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“International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence”

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Thirty-five years ago the International Conference on Human Rights held at Teheran adopted a resolution entitled “Human Rights in Armed Conflicts”. In political terms, the 1968 resolution signalled the international community’s recognition that armed conflicts “continued to plague humanity” despite the United Nations Charter’s prohibition on threats or use of force in international relations. By dealing with human rights in armed conflict, the resolution also put an end to more than two decades of United Nations reluctance to address issues of *ius in bello* for fear of undermining the Charter’s provisions on *ius ad bellum*. In legal terms, the adoption of the Teheran resolution opened the way for a fresh look at the relationship between international humanitarian law and international human rights law in the protection of persons affected by war.

The decades that have passed since the Teheran Human Rights Conference have confirmed that comprehensive protection of individuals in armed conflict requires the application of international humanitarian law and of other bodies — including international human rights law, international refugee law, international criminal law and domestic law. In addition to the United Nations, whose resolutions over the years have consistently invoked

the various legal regimes, and the efforts of individual States, a major contribution to enhancing protection by reliance on the different bodies of law has been made by non-governmental organizations.

Despite the undoubted progress achieved in enlarging the scope and content of legal norms on the protection of persons, the question remains of the exact interplay between the different bodies of law in situations of violence. Are the different legal regimes, as some continue to believe, mutually exclusive, or are they, as others think, one and the same normative framework aimed at protecting human beings? Or, are they, as we believe, distinct but complementary? That is the overriding issue that this Round Table will attempt to address through the sessions and working groups planned for over the next two and half days.

I will not attempt to outline the factual evolution of international humanitarian law, or of the other bodies of law that we will be dealing with during the Round Table, as that will be aptly done by other speakers. What I would like to briefly touch upon are the similarities and differences between international humanitarian law and human rights law, which, for the purposes of my presentation, will also largely include international refugee law. The similarities are to be found in both purpose and content.

The common underlying purpose of international humanitarian and international human rights law is the protection of the life, health and dignity of human beings. While one of the specific aims of international humanitarian law is to ensure the protection of persons affected by armed conflict and, in particular, of those who find themselves in the hands of the adversary, the purpose of human rights law is to govern relations between States and individuals. In either case, the guiding principle is that individuals have the right to be protected from arbitrariness and abuse because they are human, which was an idea that revolutionized international law and had a lasting impact on international relations.

For centuries, international law was only concerned with relations among States, not recognizing that individuals could also be the subject of its rules. While international humanitarian law primarily establishes the duties of parties to an armed conflict, there is no doubt that humanitarian law norms in fact serve to spare individuals — to the extent possible — from the ravages of war. It was international human rights law that gave normative expression to the notion that a state's treatment of persons on its territory or under its jurisdiction does not belong to the sphere of its internal affairs. Individuals thus became subjects of international law by means of various

human rights mechanisms permitting international scrutiny over the way in which a state treats persons.

The result of these extraordinary developments for international relations was succinctly expressed by UN Secretary-General Kofi Annan in his Millenium Report. After a reminder that the avowed purpose of the United Nations is transforming relations among States, the Report adds: "...Even though the United Nations is an organization of States, the Charter is written in the name of 'we the peoples'. It reaffirms the dignity and worth of the human person, respect for human rights and the equal rights of men and women, and a commitment to social progress (...) Ultimately, then, the United Nations exists for, and must serve, the needs and hopes of people everywhere".

The similarity of purpose between international law norms dealing with the protection of persons is mirrored by the similar, albeit not identical, content of many of their norms. Like international human rights, international humanitarian law aims, among other things, to protect human life, prevent and punish torture and ensure fundamental judicial guarantees to persons subject to criminal process.

International humanitarian law rules on the conduct of hostilities and on the treatment of persons who find themselves in enemy hands are designed to safeguard the right to life. Basic international humanitarian law tenets such as the principle of distinction, the prohibition of direct attacks against civilians and the prohibition of indiscriminate attacks are meant to protect the lives of persons not taking a direct part in hostilities. Many other international humanitarian law norms serve the same purpose, among them provisions on the treatment of persons *hors de combat*, on internees and detainees, on humanitarian assistance to populations in need. While international human rights norms protecting the right to life are more stringent — which is not surprising given that they are meant to be applied in a law enforcement context — the fact is that both bodies of law prescribe what constitutes unlawful taking of life within their respective scope of application. One of the basic tenets of international refugee law aimed also at safeguarding, among other things, the right to life, is the principle of non-refoulement.

As regards torture and other forms of cruel, inhuman or degrading treatment or punishment, it hardly needs to be emphasized that such acts are prohibited under both international humanitarian law and other bodies of law in all circumstances, and are considered crimes under international law. Permit me therefore to say that it is with the gravest concern that the

International Committee of the Red Cross (ICRC) has been following the renewed public debate on whether torture or other cruel, inhuman or degrading treatment or punishment should in some cases be permitted. In our view, such acts are most certainly never justified, whatever the reasons or circumstances.

Fundamental judicial guarantees are another example of norms that are common to international humanitarian and human rights law. Article 3 common to the Geneva Conventions, which is applicable in all types of armed conflicts, prohibits the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court”. The fair trial standards of human rights law must be relied on to interpret and give specific content to the relevant provisions of common article 3. The mutually reinforcing nature of humanitarian and human rights law in the area of judicial guarantees is, moreover, confirmed by the wording of article 75 of Additional Protocol I of 1977 and article 6 of Additional Protocol II, which was clearly influenced by human rights law. And, despite those elaborations, IHL lawyers must still resort to human rights standards in order to apply certain terms used in the Additional Protocols such as the right of an accused to the “necessary rights and means of defence”. Similarly, human rights standards need to be relied on, particularly in non-international armed conflicts, when it comes to determining the treatment of persons deprived of liberty and their conditions of detention.

Apart from similarity of norms in the areas just mentioned, international humanitarian law also facilitates the realization of a certain number of economic and social rights in situations of armed conflict. Even though international humanitarian law does not, for example, explicitly mention the right to food, many of its provisions are aimed at ensuring that civilians and other persons are not denied food or access to food in armed conflict. Thus, humanitarian law rules on the conduct of hostilities prohibit both starvation of the civilian population as a method of warfare and attacks against or destruction of objects indispensable to the survival of the civilian population.

As is well known, humanitarian law also contains rather detailed provisions on humanitarian assistance to civilian populations when basic needs, including food, are inadequately provided for. Just as important are humanitarian law provisions aimed at ensuring that specific categories of individuals are supplied with food and are able to receive individual and collective relief. The sheer volume of these rules is such that they cannot be covered in this brief review.

The similarity of purpose and, to an extent, of content between international humanitarian and human rights law is also evidenced by the adoption of several treaties containing a mix of international humanitarian law and human rights provisions. The Convention on the Rights of the Child and, in particular, its recent Protocol on the Involvement of Children in Armed Conflict are cases in point. Likewise, the Rome treaty establishing a permanent International Criminal Court pools together violations of separate bodies of law — war crimes, genocide and crimes against humanity.

It should also be mentioned that the ICRC's Study on Customary International Humanitarian Law Applicable in Armed Conflicts, which will be available at the International Conference of the Red Cross and Red Crescent in December this year, confirms the overlapping nature of a number of fundamental guarantees provided for in both humanitarian and human rights law. Among them are some already mentioned safeguards — the prohibition of arbitrary killing, torture, or denial of judicial guarantees — as well as others, including respect for religion and religious practices and respect for family life.

Even though international humanitarian and human rights law share certain features, there are also important distinguishing characteristics stemming from their distinct scope of application. Humanitarian law is the *lex specialis* designed to regulate armed conflict, whether international or non-international. The exceptional circumstances of armed conflict by their very nature demand that no derogations from any of the obligations of the parties to a conflict be allowed if humanitarian law is to serve the purpose of protecting persons. Thus, in contrast to certain rules of human rights law, the totality of humanitarian law norms is non-derogable.

Just as importantly, international humanitarian law binds parties to an armed conflict, which includes state and non-state actors. Humanitarian law defines the identical obligations of parties to an armed conflict (which is not the case under domestic law), in order to provide predictability of behavior and thus maintain the parties' interest in abiding by humanitarian law norms. By contrast, international human rights law governs relations between a state and individuals. As is well known, the issue of how to hold organized armed groups accountable for human rights violations that do not rise to the level of crimes under international law remains contentious.

Another distinguishing feature of international humanitarian law is the extraterritorial applicability of its norms. There is no question, either as matter of logic or of law that the parties to an armed conflict remain bound

by their humanitarian law obligations regardless of where the hostilities triggering humanitarian law application may be taking place. Effective control over territory is not a precondition for parties' compliance with treaty or customary norms governing the conduct of hostilities or the treatment of persons belonging to the adverse party who may have fallen into their hands. The extraterritorial application of international and regional human rights treaty law, by contrast, is still being clarified by means of human rights jurisprudence.

The general complementarity between the different bodies of law aimed at ensuring the protection of the human person does not mean that the law provides clear or sufficiently detailed guidance to those who are meant to apply it in every situation. Challenging questions remain related to determining the thresholds of violence necessary for the application of humanitarian law, to legally characterizing new forms of violence, and to the exact interplay of the different bodies of law regardless of the type of violence involved. Permit me to mention a few specific issues on the agenda which your deliberations, I am confident, will help clarify.

The Geneva Conventions and Additional Protocol I regulate international armed conflicts, defined as those taking place between High Contracting Parties, that is, States. However, acts of transnational violence since September 11th 2001 have led to suggestions that international armed conflicts may, under customary humanitarian law, also involve States and non-State actors. Although the ICRC does not share this view, it will be interesting to examine if there is a legal basis for such an interpretation and the content of the customary norms allegedly involved.

A distinct issue that also merits reflection is the exact scope of international humanitarian law as *lex specialis* in relation to other bodies of law in situations of international armed conflict. Does the *lex specialis* exclude the application of other bodies of law, and if, as we believe, it does not, how does human rights law help ensure the comprehensive protection of persons? Do, for example, persons interned for security reasons in international armed conflict have the right to be assisted by a lawyer in proceedings related to the internment? Can it be said, as a result of developments in human rights law, that the right to appeal in criminal proceedings against protected persons today includes the right of having one's conviction and sentence reviewed by a higher tribunal? Or, is the right to appeal, as defined in article 75 of Additional Protocol I, still limited to a person being advised of the availability of judicial and other remedies that may exist?

If the *lex specialis* nature of humanitarian law in international armed conflicts is well established, the relationship between international humanitarian and other bodies of law is considerably more complex in internal armed conflicts. First, there are significantly fewer treaty rules regulating internal armed conflicts than international armed conflicts, which means that comprehensive protection can only be achieved by recourse to customary humanitarian law, human rights and domestic law. This is quite evident in non-international armed conflicts governed only by article 3 common to the Geneva Conventions. While common article 3 functions as a safety net, providing basic rules on the treatment of persons not taking or no longer taking part in hostilities, it must, as already mentioned, be given specific content by application of other bodies of law in practice.

Furthermore, non-international armed conflicts are those that ordinarily take place within the territory of a state, either between its armed forces and rebel groups or between rebel groups themselves. The existence of an armed conflict — and the application of humanitarian law — does not mean that the government is absolved of its human rights obligations towards persons on its territory or subject to its jurisdiction pursuant to treaty-based or customary human rights law. Human rights law continues to apply alongside domestic law in armed conflict, except for the limited extent to which certain human rights norms may have been derogated from under the relevant treaty provisions governing states of emergency.

The complementary application of different bodies of law in internal armed conflicts does not, however, mean that effective protection of persons in these types of conflicts is provided. In fact, the contrary may be claimed. Often-times governments deny that a situation of violence has risen to the level of non-international armed conflict triggering humanitarian law application. The determination of this issue is not helped by the lack of precise criteria distinguishing sporadic violence from internal armed conflict. I am pleased that one Round Table session will be devoted to an examination of the legal and factual criteria that must be met in order to assert the existence of a non-international armed conflict, and look forward to learning about the outcome of your deliberations.

One form in which the post-September 11th 2001 fight against terrorism is being waged are so-called “extraterritorial self-help operations”, which you will also be discussing. These may be described as law enforcement — or sometimes even military-like actions — taken by one state on the territory of another, with or without the latter’s consent, against individuals or groups

suspected of criminal activity. Given the scarce precedents over the last several decades — at least as a matter of public record — these operations raise a host of legal and protection issues. Among them are questions such as when does an “extraterritorial self-help operation” become an armed conflict and what legal regimes are applicable to such operations? Bearing in mind that the extraterritorial application of human rights law is still in the process of being clarified, dealing with possible protection gaps is also an issue deserving of attention.

Another consequence of the fight against terrorism has been the erosion of States’ compliance with international standards governing deprivation of liberty. Administrative detention without criminal charge or judicial review of persons suspected of terrorist acts is a tool that States have been resorting to, and is one that is often made use of in internal disturbances and tensions and in non-international armed conflicts. Apart from mentioning internment, humanitarian law applicable in internal armed conflicts does not regulate the rights of internees or the procedure to be followed, which means, as earlier explained, that human rights and domestic law must be relied on for guidance. Given the paucity of human rights treaty norms governing this type of detention, the Round Table’s examination of the substantive rules governing administrative detention is, in my view, most timely and welcome.

In this context, it should be remembered that humanitarian law applicable in international armed conflicts does not allow the indefinite detention of protected persons. Prisoners of war and civilian internees must be released, if not before, then no later than after the end of active hostilities. If they have been charged with a criminal offense, protected persons must be released once the sentence imposed has expired, which can obviously occur at a later point in time.

There are a range of other topics of equal importance that will be discussed at the Round Table that I simply do not have time to mention. Permit me, therefore, in closing, to briefly raise two final points. The first concerns complementarity in action between the agencies and organizations, including non-governmental organizations, entrusted with protection activities, and the second concerns the importance of ensuring compliance with the law.

It should not be forgotten that protection of individuals is primarily the responsibility of States and that the tasks associated with protection are assumed by humanitarian and human rights organizations when States fail to meet their obligations. Therefore, before considering, or in parallel to

assisting persons in need, the thrust of efforts of agencies and organizations involved in protection must be to encourage and help governments fully assume their protection duties and, when appropriate, to support them in that direction.

It is important, however, that humanitarian and human rights organizations be aware of and rely on the differences and complementarity between their specific specializations and skills if they are to achieve their goals. Just as the legal protection of persons depends on the complementary application of different bodies of law, it is essential that, in practice, each organization make full use of its specific mandate and mode of actions.

As is well known, the ICRC's primary mode of action is persuasion, through confidential dialogue with governments based on its mandate under international humanitarian law. The primary mode of action of human rights agencies and organizations is to engage with governments in a public dialogue on ways of improving human rights protection. The scope of human suffering in situations of violence is so vast that only a focused effort by the agencies and organizations involved can hope to address even the most basic needs.

Despite the fact that this Round Table is devoted to examining legal standards, I cannot end my statement today without a reminder that persistent work to ensure compliance with existing law continues to be our basic, common task. With this goal in mind, the ICRC recently organized several regional expert seminars — in Cairo, Pretoria, Kuala Lumpur and Mexico City — devoted to examining ways and mechanisms of improving compliance with international humanitarian law during armed conflicts. The final expert seminar in the series will be held in Bruges, Belgium, next week.

Regardless of some of the open questions in the law outlined above for the purposes of this Round Table, we must not forget that the international community has, over many decades, created a significant body of rules that does not permit the existence of any "rights-free zone" in situations of violence. Our abiding challenge is to make a difference to people's lives by ensuring that those norms are applied and by working constantly to defend and expand the scope of individual protection in practice.