with military, governmental, non-governmental, humanitarian and academic circles in order to explain and promote the Interpretive Guidance.

Provided below is very brief summary of the main questions posed in the Interpretive Guidance and the answers provided:

*(i) Who is considered a civilian for the purposes of the principle of distinction?*

The answer to this question determines the scope of persons protected against direct attack unless and for such time as they directly participate in hostilities. For the purpose of the conduct of hostilities it is important to distinguish members of organized armed forces or groups (whose continuous function is to conduct hostilities on behalf of a party to an armed

conflict) from civilians (who do not directly participate in hostilities, or who do so on a merely spontaneous, sporadic, or unorganized basis).

*In international armed conflict*, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Members of irregular armed forces (e.g. militia, volunteer corps, etc.) whose conduct is attributable to a state party to an armed conflict are considered part of its armed forces. They are not deemed civilians for the purposes of the conduct of hostilities even if they fail to fulfil the criteria required by IHL for combatant privilege and POW status.<sup>26</sup>

*In non-international armed conflict*, all persons who are not members of state armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.

In NIAC, organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function it is to directly participate in hostilities. The decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities ("continuous combat function"). Continuous combat function does not imply *de jure* entitlement to combatant privilege, which in any case is absent in NIAC. Rather, it distinguishes members of the organized fighting forces of a non-state party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions.

Armed violence that does not meet the requisite degree of intensity and organization to qualify as an armed conflict remains an issue of law and order, i.e. is governed by international standards and domestic law applying to law enforcement operations. This is the case even when the violence takes place during an armed conflict, whether international or non-international, if it is unrelated to the armed conflict.

*(ii) What conduct amounts to direct participation in hostilities?*

The answer to this question determines the individual conduct that leads to the suspension of a civilian's protection against direct attack. The notion of direct participation in hostilities refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. It should be interpreted synonymously in situations of international and NIAC.

In order to qualify as direct participation in hostilities, a specific act must fulfil the following cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (*threshold of harm*), and
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (*direct causation*), and

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<sup>26</sup> Membership in irregular armed forces belonging to a party to the conflict is to be determined based on the same functional criteria that apply to organized armed groups in non-international armed conflict.

3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*).

Applied in conjunction, the three requirements of *threshold of harm*, *direct causation* and *belligerent nexus*, permit a reliable distinction between activities amounting to direct participation in hostilities and activities which, although occurring in the context of an armed conflict, are not part of the conduct of hostilities and, therefore, do not entail loss of protection against direct attack.

In addition, 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.

*(iii) What modalities govern the loss of protection against direct attack?*

The answer to this question deals with the following issues: a) duration of loss of protection against direct attack, b) the precautions and presumptions in situations of doubt, c) the rules and principles governing the use of force against legitimate military targets, and d) the consequences of regaining protection against direct attack.

a) As regards the temporal scope of loss of protection, civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-state party to an armed conflict cease to be civilians (see (i) above) and lose protection against direct attack for as long as they assume their continuous combat function.

b) In practice, civilian direct participation in hostilities is likely to entail significant confusion and uncertainty in the implementation of the principle of distinction. In order to avoid the erroneous or arbitrary targeting of civilians entitled to protection against direct attack, it is therefore of particular importance that all feasible precautions be taken in determining whether a person is a civilian and, if so, whether he or she is directly participating in hostilities. In case of doubt, the person in question must be presumed to be protected against direct attack.

c) Loss of protection against direct attack, whether due to direct participation in hostilities (civilians) or continuous combat function (members of organized armed groups), does not mean that no further legal restrictions apply. It is a fundamental principle of customary and treaty IHL that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited". Even direct attacks against legitimate military targets are subject to legal constraints, whether based on specific provisions of IHL, on the principles underlying IHL as a whole, or on other applicable branches of international law.

Thus, in addition to the restraints imposed by IHL on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

d) Finally, as has already been mentioned above, IHL neither prohibits nor privileges civilian direct participation in hostilities. When civilians cease to directly participate in hostilities, or when members of organized armed groups belonging to a non-state party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack, but are not exempted from prosecution for violations of domestic and international law that might have been committed.

It should be noted that certain aspects of the Interpretive Guidance have generated legal debates in government, academic and NGO circles since its publication. An issue, for example, that has proved controversial is the concept of continuous combat function as described above. While some consider that it has been too narrowly drawn others believe, to the contrary, that it has been too widely conceived. A similar range of opinions have been expressed with regard to the ICRC's view that civilians directly participating in hostilities on an unorganized or sporadic basis may be subject to attack only for the duration of each specific act of direct participation. While some believe that this approach is unacceptable as it recognizes the so-called "revolving door" of protection for persons who sporadically take part in hostilities, others believe that it should be applied to any civilian taking a direct part in hostilities, i.e. even those who do so on an organized basis. The position enunciated in recommendation IX of the Interpretive Guidance, according to which "the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances" has also been the subject of diverse opinions. The main criticism is that the introduction of an element of necessity into the targeting process against persons directly participating in hostilities is not supported by existing law. It is argued that IHL allows attacks against persons directly participating in hostilities regardless of whether, in the particular circumstances, means other than the use of lethal force would suffice to achieve a desired operational outcome.

The ICRC deliberated on each of these critiques, as well as others that have been expressed, in the process of preparing the final text of the Guidance which, in its view, presents a "package" of carefully balanced legal and operational considerations. The organization is closely following the reception of the Interpretive Guidance and the different positions expressed in relation to some of the recommendations made and is ready to engage in further exchanges aimed at both clarifying particular aspects of the Guidance and explaining their interlinking nature.

#### **4) The Arms Trade Treaty**

Every year, because *inter alia* of the inadequately regulated availability and misuse of conventional weapons, hundreds of thousands of civilians are displaced, injured, or killed. In many parts of the world, weapons are so easy to obtain and armed violence is so prevalent that even after an armed conflict, civilians face many of the same threats as when it was ongoing.

States party to the Geneva Conventions first expressed concern at the rapid expansion of the arms trade and the unregulated proliferation of weapons during the 26th International Conference of the Red Cross and Red Crescent in 1995. The Conference mandated the ICRC to conduct a study on the implications of arms availability for IHL and the situation of civilians in armed conflicts. The study concluded that the widespread availability of arms facilitates violations of IHL and has harmful consequences both for civilians and for humanitarian assistance operations during and after armed conflicts. As long as weapons are too easily available, serious IHL violations will be made more likely and the provision of humanitarian assistance endangered.

Since the conclusion of its study in 1999, the ICRC has called for stricter regulation of international transfers of weapons and ammunition and evaluation of the likely respect by recipients for IHL as a means to reduce the suffering caused by the poorly regulated availability of weapons.

##### *a) Elaborating the Arms Trade Treaty*

Since 2006, the UN General Assembly has repeatedly recognized that the absence of common international standards for the transfer of conventional arms contributes to armed conflict, the displacement of people, crime and terrorism, which, in turn, undermine peace, reconciliation, safety, security, stability and sustainable social and economic development. In January 2010 the General Assembly decided to convene, in 2012, the UN Conference on the Arms Trade Treaty (ATT) to elaborate a legally binding instrument "containing the highest possible common international standards for the transfer of conventional arms".

For the ATT to be truly effective, its scope and transfer criteria will need to be consistent with the object and purpose of the ATT, which is to prevent the problems resulting from the unregulated trade in conventional weapons. As explained by the Chairman of the ATT process in his conclusion of a March 2011 Preparatory Meeting, one of the "Goals and Objectives" of the ATT is to:

*"Contribute to international and regional peace, security and stability by preventing international transfers of conventional arms that contribute to or facilitate: human suffering, serious violations of international human rights law and international humanitarian law, violations of United Nations Security Council sanctions and arms, embargoes and other international obligations, armed conflict, the displacement of people, organized crime, terrorist acts and thereby undermining peace, reconciliation, safety, security, stability and sustainable social and economic development (...)"*.

To date, states' positions range from favouring a comprehensive treaty scope that regulates the trade of all conventional weapons and their ammunition, to supporting a scope that is limited to the seven categories of weapons under the UN Register of Conventional Arms. Other states favour a scope that lies somewhere in between the two approaches: the seven UN Register categories plus small arms and light weapons (SALW), the seven UN Register categories plus SALW and ammunition, or a comprehensive range of conventional weapons, but not their ammunition. The ATT Chairman's July 14, 2011 draft text lists a broad range of categories of weapons, ammunition, components, technology and equipment. On the transactions to be covered in the ATT, the draft text covers import, export, transfer, brokering, manufacture under foreign license, and technology transfers of the items that will be covered.

States have also had discussions on arms transfer criteria, which are the standards that states should apply when determining whether to authorize a transfer of arms. The most commonly proposed criteria for an ATT relate to existing express international obligations prohibiting transfers, such as UN Security Council arms embargoes, and to likely post-transfer uses that states wish to prevent. This latter category of criteria would aim to ensure that the transferred weapons are not used to commit or facilitate violations of international law.

#### *b) An IHL Criterion for Arms Transfers*

The ICRC supports the elaboration of a comprehensive, legally binding ATT that establishes common international standards for the responsible transfer of all conventional weapons and their ammunition. The negotiation and eventual implementation of the Arms Trade Treaty (ATT) will create an historic opportunity to reduce the human cost of the widespread and poorly regulated availability of conventional arms.

Under the Geneva Conventions and customary law, states have an obligation to ensure respect for IHL. This entails a responsibility to make every effort to ensure that the arms and ammunition they transfer do not end up in the hands of persons who are likely to use them in violation of IHL. Both the Agenda for Humanitarian Action adopted in resolution 1 at the 28th International Conference of the Red Cross and Red Crescent in 2003, and resolution 3

adopted at the 30th International Conference in 2007 stressed that, in light of the obligation of states to respect and ensure respect for IHL, strict control of the availability of arms and ammunition is required so that they do not end up in the hands of those who may be expected to use them in violation of IHL.

In the ICRC's view, the ATT should reflect states' obligation to ensure respect for IHL by requiring that they: a) assess the likelihood that serious violations of IHL will be committed with the weapons being transferred, and b) not authorize transfers when there is a clear risk that the arms will be used to commit serious violations of IHL. If the future ATT were to permit measures short of denial where there is a clear risk that serious violations of IHL will be committed with the weapons being transferred, it is believed that its humanitarian goal would be seriously undermined.

Differences in states' respective IHL obligations are unlikely to cause a particular problem in the choice of IHL obligations to be assessed before deciding to transfer weapons. States transferring weapons would need to evaluate the risk of "serious" violations. These are the violations that states already have an obligation to investigate when committed by their nationals or on their territory or over which there is universal jurisdiction under the grave breaches provisions of the 1949 Geneva Conventions (articles 50, 51, 130, 147 of Conventions I, II, III and IV respectively) and of Additional Protocol I of 1977 (articles 11 and 85). According to customary law, serious violations of IHL constitute war crimes, which, in turn, have been listed under Article 8 of the Rome Statute of the International Criminal Court. While not all states are party to the Rome Statute, the list of war crimes under Article 8 serves as a useful reference for acts that states have generally considered serious violations of customary international law.

Specific guidelines on making systematic and objective risk assessments can be helpful tools in applying IHL criteria. In 2007 the ICRC published a *Practical Guide* to applying IHL criteria in arms transfer decisions. The *Guide* sets out a range of indicators that can be used for making risk assessments, suggests sources of pertinent information, and provides a list of grave breaches and war crimes.

### *c) Scope of Weapons and Activities*

If one of the objectives of the ATT is to prevent international transfers of conventional arms that contribute to or facilitate human suffering, then it is difficult to imagine a conventional weapon or type of transfer that would not require regulation. Thus, in the ICRC's view, all conventional weapons and ammunition should be included in the scope of the treaty.

It is also important that the treaty cover transfers of ammunition if it is to meet its humanitarian goal effectively. Without ammunition, no use can be made of existing stocks of conventional arms; and supplies of ammunition need to be continuously renewed. According to the UN Secretary-General's April 2011 report on Small Arms "expert panels monitoring Security Council arms embargoes have suggested that the popularity of certain types of weapons among armed groups corresponds to the availability of their ammunition (...). Conversely, reports have shown that, in some cases, lack of ammunition has prompted combatants to seek to resolve their disputes peacefully. Preventing resupply in situations of high risk to civilian populations should be a priority." In addition, research has shown that a very large majority of the countries that currently regulate arms transfers also regulate the transfer of ammunition, demonstrating that regulation of the transfer of ammunition is both practicable and desirable.

The ATT should also cover all types of transfer, as understood in existing international instruments. Activities such as transit, trans-shipment, loans, leases, as well as brokering

and closely related activities, should fall within the scope of the Arms Trade Treaty to ensure that it is truly comprehensive and effective.

In sum, one of the most important objectives of an international Arms Trade Treaty must be to reduce the human cost of the availability of weapons by setting clear norms for the responsible transfer of conventional arms and their ammunition. States, National Red Cross and Red Crescent Societies and civil society all have a role to play in advance of negotiations on an Arms Trade Treaty in 2012 by promoting public awareness of the human cost of poorly regulated arms transfers and by encouraging states to adopt a strong and comprehensive treaty. An effective ATT and its implementation could make a momentous contribution to reducing preventable human suffering during and after armed conflicts.

## VI. THE CONFLATION OF IHL AND THE LEGAL FRAMEWORK GOVERNING TERRORISM

While armed conflict and acts of terrorism are different forms of violence governed by different bodies of law, they have come to be perceived as almost synonymous due to constant conflation in the public domain. The ICRC's views on the legal classification of what has been called the "war against terrorism" and of the legal status of persons detained was dealt with in previous reports on *IHL and the Challenges of Contemporary Armed Conflicts* prepared for the 2003 and 2007 International Conferences. This section aims to provide a brief outline of the legal, policy and practical reasons for which it is believed that it is not helpful to conflate armed conflict and terrorism or the respective legal regimes governing these forms of violence.

### 1) Legal and Policy Effects

There are several important distinctions between the legal frameworks governing armed conflict and terrorism, based primarily on the different reality that each seeks to govern. The main divergence is that, in legal terms, armed conflict is a situation in which certain acts of violence are allowed (lawful) and others prohibited (unlawful), while *any* act of violence designated as terrorist is always unlawful. As already mentioned, the ultimate aim of armed conflict is to prevail over the enemy's armed forces. For this reason, the parties are permitted, or at least are not prohibited from, attacking each other's military objectives. Violence directed at those targets is not prohibited as a matter of IHL, regardless of whether it is inflicted by a state or a non-state party. Acts of violence against civilians and civilian objects are, by contrast, unlawful because one of the main purposes of IHL is to spare civilians, as well as civilian objects, from the effects of hostilities. IHL thus regulates both lawful and unlawful acts of violence and is the only body of international law that takes such a two-pronged approach.

There is no similar dichotomy in the international norms governing acts of terrorism. The defining feature of any act legally classified as "terrorist" under either international or domestic law is that it is always penalized as criminal: no act of violence legally designated "terrorist" is, or can be, exempt from prosecution. The current code of terrorist offences comprises 13 so-called 'sectoral' treaties adopted at the international level that define specific acts of terrorism. There is also a draft Comprehensive Convention on International Terrorism that has been the subject of negotiations at the UN for over a decade.<sup>27</sup> As has

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<sup>27</sup> The relationship between the definition of acts deemed terrorist under the draft Convention and acts committed in armed conflict is one of the points of disagreement holding up the conclusion of



been calculated, the treaties currently in force define nearly fifty offences, including some ten crimes against civil aviation, some sixteen crimes against shipping or continental platforms, a dozen crimes against the person, seven crimes involving the use, possession or threatened use of "bombs" or nuclear materials, and two crimes concerning the financing of terrorism.

The legal regimes governing armed conflict and terrorism also differ in that only IHL is based on the notion of equality of rights and obligations of the parties to an armed conflict (by way of reminder, equality of rights and obligations under IHL does not mean that such equality exists between the parties to a NIAC under domestic law). Thus, any party to an armed conflict is equally prohibited from directly attacking enemy civilians, but is not prohibited from attacking the adversary's military objectives. The same principle obviously does not apply to acts of terrorism.

A crucial reason for not legally conflating armed conflict and acts of terrorism is that the legal framework governing armed conflict already prohibits the great majority of acts that would be designated as 'terrorist' if they were committed in peacetime. IHL both: i) prohibits, as war crimes, specific acts of terrorism perpetrated in armed conflict, and ii) prohibits, as war crimes, a range of other acts that would commonly be deemed 'terrorist' if committed outside armed conflict.

i) "Terrorism" is specifically prohibited in article 33 of the Fourth Geneva Convention, as well as in article 4 (2)(d) of Additional Protocol II. In the first case, the prohibition aims to protect civilians who find themselves *in the power of an adversary* in an IAC. In the second case the prohibition relates to persons not or no longer participating directly in hostilities who similarly find themselves in the power of an adversary in a NIAC. The placement and scope of both provisions make it clear that the aim is to ensure that a party to an armed conflict is barred from terrorizing civilians under its control, particularly by means of inflicting collective punishments.

In addition, articles 51 (2) of Additional Protocol I and 13 (2) of Additional Protocol II specifically prohibit acts of terrorism *in the conduct of hostilities*, providing that '[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'. The ICTY determined in the 2006 *Galic* judgment that this prohibition is binding not only as treaty law, but is of a customary law nature as well.

ii) Perhaps more important than the fact that IHL specifically prohibits certain acts of terrorism is that most of its "regular" rules on the conduct of hostilities prohibit acts that would be deemed 'terrorist' when committed outside armed conflict.

As already mentioned, the principle of distinction informs the totality of the other rules on the conduct of hostilities under IHL. For the purpose of demonstrating why the legal regimes of armed conflict and terrorism need not be blurred it must be recalled that, based on the principle of distinction, IHL in both IAC and NIAC absolutely prohibits direct and deliberate attacks against civilians. This prohibition - of which the prohibition of terrorization discussed above is a specific expression - is also a norm of customary IHL and its violation constitutes a war crime.

In addition to direct and deliberate attacks, IHL proscribes indiscriminate and disproportionate attacks, the definitions of which have already been discussed in other sections of this report.

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negotiations. The ICRC believes that it is important that the relevant exclusion clause does not undermine IHL.

Like civilians, civilian objects (defined under IHL as “all objects which are not military objectives”) cannot be the target of direct and deliberate attacks. In case of doubt as to whether an object normally dedicated to civilian purposes - such as a house or school - is being used to make an effective contribution to military action - and has thus become a military objective - it must be presumed not to be so.

While, as mentioned above, one prong of IHL governs (prohibits) acts of violence against civilians and civilian objects in armed conflict, the other prong allows, or at least does not prohibit, attacks against combatants or military objectives. These acts constitute the very essence of armed conflict and, as such, should not be legally defined as “terrorist” under a different body of international law. To do so would imply that they are prohibited acts which must be subject to criminalization under that other international legal framework. This would stand at odds with the dichotomous regulation of acts of violence which is at the core of IHL.

It is important to note that the rules on the conduct of hostilities prohibiting attacks against civilians or civilian objects outlined above apply in NIAC as well. There is, however, a crucial legal difference between international and non international armed conflicts. Under IHL, there is no “combatant” or “POW” status in NIAC. States' domestic law prohibits and penalizes violence perpetrated by private persons or groups, including all acts of violence that would be committed in the course of an armed conflict. A non-state party thus has no right under domestic law to take up arms and engage in hostilities against the armed forces of a government adversary (the essence of combatant status), nor can it expect to be granted immunity from prosecution for attacks against military targets (the essence of combatant privilege). In other words, all acts of violence perpetrated in a NIAC by an organized non-state armed group are regularly prohibited and usually severely penalized under domestic law, regardless of their lawfulness under IHL.

The interplay of IHL and domestic law in a NIAC thus leads to a situation in which members of non-state armed groups are likely to face stiff sentences under domestic law even for acts of violence that are not prohibited by IHL (for example, attacks against military objectives). This inherent contradiction between the two legal frameworks is part of the reason why non-state armed groups often disregard IHL norms, including those prohibiting attacks against civilians and civilian objects. They have no explicit legal incentive to abide by IHL norms as they can be equally punished upon capture by the government whether they fought according to the laws and customs of war - and respected civilians and civilian objects - or violated the rules.

The drafters of IHL treaties were well aware of the problem and introduced certain provisions in Additional Protocol II aimed at remedying the imbalance between the belligerents in a NIAC that arises as a result of domestic law. Article 6(5) of the Protocol provides: “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”.

This is also a rule of customary law applicable in NIAC based on the practice of a number of states that granted amnesties after NIACs either by special agreements, legislation, or other measures. The UN Security Council, the General Assembly, and other UN and regional bodies have likewise encouraged or welcomed amnesties granted by states at the end of armed conflicts. By way of reminder, the amnesties referred to do not relate to war crimes (or other crimes under international law such as genocide or crimes against humanity), that might have been committed in NIAC, as that would be contrary to the obligation of states to investigate and prosecute such acts.

The interface between international and domestic law thus results in a lopsided legal situation unfavourable to non-state armed group compliance with IHL. It is submitted that

adding an additional layer of incrimination, that is designating as “terrorist” acts committed in armed conflict that are not prohibited under IHL reduces the likelihood of obtaining respect for its rules even further. As explained above, attacks against military objectives carried out by non-state actors are prohibited by domestic law. The proposition that amnesties, or any other means of acknowledging the behaviour of groups that attempted to fight according to laws of war becomes legally (and politically) very difficult once such acts are designated as “terrorist”. As regards attacks against civilians and civilian objects, they are already prohibited under both IHL (war crimes) and domestic law. It is thus not clear what legal advantage is to be gained from also charging them as “terrorist” given the sufficient proscriptions provided for under the existing two legal frameworks.

If such labelling is the result of policy or political decisions aimed at disqualifying non-state adversaries by branding them “terrorists”, this may prove to be an obstacle to eventual peace negotiations or national reconciliation that are necessary in order to end an armed conflict and ensure peace.

In sum, it is believed that the term “terrorist act” should be used, in the context of armed conflict, only in relation to the few acts specifically designated as such under the treaties of IHL. It should not be used to describe acts that are lawful or not prohibited by IHL. While there is clearly an overlap in terms of the prohibition of attacks against civilians and civilian objects under both IHL and domestic law, it is believed that, overall, there are more disadvantages than advantages to additionally designating such acts as “terrorist” when committed in situations of armed conflict (whether under the relevant international legal framework or under domestic law). Thus, with the exception of the few specific acts of terrorism that may take place in armed conflict, it is submitted that the term “act of terrorism” should be reserved for acts of violence committed outside of armed conflict.

## 2) Practical effects

The designation of a non-state armed group party to a NIAC as “terrorist” means that it is likely to be included in lists of proscribed terrorists organizations maintained by the UN, regional organizations and states. This may, in practice, have a chilling effect on the activities of humanitarian and other organizations carrying out assistance, protection, and other activities in war zones. It potentially criminalizes a range of humanitarian actors and their personnel, and may create obstacles to the funding of humanitarian work.

The legal avenue by which these effects may be produced are laws and policies adopted at both the international and domestic level aimed at suppressing the financing of terrorism. UN Security Council resolution 1373 of 2001 is illustrative of the risks to humanitarian action posed by the unqualified criminalization of all forms of “support” or “services” to terrorists. The resolution requires states *inter alia* to:

*Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons [involved in] terrorist acts or of entities controlled by such persons [...and also to...] refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts [...]*

In implementing international requirements at the domestic level, some governments have made it a criminal offence to provide “support”, “services” and/or “assistance” to entities or persons involved in terrorist acts, and to “intentionally associate with” such entities or persons. The exact content and scope of the offences vary from one state to another. While some states circumscribe the crimes narrowly to exclude humanitarian action, others do not. In general, the relevant provisions tend to be broadly worded and can, as a result, be

interpreted to include within their ambit any humanitarian activity involving contact with "individuals or entities associated with terrorism".

The prohibition in criminal legislation of unqualified acts of "material support", "services" and "assistance to" or "association with" terrorist organizations could thus in practice result in the criminalization of the core activities of humanitarian organizations and their personnel aimed at meeting the needs of victims of armed conflicts and situations of violence below that threshold. These could include: visits and material assistance to detainees suspected of or condemned for being members of a terrorist organization; facilitation of family visits to such detainees; first aid training; war surgery seminars; IHL dissemination to members of armed opposition groups included in terrorist lists; assistance to provide for the basic needs of the civilian population in areas controlled by armed groups associated with terrorism; and large-scale assistance activities to internally displaced persons, where individuals associated with terrorism may be among the beneficiaries.

In addition, the criminalization based on broad definitions of "support or services" to terrorism" may have the effect of governments including "anti-terrorist" funding conditions or restrictions in donor agreements. The relevant funding clauses may impede the provision of humanitarian services such as those mentioned above and would thus be *de facto* contrary to the mandates and/or missions of humanitarian organizations.

The potential for criminalization of humanitarian action is of concern to the ICRC for the reasons mentioned above, but also for others particular to the organization's mandate and mission.

At a basic level, the potential criminalization of humanitarian engagement with organized armed groups designated as "terrorist organizations" may be said to reflect a non-acceptance of the notion of neutral and independent humanitarian action, an approach which the ICRC strives to promote in its operational work in the field.

In legal terms, potential criminalization may be said to be incompatible with the letter and spirit of IHL, which in Common Article 3 specifically allows the ICRC to offer its service to the parties to a NIAC. As has already been explained, that includes the non-state party to such a conflict. The ICRC is permitted and must in practice be free to offer its services for the benefit of civilians and other persons affected by an armed conflict who find themselves in the power of or in the area of control of the non-state party. Broad language, or broad interpretation of language, in criminal legislation prohibiting "services" or "support" to terrorism could prove to be a serious impediment for the ICRC to fulfil its IHL mandate in contexts in which armed groups party to a NIAC are designated "terrorist organizations". The fulfilment of the ICRC's mandate under the Statutes of the International Red Cross and Red Crescent Movement, which provide that it may also offer its humanitarian services in situations of violence other than armed conflicts may likewise be effectively hampered in contexts in which such services would involve contacts with persons or entities associated with "terrorism".

Potential criminalization of humanitarian action may also be said to preclude respect for the Fundamental Principles of the International Red Cross and Red Crescent Movement which bind the ICRC and other components of the Movement.

The principle of neutrality means that the Movement "may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature". The ICRC or the Movement could not abide, or be seen to be abiding by this principle if they were directed, as a result of anti-terrorist legislation or other measures, to carry out their activities for the benefit only of persons on one side of the divide in an armed conflict or other situation of violence. ICRC visits to places of detention worldwide, required or allowed for in the universally ratified Geneva Conventions, illustrate an inherent tension between the

prohibition of “services” or “support” language in anti-terrorism legislation and the implementation of the principle of neutrality in the field. The ICRC endeavours to visit all persons detained in relation to an armed conflict regardless of the side to which they belong in order to ensure that they are humanely treated and that other rights are respected. This role, which is widely supported by states, is at the crux of the organization’s work in detention and yet could possibly be called into question due to the lack of exemptions for humanitarian activities in anti-terrorism measures.

Pursuant to the principle of impartiality, the ICRC and other components of the Movement may not discriminate based on “nationality, race, religious beliefs, class or political opinions” and are bound to “relieve the suffering of individuals being guided solely by their needs, and to give priority to the most urgent cases of distress”. The ability of the ICRC and of National Red Cross and Red Crescent Societies to, for example, provide medical assistance to victims of armed conflict and other situations of violence in keeping with the principle of impartiality could be rendered difficult based on the broad language of anti-terrorism legislation. A strict reading could imply that medical services to persons rendered *hors de combat* by wounds or sickness, as well as to other persons under the control of a non-state party designated as “terrorist” could be prohibited as support or services to “terrorism”. This is a result that would call into question the very idea behind the creation of the ICRC - and subsequently of National Red Cross and Red Crescent Societies - over 150 years ago.

In sum, there appears to be a need for greater awareness by states of the necessity to harmonize their policies and legal obligations in the humanitarian and anti-terrorism realms in order to properly achieve the desired aims in both. It is submitted that, to this end:

- Measures adopted by governments, whether internationally and nationally, aimed at criminally repressing acts of terrorism should be crafted so as not to impede humanitarian action. In particular, legislation creating criminal offences of "material support", "services" and "assistance" to or "association" with persons or entities involved in terrorism should exclude from the ambit of such offences activities that are exclusively humanitarian and impartial in character and are conducted without adverse distinction.
- In respect of the ICRC in particular, it should be recognized that humanitarian engagement of non-state armed groups is a task foreseen and expected from the ICRC under Common Article 3 to the Geneva Conventions, which allows the ICRC to offer its services to the parties to NIACs. Criminalization of humanitarian action would thus run counter to the letter and spirit of the Geneva Conventions, i.e. broad language prohibiting "services" or "support" to terrorism could make it impossible for the ICRC to fulfil its conventional (and statutory) mandate in contexts where the armed groups party to a NIAC are designated “terrorist organizations”.