

International humanitarian law and the challenges of contemporary armed conflicts

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Executive summary

This is the fourth report on international humanitarian law (IHL) and the challenges of contemporary armed conflicts prepared by the International Committee of the Red Cross (ICRC) for the International Conference of the Red Cross and Red Crescent (International Conference). The first three reports were submitted to the International Conferences held in 2003, 2007 and 2011. 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 the preceding ones, addresses only a selection of the ongoing challenges to IHL. It outlines a number of issues that are the focus of increased interest among States and other actors, as well as the ICRC. These include some topics that were not addressed in previous reports, such as the end of IHL applicability, the protection of medical personnel and objects, and nuclear weapons. The report also seeks to provide an update on some of the issues that were addressed in previous reports and remain high on the international agenda. These include: the geographic reach of this body of norms, the use of force under IHL and international human rights law (IHRL), the use of explosive weapons in populated areas and new technologies of warfare.

Two other reports on IHL issues are being submitted to the 32nd International Conference for its consideration and appropriate action.¹ Both were prepared in follow-up to Resolution 1 of the 31st International Conference, which was entitled “Strengthening legal protection for victims of armed conflicts.” The first report summarizes the results of a consultation process undertaken with the aim of strengthening legal protection for persons deprived of their liberty in relation with armed conflict, and sets out options and the ICRC’s

recommendations for the way forward. The second report outlines the results of a consultation process undertaken by the ICRC and the Government of Switzerland that examined ways of enhancing the effectiveness of mechanisms of compliance with IHL. This report also includes options and the facilitators' recommendations.



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

Chapter II focuses on a few issues related to the applicability of IHL that have generated legal debate over the past few years. The first issue is how to determine the beginning and end of IHL applicability, whether in international or non-international armed conflicts: a question of obvious legal and practical significance. The second is the geographic reach of IHL, particularly in light of the extraterritorial use of force against individuals. The relationship between IHL and the legal regime governing acts of terrorism is also addressed to *inter alia* reiterate the need to differentiate between them, and to recall the aspects of IHL that are relevant to the “foreign fighters” phenomenon.

Chapter III is devoted to IHL and multinational forces, an increasing number of which are being deployed in conflict environments or are given mandates likely to involve them in ongoing armed conflicts. Among other things, this chapter outlines a legal test for determining when multinational forces become a party to an armed conflict. It also attempts to delineate who among the participants in a multinational operation may be deemed to be a party to an armed conflict, and discusses the personal scope of applicability of IHL in the context of multinational operations.

As noted in the introduction, the incapacity of the international system to maintain peace and security has, among other things, had the effect of shifting the focus of international engagement from conflict resolution to humanitarian activities. The first section of chapter IV thus seeks to outline a range of legal issues related to humanitarian activities with a view to providing an IHL-based reading of some of the debated questions. The second section focuses on the specific protection of medical personnel and objects. It focuses, in particular, on the application of the IHL principles of proportionality and precautions in attack to military medical personnel and objects, as well as on the scope of the notion of “acts harmful to the enemy” in the context of the specific protection owed to medical personnel, facilities and transports.

1 *Strengthening international humanitarian law protecting persons deprived of their liberty: Concluding Report, and Concluding Report: Strengthening Compliance with International Humanitarian Law*, available at: <http://tcrconference.org/international-conference/documents/>.

In many contemporary armed conflicts, armed forces are increasingly expected to conduct not only combat operations against the enemy, but also law enforcement operations for the purpose of maintaining or restoring public security, law and order. Chapter V addresses the interplay of the conduct of hostilities and law enforcement paradigms in situations of armed conflict. A few factual, albeit hypothetical, scenarios serve as a backdrop to the delineation/application of the two frameworks and the ensuing range of legal and practical challenges.

Chapter VI essentially draws attention to the ICRC's work on detention, i.e. to the consultation process undertaken with States that is the subject of one of the two reports mentioned above – *Strengthening international humanitarian law protecting persons deprived of their liberty* – which has been submitted to the 32nd International Conference for its consideration and appropriate action.

Chapter VII examines a range of issues related to means and methods of warfare. As rapid advances continue to be made in new and emerging technologies of warfare, particularly those relying on information technology and robotics, it is important to ensure informed discussions of the many and often complex challenges raised by these developments. This chapter thus addresses a number of legal questions being posed in the context of the development of military cyber capabilities and their potential use in armed conflict, as well as those posed with regard to compliance of autonomous weapon systems with IHL. It also examines the use of explosive weapons in populated areas and discusses responsible arms transfers. The last section is devoted to a brief overview of IHL rules regulating the conduct of hostilities and nuclear weapons.

Chapter VIII of the report outlines the progress made and the challenges that still remain in order to implement and broaden support for the 2008 Montreux Document, the main purpose of which was to define how international law applies to the activities of private military and security companies present in theatres of armed conflict.

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I. Introduction

This is the fourth report on international humanitarian law (IHL) and the challenges of contemporary armed conflicts prepared by the International Committee of the Red Cross (ICRC) for the International Conference of the Red Cross and Red Crescent (International Conference). The first three reports were submitted to the previous conferences held in 2003, 2007 and 2011. 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. The goal of this introductory section is to briefly outline the operational realities in which those challenges arise.

Since the last report in 2011, the spiral of armed conflict and violence has continued in most parts of the world. Political, ethnic, national or religious grievances and the struggle for access to critical resources remained at the source of many ongoing cycles of armed conflict, and have sparked recent outbreaks of hostilities. A number of conflict trends have become even more acute in the last few years, such as the growing complexity of armed conflicts linked to the fragmentation of armed groups and asymmetric warfare; the regionalization of conflicts; the challenges of decades-long wars; the absence of effective international conflict resolution; and the collapse of national systems. With few exceptions, almost all of the armed conflicts that have occurred in the past few years are the result of the “conflict trap”: conflicts engendering conflicts, parties to armed conflict fracturing and multiplying, and new parties intervening in ongoing conflicts. Unresolved tensions that have lasted for years and decades continue to deplete resources and severely erode the social fabric and the means of resilience of affected populations.

The turmoil that escalated in parts of the Middle East during the so-called Arab Spring in 2011 – which degenerated into devastating armed conflicts in Syria, Iraq and Yemen in particular – was also felt far beyond the region by countries that began to support the many parties to those conflicts in various ways. Basic means of survival are becoming increasingly limited for people already struggling to cope with the effects of recurrent upheaval, drought and chronic impoverishment. Countries like Afghanistan, South Sudan, the Central African Republic, Somalia, Libya and the Democratic Republic of the Congo continue to be mired in protracted armed conflicts, causing immeasurable suffering for entire populations. In eastern Ukraine, the outbreak of a new armed conflict has already caused the death of thousands of people, many of whom are civilians, as well as massive destruction, and the displacement of over a million people.

In most armed conflicts, civilians continue to bear the brunt of the hostilities, especially when fighting takes place in densely populated areas or when civilians are deliberately targeted. Thousands of people are being detained, often outside any legal framework and often subject to ill treatment or inhuman conditions of detention. The number of persons going missing as a result of armed conflict is dramatic. The devastation caused by violence has prompted increasing numbers of people to flee their communities, leaving their homes and livelihoods behind and facing the prospect of long-term displacement and exile. The number of internally displaced persons (IDPs), refugees and asylum seekers uprooted by ongoing armed conflicts and violence worldwide has soared in the past two years. In 2013, for the first time since the Second World War, their total number exceeded 50 million people, over half of whom were IDPs. This negative trend continued in 2014, as conflict situations deteriorated.

The international humanitarian sector is at risk of reaching breaking point. The ICRC and other impartial humanitarian organizations are facing humanitarian needs on an epic scale, in an unprecedented number of concurrent crises around the world. The gap between those needs and the ability of humanitarian actors to meet them is impossible to bridge.

The incapacity of the international system to maintain peace and security has, among other things, had the effect of shifting the focus of international engagement from conflict resolution to humanitarian activities. Thus, much energy has been spent on negotiations about humanitarian access, humanitarian pauses, local ceasefires, evacuations of civilians, humanitarian corridors or freezes, etc. While achieving consensus about humanitarian access and the provision of assistance to those in need is to be welcomed, the political antagonisms that often accompany such debates carry the risk of tarnishing the very notion of impartial humanitarian action and run counter to its object and purpose.

As a background to this report on legal challenges related to armed conflicts, some salient trends of contemporary armed conflicts should be highlighted, since many of the challenges arise as a consequence of new conflict patterns.

The ever increasing complexity arising from the multitude of parties and their conflictual relations is a noticeable feature of contemporary armed conflicts. On the State side, the number of foreign interventions in many ongoing armed conflicts contributes substantially to the multiplication of actors involved. In many situations, third States and/or international organizations, such as the United Nations (UN) or the African Union (AU), intervene, sometimes themselves becoming parties to the conflict. This intervention – in support of States or of non-State armed groups – poses extremely complex questions concerning conflict classification. These often arise because of a lack of precise information about the nature of the involvement of third parties but also when third parties do not acknowledge their participation in the hostilities at all. Regardless, it will be important for the ICRC to continue to engage with States in the months and years to come on the humanitarian and legal consequences of the support they provide to parties to armed conflicts.

On the non-State side, a myriad of fluid, multiplying and fragmenting armed groups frequently take part in the fighting. Often, their structure is difficult to understand. The multiplication of such groups poses a number of risks for the civilian population, the first being that it necessarily entails an increase of the front lines with the ensuing risk that civilians will be caught in the fighting. The multiplication of non-State armed groups also signifies a greater strain on resources, especially natural and financial, as every new party needs to sustain itself. Also, although this is difficult to quantify, as parties multiply and split societies become fractured. Communities and families come under pressure and are divided over their allegiance to different armed groups, people are at higher risk of being associated with one of the many parties, and thus at higher risk of reprisals. As far as humanitarian action is concerned, the opacity or lack of the chain of command or control of some groups poses a challenge not only in terms of security but also for engaging such groups on issues of protection and compliance with IHL.

In terms of the territorial span, the spillover of conflicts into neighbouring countries, their geographical expanse and their regionalization also appear to have become a distinctive feature of many contemporary armed conflicts – partly as a

consequence of the above-mentioned foreign involvements. This is the case especially in today's Middle East but also in North and West Africa. In Syria, the split within the armed opposition, the spillover of the armed conflict into neighbouring countries, some of which were already burdened by their own conflicts, and the multiplication of intervening foreign States and armed groups is leading to a regional situation in which some of the conflictual relations are barely comprehensible. In the Sahel region, elusive and highly mobile armed groups are fighting each other as well as a number of governments, affecting already vulnerable populations. Another example of the territorial span is the armed conflict against Boko Haram, which already involves at least four States.

For the ICRC, the brutality and mercilessness of many contemporary armed conflicts is a cause for deep alarm. Egregious violations of IHL are being committed every day, by both States and non-State parties. In many situations, this is linked to a denial of the applicability or relevance of IHL. On the part of non-State armed groups, there is sometimes a rejection of IHL, which some parties do not feel bound by. In addition to this, recent armed conflicts have seen a rise in the deliberate commission of violations of IHL by some non-State armed groups and their use of media to publicize those violations. The ultimate aim of this may be to benefit from the significant negative impression conveyed by the media coverage in order to rally support, as well as to undermine support for the adversary. On the part of States, it is often, though not always, the result of counterterrorism measures and discourses, which the ICRC has recently observed to be hardening. It remains the case that some States deny the existence of armed conflicts, rendering dialogue difficult on the humanitarian consequences of the conflict and the protection of those affected by it.

To deny the basic protections of IHL to combatants and civilians is to deny IHL's core aims of protecting human life, physical integrity and dignity. As has been repeated in all previous ICRC reports on IHL and the challenges of contemporary armed conflicts, the single most important challenge to IHL continues to be that it should be better respected. It remains the ICRC's firm belief that in spite of the inevitable suffering that armed conflicts entail, the sorrow and pain of victims of armed conflicts would be lessened if the parties to armed conflicts respected the letter and spirit of IHL.²

2 This challenge has been the focus of the ICRC/Swiss initiative on strengthening compliance with IHL, pursuant to Resolution 1 of the 31st International Conference. This initiative has involved a major research and consultation process with States and other relevant actors on possible ways to enhance and ensure the effectiveness of mechanisms of compliance with IHL. For further information see "Strengthening compliance with international humanitarian law (IHL): The work of the ICRC and the Swiss government," available at: www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm and the concluding report on strengthening compliance with IHL, available at: <http://rcrcconference.org/international-conference/documents/>.

II. Applicability of IHL: Selected issues

A legal issue that may be said to have (re)emerged as a result of the complexity of current armed conflicts is the applicability of IHL to particular situations of violence. There are several aspects to this issue; those examined below are:

- 1) the beginning and end of IHL applicability;
- 2) the geographic reach of IHL applicability; and
- 3) the applicability of IHL to terrorism and counterterrorism.

1) The beginning and end of IHL applicability

The applicability of IHL is triggered by the existence of an armed conflict, the determination of which depends solely on an assessment of the facts on the ground. This view, shared by the ICRC, is reflected in decisions of international judicial bodies, in military manuals, and is widely supported in the academic literature. Whether an armed conflict exists, and whether by extension IHL is applicable, is assessed based on the fulfilment of the criteria for armed conflict found in the relevant provisions of IHL, notably Articles 2 and 3 common to the 1949 Geneva Conventions.

Under IHL, an international armed conflict (IAC) exists whenever there is recourse to armed force between two or more States. The threshold for determining the existence of an IAC is therefore fairly low, and factors such as duration and intensity are generally not considered to enter the equation. For instance, the mere capture of a soldier or minor skirmishes between the armed forces of two or more States may spark off an international armed conflict and lead to the applicability of IHL, insofar as such acts may be taken as evidence of genuine belligerent intent.³ In this context, it is important to bear in mind that an armed conflict can arise where a State uses unilateral force against another State even if the latter does not or cannot respond with military means. The attacking State's

3 Belligerent intent may be identified when a situation objectively shows that a State is effectively involved in military operations or other hostile action against another State. This involvement is aimed at neutralizing enemy military personnel and assets, hampering its military operations, or using/controlling its territory, be it to subdue or defeat the adversary, to induce it to change its behaviour, or to gain a military advantage. Belligerent intent must therefore be deduced from the facts. Reference to belligerent intent for the purposes of determining the existence of an armed conflict must not be confused with the notion of *animus belligerandi* intrinsic to the notion of war. While *animus belligerandi* is a pre-requisite for a state of war to exist – denoting the purely subjective dimension of the notion of war – the concept of belligerent intent has only an evidentiary value and cannot be interpreted as challenging the objective dimension of the concept of armed conflict under the 1949 Geneva Conventions (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 31 (hereafter First Geneva Convention); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 85 (hereafter Second Geneva Convention); Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 135 (hereafter Third Geneva Convention); Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 287 (hereafter Fourth Geneva Convention)).

resort to force need not actually be directed against the armed forces of another State. IACs are fought between States. The government is only one of the constitutive elements of a State, while the territory and the population are others. It is the resort to force against the territory, infrastructure or persons in the State that determines the existence of an IAC and therefore triggers the applicability of IHL.

The classification of a non-international armed conflict (NIAC) under IHL is usually a more complex endeavour. Despite the absence of a clear definition of NIAC in Article 3 common to the Geneva Conventions, it is widely accepted that two conditions must be fulfilled before it can be said that, for the purposes of IHL applicability, such a conflict exists: (1) the fighting must occur between governmental armed forces and the forces of one or more non-State armed groups having a certain level of organization, or between such armed groups; and (2) the armed confrontation must have reached a certain threshold of intensity.

The determination of the beginning of an armed conflict, whether an IAC or a NIAC, has been the subject of considerable examination in legal and scholarly circles, and was addressed in the ICRC challenges report to the 31st International Conference. However, it would appear that less attention has been paid so far to the end of IHL applicability. Given the important legal consequences involved, this issue deserves a more detailed examination.

End of an international armed conflict

Evaluating whether an armed conflict has come to an end may be a difficult undertaking. This is mainly due to the lack of detailed guidance in the 1949 Geneva Conventions on the subject but also to the fact that peace treaties are a less and less common State practice.

In the view of the ICRC, the starting point – based on the wording of the 1949 Geneva Conventions and Additional Protocol I, as well as international jurisprudence – is that, in international armed conflict, IHL ceases to apply on the general close of military operations, except for persons whose final release, repatriation or re-establishment takes place thereafter.⁴ The general close of military operations, however, is not always easily determined, especially in the absence of ongoing hostilities.

International armed conflicts hardly ever give rise to the conclusion of peace treaties nowadays. Their waning days are more often characterized by unstable ceasefires, a slow but progressive decrease in the intensity of confrontations, or the involvement of peacekeepers. In a number of cases, there is also a significant risk that hostilities may resume. In addition to these and other features, it may be observed that the distinction between agreements aimed at suspending the hostilities and peace treaties is also becoming blurred. Ceasefire agreements may in fact have

⁴ See Article 6(2) of the Third Geneva Convention, Article 6(4) of the Fourth Geneva Convention, and Article 3(b) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3 (hereafter Additional Protocol I).

the effect of permanently terminating hostilities. Where this is the case, the precise labelling of a particular agreement may be of limited relevance for the purposes of IHL applicability. It is rather the resulting *de facto* situation that will define the real import of the agreement and its ability to objectively put an end to the armed conflict.

International case law has so far not proven to be sufficiently helpful on the issue of how to determine whether an IAC has ended. By way of example, in the *Tadić* case, the ICTY opined that in situations of international armed conflict IHL continues to apply “until a general conclusion of peace [has been] reached.” This, it may be pointed out, is a rather vague and impractical criterion.

As regards academic writing, the general view revolves around the following basic proposition: IHL applicability ceases once the conditions that initially triggered its application no longer exist. This means that an IAC ends when the belligerent States are no longer involved in an armed confrontation. The application of this proposition would be fairly straightforward in situations in which, for instance, a conflict is triggered by the capture of soldiers or by the sporadic and temporary military incursion of one State into an enemy State’s territory. In these cases, the release of the soldiers or the end of the incursion would suffice to put an end to the armed conflict.

However, determining that an IAC has ended is likely to be far more complex where it was the result of active hostilities between the armed forces of two or more States. The proposition mentioned above would appear to be of limited utility in the face of a mere lull or cessation of hostilities. It would also seem to be of little use if, despite the end of active hostilities, the belligerent States continue to deploy troops on each other’s borders, undertake military movements on their own territory for defensive or offensive purposes, or maintain a state of alert and mobilization of their troops.

Bearing in mind that the threshold for the existence of an IAC is fairly low, and that it would be impractical to treat every lull in the fighting as the end of it and each resumption as the start of a new one, the ICRC is of the opinion that hostilities must end with a degree of stability and permanence for an IAC to be deemed terminated. Thus, military operations short of active hostilities pitting one belligerent against another would still justify the continued existence of an IAC provided it can reasonably be considered that the hostilities are likely to resume in the near future due to ongoing military movements by the belligerents. Indeed, such a scenario would be insufficient to conclude that there is a general close of military operations. The notion “a general close of military operations” goes beyond the mere cessation of active hostilities, given that military operations of a belligerent nature do not necessarily imply the use of armed violence and that these may persist despite the absence of hostilities. In other words, it can be inferred that a general close of military operations includes not only the end of active hostilities but also the end of military movements of a bellicose nature, including those to reform, reorganize, or reconstitute. With the end of these movements, the likelihood of a resumption of hostilities can reasonably be ruled out.

End of a non-international armed conflict

As was discussed in the 2011 report on IHL and the challenges of contemporary armed conflicts, which was submitted to the 31st International Conference,⁵ the factual scenarios of non-international armed conflicts are evolving and have become increasingly complex. In consequence, determining the end of IHL applicability to such conflicts has also become more difficult.

As is the case with IACs, international case law has not precisely identified when a situation of NIAC may be deemed to have come to an end. In the already mentioned seminal *Tadić* decision, the ICTY stated that, for the purposes of IHL applicability, a NIAC ceases when a “peaceful settlement” is reached.⁶ As may be observed, this criterion does not provide sufficient practical guidance, and may even be interpreted as introducing a measure of formalism in a determination that should, first and foremost, be driven by facts on the ground. As a result, it is submitted that the notion “peaceful settlement” should be interpreted as a situation where a factual and lasting pacification of the NIAC has been achieved.

The requisite threshold of intensity will, admittedly, make the determination of the end of a NIAC even less straightforward than in an IAC scenario. There are, broadly speaking, two views on how to address this. One view is to rely on the intensity threshold required for NIACs (which is higher than that required for IACs, as explained above). Under this approach, it would be sufficient for the hostilities to fall below the threshold of “protracted armed violence” with a certain degree of permanence and stability. In other words, the legally relevant question would then be whether the threshold continues to be met. According to a second view, a NIAC only ceases to exist, and the applicability of IHL therefore comes to an end, when at least one of the opposing parties to the conflict has disappeared or no longer meets the level of organization required by IHL. A NIAC would also come to an end when the hostilities have ceased and there is no real risk of their resumption even though the level of organization of the parties is still met.

When considering these options, an important feature of NIACs should, however, be kept in mind. Such conflicts are often of a fluctuating nature, typified by temporary lulls in the armed violence or instability in the level of organization of the non-State party to the conflict. If these factors are automatically considered as signalling the end of a NIAC, this could lead to a premature conclusion as regards the end of applicability of IHL.

5 *International Humanitarian Law and the challenges of contemporary armed conflicts: Report*, October 2011, available at: www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf.

6 It should be noted that persons who have been deprived of their liberty or whose liberty continues to be restricted for reasons related to a NIAC continue to enjoy the protections of IHL until the end of such deprivation or restriction of their liberty, see Article 2(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 609 (hereafter Additional Protocol II).

Taking this feature of NIACs into account, the closest one may come to the requirement of “a peaceful settlement” suggested by the relevant international case law is by waiting for the complete cessation of all hostilities – without real risk of resumption – before assuming that a NIAC has come to an end.⁷

In the ICRC’s practical experience, the cessation of all hostilities between the parties to the conflict and the absence of a real risk of their resumption – based on an overall assessment of the surrounding factual circumstances – have proven to provide the strongest and most reliable indicators that a NIAC has ended. The ICRC’s practice has thus been to wait for the complete cessation of hostilities between the parties to a NIAC before assessing, based on the surrounding factual circumstances, whether there is a real risk of resumption of hostilities. If there is no such risk, the conclusion is drawn that the NIAC at issue has come to an end. The “risk of resumption” test helps ensure that the determination of the end of a NIAC is based not solely on the cessation of hostilities, which may be short-lived, but on an evaluation that related military operations of a hostile nature have also ended. In this way, the likelihood of a resumption of hostilities can reasonably be ruled out.

Beginning and end of occupation

A range of legal challenges raised by contemporary forms of occupation were at the core of an exploratory process undertaken by the ICRC on occupation and other forms of administration of foreign territory, which began in 2007 and concluded in 2012 with the publication of an ICRC report.⁸ The purpose of this initiative 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. The delineation of the notion of “occupation,” in particular its beginning and end, was one of the main issues addressed within this process.

Determining the existence of an occupation – which is a type of IAC – is complex given that the 1949 Geneva Conventions do not define the notion of occupation. It is, however, outlined in Article 42 of the Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land of 1907 (hereafter 1907 Hague Regulations). Subsequent treaties, including the 1949 Geneva Conventions, have not altered this definition, which reads: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

7 See ICTY in the *Haradinaj* case, where it underlined that the “peaceful settlement” of a NIAC is the decisive criterion for determining the end of the conflict and stated that exploring the oscillating intensity of a conflict is not a valid option for determining its cessation. ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Case No. T-04-84bis-T, Judgment, 29 November 2012, para. 396, available at: www.icty.org/x/cases/haradinaj/tjug/en/121129_judgement_en.pdf.

8 ICRC, *Expert meeting: Occupation and other forms of administration of foreign territory*, ICRC, Geneva, March 2012, available at: www.icrc.org/fre/assets/files/publications/icrc-002-4094.pdf.

Apart from the need to determine the existence of an occupation based solely on the prevailing facts, the notion of occupation also requires an examination of the concept of “effective control,” which is at its core. While this concept is often used to characterize the notion of occupation, it should be noted that neither the 1949 Geneva Conventions nor the 1907 Hague Regulations contain a reference to it. In relation to occupation, “effective control” was developed in the legal discourse primarily to describe the circumstances and conditions for determining its existence.

It is self-evident that an occupation implies some degree of control by hostile troops over a foreign territory, or parts thereof, instead of by the territorial sovereign. Under IHL, it is the effectiveness of the control by foreign troops that triggers the application of the law of occupation. They will only be able to enforce their rights and duties under the law of occupation if they exercise effective control. In this regard, effective control is an essential concept, as it substantiates and specifies the notion of “authority,” which is at the core of the definition of occupation in Article 42 of the 1907 Hague Regulations.

On the basis of the 1907 Hague Regulations and their *travaux préparatoires*, scholarly literature, military manuals and judicial decisions, the ICRC has devised the following three conditions that need to be cumulatively met in order to establish a state of occupation within the meaning of IHL:

- 1) The armed forces of a State are physically present in a foreign territory without the consent of the effective local government in place at the time of the invasion.
- 2) The effective local government in place at the time of the invasion has been or can be rendered, substantially or completely, incapable of exerting its powers by virtue of the foreign forces’ unconsented presence.
- 3) The foreign forces are in a position to exercise authority instead of the local government over the concerned territory (or parts thereof).

Taken together, these constitute the so-called “effective-control test” which is used to determine whether a situation qualifies as an occupation for the purposes of IHL.

The end of an occupation may also be difficult to assess from a legal perspective. The legal classification of a given situation and the determination of when an occupation may be said to have ended can be complicated by several factors, such as progressive phase-out, partial withdrawal, retention of certain competences over previously occupied areas, or the maintenance of military presence based on questionable consent.

In principle, the effective-control test is equally applicable when establishing the end of occupation, meaning that the criteria to be met should generally mirror those used to determine the beginning of occupation, only in reverse. Thus, if any of the three conditions listed above ceases to exist, an occupation should be considered to have ended.

The ICRC considers, however, that in some specific and rather exceptional cases – in particular when foreign forces withdraw from occupied territory (or parts thereof) but retain key elements of authority or other important governmental

functions usually performed by an occupying power – the law of occupation may continue to apply within the territorial and functional limits of such competences. Indeed, despite the lack of the physical presence of foreign forces in the territory concerned, the retained authority may amount to effective control for the purposes of the law of occupation and entail the continued application of the relevant provisions of this body of norms. This is referred to as the “functional approach” to the application of occupation law. This test will apply to the extent that the foreign forces still exercise, within all or part of the territory, governmental functions acquired when the occupation was undoubtedly established and ongoing.

The functional approach described above permits a more precise delineation of the legal framework applicable to situations in which it is difficult to determine, with certainty, whether an occupation has ended or not.

It may be argued that technological and military developments have made it possible to assert effective control over a foreign territory (or parts thereof) without a continuous foreign military presence in the concerned area. In such situations, it is important to take into account the extent of authority retained by the foreign forces rather than to focus exclusively on the means by which it is actually exercised. It should also be recognized that, in these circumstances, the geographical contiguity between belligerent States could facilitate the remote exercise of effective control. For instance, it may permit an occupying power that has relocated its troops outside the territory to reassert its full authority in a reasonably short period of time. The continued application of the relevant provisions of the law of occupation is all the more important in this scenario as these were specifically designed to regulate the sharing of authority – and the resulting assignment of responsibilities – between the belligerent States concerned.

2) The geographic reach of IHL applicability

The territorial scope of armed conflict – and therefore of IHL – is an issue that has attracted a great deal of attention over the past few years due, mainly, to the extraterritorial use of force by means of armed drones. This issue arises largely as a result of the fact that IHL does not contain an overall explicit provision on its scope of territorial applicability. The questions that are most often asked are: does IHL apply to the entire territories of the parties to an armed conflict or is it restricted to the “battlefield” within such territories? Does it apply outside the territories of the parties, i.e. in the territory of neutral or non-belligerent States? The views offered below are of a “framework” nature only, as the reality is complex and constantly evolving.

As regards IAC, it is generally accepted that IHL applies to the entire territories of the States involved in such a conflict, as well as to the high seas and the exclusive economic zones (the “area” or “region” of war). A State’s territory includes not only its land surface but also rivers and landlocked lakes, the territorial sea, and the national airspace above this territory. There is no indication either in the 1949 Geneva Conventions and their Additional Protocols,

or in doctrine and jurisprudence, that IHL applicability is limited to the “battlefield,” “zone of active hostilities” or “zone of combat,” which are generic terms used to denote the space in which hostilities are taking place. In addition, it is widely agreed that military operations cannot be carried out beyond the area or region of war as defined above, meaning that they may not be extended to the territory of neutral States.

It may likewise be argued that IHL applies in the whole territory of the parties involved in a NIAC. While common Article 3 does not deal with the conduct of hostilities, it provides an indication of its territorial scope of applicability by specifying certain acts as prohibited “at any time and in any place whatsoever.”⁹ International jurisprudence has, in this vein, explicitly confirmed that “there is no necessary correlation between the area where the actual fighting takes place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring parties, or in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there.”¹⁰

It is important to stress, however, that the applicability of IHL to the territories of the parties to a conflict does not mean that there are no legal restraints, apart from those related to the prohibition of specific means and methods of warfare, on the use of lethal force against persons who may be lawfully targeted under IHL (i.e. members of State armed forces or of organized armed groups, as well as individual civilians taking a direct part in hostilities), particularly outside the “battlefield” or “zone of active hostilities/combat.” As explained in the commentary on Recommendation IX of the ICRC’s 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*,¹¹ IHL does not expressly regulate the kind and degree of force that is permissible against legitimate targets. This does not imply a legal entitlement to use lethal force against such persons in all circumstances without further considerations. Based on the interplay of the principles of military necessity and humanity, the *Guidance* determines that: “[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.”¹² It is recognized that this will involve a complex assessment that will be dependent on a wide range of operational and contextual factors. In some instances, this assessment

9 Common Article 3(1).

10 ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Judgment, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 57, available at: www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf. See also ICTR, *The Prosecutor v. Laurent Semanza*, Judgment, Case No. ICTR-97-20-T, 15 May 2003, para. 367, available at: www.refworld.org/docid/48abd5a30.html.

11 ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, May 2009, available at: www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf.

12 Recommendation IX, which was formulated without prejudice to further restrictions that may arise under other applicable branches of international law.

should lead to the conclusion that means short of lethal force will be sufficient to achieve the aims of a given military operation.

In the context of a NIAC with an extraterritorial element, the question of IHL applicability to the territories of the parties to this conflict may be posed. This scenario is one in which the armed forces of one or more States (the “assisting” States) fight alongside the armed forces of a “host” State in its territory against one or more organized armed groups. It should be noted that at present official pronouncements by States on this specific issue are scarce, and the few publicly expressed expert views differ. According to some, IHL applies in principle only to the territory of the State in which the conflict is taking place. Others have posited that IHL also applies throughout the territories of States involved in a NIAC extraterritorially, even though hostilities related to that conflict may not be taking place on their own soil.

There are cogent legal reasons to consider that IHL applies to the territories of the assisting States in the scenario posited above. It may be argued that assisting States involved in an extraterritorial NIAC should not be able to shield themselves from the operation of the principle of equality of belligerents under IHL once they have become a party to this type of armed conflict beyond their borders. This would be contrary to the IHL aim of laying down the same rights – and, of course, obligations – for all parties to a conflict.

Thus, while acts potentially carried out by a non-State party on an assisting State’s territory as part of the hostilities would certainly be penalized under the domestic law of that State (and probably qualified as “terrorist”), they may under some circumstances be lawful under IHL. This would be the case, for example, if an attack by the non-State party concerned were directed at a military objective in the assisting State’s territory. If the attack were directed at civilians or civilian objects, it would also be criminal and prosecutable under IHL as a war crime. As regards the use of lethal force by an assisting State on its own territory against the non-State side, it would be governed by the standard included in Recommendation IX of the ICRC’s *Guidance* outlined above, as well as by the State’s domestic law and its international and/or regional human rights obligations.

As just explained, IHL is believed to apply in the entire territories of the parties to an armed conflict. However, there are a range of views among practitioners, legal scholars and others, and significant disagreement regarding the applicability of IHL to the territory of a non-belligerent State. Leaving aside situations of IAC, in which the law of neutrality will come into play, the scenario now being debated may be summarized as follows: a person who would constitute a lawful target under IHL moves from a State in which there is an ongoing NIAC into the territory of a non-neighbouring non-belligerent State, and continues his or her activities in relation to the conflict from there. Can such a person be targeted under the rules of IHL by a third State in the territory of the non-belligerent State?

Two basic positions have been enunciated on this question. Pursuant to the first view, there is no territorial limitation to IHL applicability as such (whether in IAC or NIAC). Under this approach, what is decisive is not where hostile acts occur

but whether, because of their nexus to an armed conflict, they actually represent “acts of war.” Therefore, any extraterritorial use of force for reasons related to an armed conflict is necessarily governed by IHL, regardless of territorial considerations. It is also posited in this approach that the norms of other bodies of international law may restrict or prohibit hostile acts between the belligerent parties even when they are permissible under IHL. This could be the *ius ad bellum* under the UN Charter.

It is submitted that a different reading of the above scenario is possible – and preferable – based on reasons of law and policy. At the outset, it must be acknowledged that common Article 3 contains explicit provisions on its applicability to the “territory” of a State in which a NIAC takes place. Traditionally, this has been understood to cover only the fighting between the relevant government’s armed forces and one or more organized non-State armed groups on its soil. However, as the factual scenarios of NIAC have evolved, so has the legal interpretation of the geographic scope of applicability of common Article 3. There have been numerous instances in which assisting States, which are fighting in the territory of a non-neighbouring host State alongside its armed forces against one or more organized armed groups, have accepted the applicability of common Article 3 and of other relevant provisions of IHL to this type of conflict.¹³ As already noted above, there are reasons to believe that, in this case, IHL also applies to the territories of the assisting States.

However, it is of a different legal magnitude to suggest that “territory” may be understood to mean that IHL – and its rules on the conduct of hostilities – will automatically extend to the use of lethal force against a person located outside the territory of the parties involved in an ongoing NIAC, i.e. to the territory of a non-belligerent State. This reading would lead to an acceptance of the legal concept of a “global battlefield.” This, however, does not appear to be supported by the essentially territorial focus of IHL, which on the face of it seems to limit IHL applicability to the territories of the States involved in an armed conflict. A territorially unbounded approach would imply that a member of an armed group or an individual civilian directly participating in hostilities would be deemed to automatically “carry” the “original” NIAC wherever they go when moving around the world. Thus, based on IHL, they would remain targetable within a

13 The scenario of a “spillover” NIAC, which is another type of extraterritorial NIAC, should be mentioned in the context of this discussion. This is an armed conflict originating within the territory of a State that is waged between government armed forces and one or more organized armed groups, which spills over into the territory of one or more neighbouring States. While common Article 3 does not expressly envisage this occurrence, there seems to be increasing acknowledgment by States and scholarly opinion that the applicability of IHL to the parties may be extended to hostilities that spill over into the territory of the adjacent non-belligerent State (or States) on an exceptional and *sui generis* basis. In line with the above cited ICTY case law (see footnote 7 above), there are cogent reasons to link the geographical extension of IHL to the neighbouring country depending on the extent of control that a party to a NIAC has over the territory of the neighbouring country or over the places where hostilities are taking place in such a country. However, as will be noted further below, prevailing State practice and *opinio iuris* do not currently allow for a similar conclusion to be reached with respect to the extension of the applicability of IHL to the parties to a NIAC when the territory of a non-adjacent non-belligerent State is involved.

potentially geographically unlimited space. With very few exceptions, State practice and *opinio iuris* do not seem to have accepted this legal approach and the great majority of States do not appear to have endorsed the notion of a “global battlefield.” In addition, in practical terms it is disturbing to envisage the potential ramifications of the territorially unlimited applicability of IHL if all States involved in a NIAC around the world were to rely on the concept of a “global battlefield.”

The ICRC is of the view that it would be more legally and practically sound to consider that a member of an armed group or an individual civilian directly participating in hostilities in a NIAC from the territory of a non-belligerent State should not be deemed targetable by a third State under IHL. Rather, the threat he or she poses should be dealt with under the rules governing the use of force in law enforcement. These rules, which are part of international human rights law (IHRL) – and which are, of course, also applicable to the potential use of lethal force outside situations of armed conflict – would merit a separate examination. Given that such an analysis is outside the scope of this section, only the most basic provisions will be noted here.

IHRL does not prohibit the use of lethal force in law enforcement but provides that it may be employed only as a last resort, when other means are ineffective or without promise of achieving the intended aim of a law enforcement operation. Lethal force is thus allowed if it is necessary to protect persons against the imminent threat of death or serious injury or to prevent the perpetration of a particularly serious crime involving grave threat to life. The use of lethal force is also subject to the human rights requirement of proportionality, which differs from the principle of proportionality applicable to the conduct of hostilities under IHL. In effect, the application of the relevant rules on the use of force in law enforcement circumscribes both the circumstances in which lethal force can lawfully be used, and the way in which it has to be planned and carried out. The use of force in the territory of a non-belligerent State would thus be legally justifiable only in very exceptional circumstances.

It is submitted that reliance on the rules governing the use of force in law enforcement in the scenario being examined is also more appropriate as a matter of policy. A non-belligerent State is by definition one that does not take part in an armed conflict being waged among others. As a result, the rules of IHL should not be those governing the potential use of lethal force in its territory by a third State pursuing a person in relation to a territorially removed NIAC. In those circumstances, the application of law enforcement rules would be more protective of the general population than IHL norms on the conduct of hostilities (designed for the specific reality of armed conflict), as there is no armed conflict in the non-belligerent State. The employment of IHL conduct-of-hostilities rules in this scenario could lawfully entail consequences in terms of harm to civilians and civilian objects in the non-belligerent State, i.e. allow for “collateral damage,” which would not be the case if the rules on law enforcement are relied on.

Reliance on other bodies of international law, essentially to “counterbalance” the effects of a territorially expansive view of IHL applicability

in a non-belligerent State – emphasized by proponents of the geographically unrestricted approach to IHL applicability – may be of limited utility. The law of neutrality does not apply to the NIAC scenario posited above. As regards the possibly constraining effect of *ius ad bellum*, it would appear that this body of norms is increasingly being interpreted by some States and experts in ways that make it easier for third States to use force extraterritorially, particularly against non-State actors. As for the restraining influence of the law on State responsibility, its purpose is not to directly prevent a particular conduct but rather to establish, potentially, that it was unlawful after the fact.

The above should not, however, be understood to mean that IHL applicability can never be extended to the territory of a non-belligerent State. The ICRC considers that IHL would begin to apply in the territory of such a State if and when the conditions necessary to establish the factual existence of a separate NIAC in its territory have been fulfilled. In other words, if persons located in a non-belligerent State acquire the requisite level of organization to constitute a non-State armed group as required by IHL, and if the violence between such a group and a third State may be deemed to reach the requisite level of intensity, that situation could be classified as a NIAC. Thus, IHL rules on the conduct of hostilities would come into effect between the parties. The relationship under IHL of the two States would also need to be determined in this case, based on the relevant rules on the classification of armed conflicts between States.

The scenarios related to the possible extension of IHL applicability to the territory of non-belligerent States explored above are not the only ones that could be envisaged.¹⁴ They have been provided, as already mentioned, to serve as a backdrop to the provision of guidance on some salient points of the law. In this context, the legal interpretation of any particular scenario will not only be heavily fact-specific, but will also inevitably mean dealing with a very complex set of facts.

3) The applicability of IHL to terrorism and counterterrorism

Recent years have again seen the rise of non-State armed groups resorting to acts of terrorism, and the subsequent rallying of a number of other non-State armed groups around them. States – and the United Nations – have reacted to these developments by tightening existing counterterrorism measures and/or legislation and by introducing new ones. There is no doubt that it is legitimate to take responsive action to ensure State security. However, in doing so, it is indispensable to

¹⁴ Two specific issues may be flagged in this regard. The first is the legal regime that would be applicable to any use of force against bases established in the territory of a non-belligerent State by a non-State armed group for training and logistical purposes in relation to an ongoing NIAC. It is submitted that the same question should be posed with respect to the legal regime that would apply to the targeting of the military bases of States located in non-belligerent territories from which military operations are conducted in relation to an ongoing NIAC. The second issue is the legal regime that would be applicable to cyber attacks launched by, and against, non-State armed groups from and through non-belligerent territories. Both questions will clearly require further examination as State practice evolves.

maintain the safeguards protecting human life and dignity laid down in IHL and IHRL.

Counterterrorism responses, combined with a robust counterterrorism discourse in both domestic and international fora, have significantly contributed to a blurring of the lines between armed conflict and terrorism, with potentially adverse effects on IHL. There appears to be a growing tendency among States to consider any act of violence carried out by a non-State armed group in armed conflict as being “terrorist” by definition, even when such acts are in fact lawful under IHL. This is in parallel to the longstanding concern of some States that recognizing the existence of an armed conflict in their territory would “legitimize” the non-State armed groups involved. The overall result is a denial that such groups, designated as “terrorist,” may be a party to a NIAC within the meaning of IHL. The above-mentioned developments have put the issue of the relationship between the legal frameworks governing IHL and terrorism back into the spotlight.

The continued need to distinguish between the legal frameworks governing IHL and terrorism

The ICRC outlined its position on this issue in the preceding report on IHL and the challenges of contemporary armed conflicts submitted to the 31st International Conference. Given the current trends in counterterrorism, some aspects are worth recalling. This section aims to provide a brief reminder of the reasons for which, in the ICRC’s view, the normative regimes governing armed conflict and terrorism should not be confused.

While the legal frameworks governing terrorism and IHL may have some common ground – IHL expressly prohibits most acts that are criminalized as “terrorist” in domestic legislation and international conventions dealing with terrorism – these two legal regimes remain fundamentally different. They have distinct rationales, objectives and structures.

A crucial difference is that, in legal terms, armed conflict is a situation in which certain acts of violence are considered lawful and others are unlawful, while *any* act of violence designated as “terrorist” is always unlawful. The ultimate aim of an armed conflict is to prevail over the enemy’s armed forces. For this reason, the parties to a conflict are permitted, or at least are not prohibited from, attacking each other’s military objectives or individuals not entitled to protection against direct attacks. 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 directed against civilians and civilian objects are, by contrast, unlawful, as one of the main purposes of IHL is to spare them from the effects of hostilities. IHL thus regulates both lawful and unlawful acts of violence.

There is no such dichotomy in the norms governing acts of terrorism. The defining feature of any act that is legally classified as “terrorist,” whether under domestic or international law, is that it is always penalized as criminal. Thus, no

act of violence legally designated as “terrorist” is, or can be, exempt from prosecution.

Another main difference between these legal frameworks is the principle of equality of belligerents, pursuant to which the parties to an armed conflict have the same rights and obligations under IHL (even if this is not the case under domestic law). This principle reflects the fact that IHL does not aim to determine the legitimacy of the cause pursued by the belligerents. Its goal, instead, is to ensure the equal protection of persons and objects affected by an armed conflict, irrespective of the lawfulness of the first resort to force. The legal framework governing acts of terrorism obviously does not contain a similar principle. In this context it is important to recall that, while IHL does foresee equal rights and obligations of belligerents in the conduct of hostilities and in the treatment of persons in their power, it does not confer legitimacy on non-State armed groups that are a party to a NIAC. Common Article 3 explicitly states that when parties to the conflict apply its provisions this “shall not affect the legal status of the Parties to the conflict.” Additional Protocol II contains a similar provision guaranteeing the sovereignty of States and their responsibility to maintain law and order, national unity and territorial integrity by all legitimate means (Article 3 of Additional Protocol II).

The above does not mean that some overlap cannot be created between the legal regimes governing IHL and terrorism. IHL prohibits both specific acts of terrorism committed in armed conflict and, as war crimes, a range of other acts of violence when committed against civilians or civilian objects. If States choose to additionally designate such acts as “terrorist” under international or domestic law, this will in effect duplicate their criminalization.

However, acts that are not prohibited by IHL – such as attacks against military objectives or against individuals not entitled to protection against direct attacks – should not be labelled “terrorist” at the international or domestic levels (although they remain subject to ordinary domestic criminalization where a NIAC is involved). Attacks against lawful targets constitute the very essence of an armed conflict and should not be legally defined as “terrorist” under another regime of law. To do so would imply that such acts must be subject to criminalization under that legal framework, therefore creating conflicting obligations of States at the international level. This would be contrary to the reality of armed conflicts and the rationale of IHL, which does not prohibit attacks against lawful targets.

Adding another layer of incrimination by designating acts that are not unlawful under IHL as “terrorist” may also discourage IHL compliance by non-State armed groups party to a NIAC. Any motivation they may have to fight in accordance with IHL would likely erode if, irrespective of the efforts they may undertake to comply with it, all of their actions are deemed unlawful. Furthermore, labelling acts that are lawful under IHL as “terrorist” is likely to render the implementation of Article 6(5) of Additional Protocol II – whose objective is to grant the broadest possible amnesty to persons having participated in the hostilities without having committed serious violations of IHL – more difficult. For obvious reasons, the prospect of an amnesty is diminished where

even lawful acts of war have been qualified as acts of terrorism. This can ultimately prove to be an obstacle to peace negotiations and reconciliation efforts.

IHL, the so-called “war against terrorism” and the geographic scope of armed conflicts

As repeatedly asserted, the ICRC considers that, from a legal perspective, there is no such thing as a “war against terrorism.” With respect to the various armed conflicts and the numerous counterterrorism measures at the domestic and international levels, the ICRC adopts a case-by-case approach in order to analyse and legally classify the various situations of violence. In this sense, the fight against terrorism involves, apart from the use of force in certain instances, the use of other measures, such as intelligence gathering, financial sanctions and judicial cooperation.

When armed force is used, only the facts on the ground are relevant for determining the legal classification of a situation of violence. Some situations may be classified as an IAC, others as a NIAC, while various acts of violence may fall outside any armed conflict due to a lack of the requisite nexus.

With respect to the phenomenon of armed groups that are perceived as having a global reach, such as al-Qaeda or the Islamic State group, the ICRC does not share the view that an armed conflict of global dimensions is, or has been, taking place. This would require, in the first place, the existence of a “unitary” non-State party opposing one or more States. Based on available facts, there are not sufficient elements to consider the al-Qaeda “core” and its associated groups in other parts of the world as one and the same party within the meaning of IHL. The same reasoning also applies, for the time being, to the Islamic State group and affiliated groups.

In addition, as stated previously,¹⁵ the ICRC does not share the view that the applicability of IHL spreads beyond the territory of the parties to the conflict in a way that would allow the targeting of individuals associated with armed groups around the world. The ICRC’s position is that NIACs are confined to the territory of each party to an armed conflict. While such NIACs can spill over into neighbouring countries because of the continuity of hostilities, they cannot spread to third countries. The ICRC is of the view that the IHL criteria of intensity and organization required to constitute a NIAC would need to be fulfilled in the territory of each individual third State for the applicability of IHL to be triggered.

IHL and “foreign fighters”

The phenomenon of the so-called “foreign fighters” – nationals of one country who travel abroad to fight alongside a non-State armed group in the territory of another State – has increased exponentially over the past few years. In order to quell the threats emanating from foreign fighters, States – in particular within the

15 See section II.2 above on The geographic reach of IHL applicability.

framework of the UN Security Council – have taken a variety of measures, including the use of force, detention (on terrorism charges, among others), and travel bans.

While most of the measures taken to prevent individuals from joining non-State armed groups or to mitigate the threat they may pose upon return are of a law enforcement nature, the applicability of IHL, where appropriate, should not be overlooked. It may be observed that little attention has been paid to how IHL deals with the phenomenon of foreign fighters.

The concept of “foreign fighter” is not a term of art of IHL. The applicability of IHL to a situation of violence in which such fighters may be engaged depends on the facts on the ground and on the fulfilment of certain legal conditions stemming from the relevant norms of IHL, in particular common Articles 2 and 3. In other words, IHL will govern the actions of foreign fighters, as well as any measures taken in relation to them, when they have a nexus to an ongoing armed conflict.

Relevant IHL norms on the conduct of hostilities will govern the behaviour of foreign fighters, regardless of their nationality, in both IAC and NIAC. Foreign fighters are thus subject to the same IHL principles and rules that are binding on any other belligerent.

As far as detention is concerned, nationality will have an impact on the status of “protected persons” in IAC but not in NIAC. Under the Third Geneva Convention, nationality is irrelevant for determining whether a person qualifies as a combatant in an IAC, but may be important for determining whether a State will grant prisoner of war (POW) status to its own nationals captured fighting for a foreign army (State practice on this issue differs).

Nationality is a decisive criterion for determining whether a detained person will benefit from “protected person” status under the Fourth Geneva Convention. This treaty, by its express terms (Article 4), does not apply to persons of the nationality of the detaining State or to the nationals of neutral or co-belligerent States, except where there is no “normal” diplomatic representation between such States and the detaining State. In a situation of occupation, the nationals of neutral States, as well as the nationals of co-belligerent States, must be granted protected-person status, unless there is normal diplomatic representation between the co-belligerent State and the occupying power. In any case, if a foreign fighter is not granted POW or protected-person status under the Third or Fourth Geneva Convention, namely for reasons of nationality, he or she will still enjoy the “safety net” protections provided by Article 75 of Additional Protocol I, as a matter of treaty and/or customary law.

Nationality has no bearing on the status of foreign fighters in NIAC (as there is no POW or protected-person status as such in this type of armed conflict) or on the legal protections they will be owed upon capture. *Hors de combat* foreign fighters will thus be entitled to the guarantees of common Article 3 and of Additional Protocol II, when applicable, as well as to the safeguards of customary law norms.

Finally, foreign fighters are often assimilated to mercenaries. Under IHL, the notion of “mercenary” only exists in IAC and its only consequence is the loss

of POW status.¹⁶ This being said, foreign fighters may fulfil “mercenary” definitions contained in national legislations prohibiting mercenarism.

The ICRC’s role in relation to foreign fighters is similar to that played with respect to any other persons captured and detained in relation to an armed conflict. If foreign fighters are detained in an IAC and fulfil the conditions for POW or protected-person status under the Third or Fourth Geneva Conventions, the ICRC must be granted access to them. If foreign fighters are detained within the framework of a NIAC, the ICRC can offer its humanitarian services to the detaining party and visit them upon the agreement of the relevant authorities.

Potential criminalization of humanitarian action

The potential criminalization of humanitarian action, as already described in further detail in the 2011 challenges report, remains an issue of concern for the ICRC and is therefore briefly reiterated here. 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 terrorist 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 has the potential to criminalize a range of humanitarian actors and their personnel, and may create obstacles to the funding of humanitarian activities. The prohibition of unqualified acts of “material support,” “services” and “assistance to” or “association with” terrorist organizations found in certain criminal laws could, in practice, result in the criminalization of the core activities of humanitarian organizations and their personnel that are endeavouring to meet the needs of victims of armed conflicts or situations of violence below the threshold of armed conflict. These activities 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; aid to meet the basic needs of the civilian population in areas controlled by armed groups associated with terrorism; and large-scale assistance activities for IDPs, where individuals associated with terrorism may be among the beneficiaries.

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

16 In this context, it should be recalled that the criteria that must be fulfilled for a person to be deemed a mercenary under Additional Protocol I (Article 47) have rarely been proven to be met in practice. It should also be recalled that the scope of application, the definition and the obligations enunciated in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (adopted 4 December 1989, entered into force 20 October 2001), 2163 UNTS 75, and the Convention on the Elimination of Mercenarism in Africa (adopted 3 July 1977, entered into force 22 April 1985), OAU Doc. CM/433/Rev. L. Annex 1 (1972), are wider for States parties thereto.

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, a non-State party.

In its 2011 report, the ICRC expressed the need for greater awareness by States of the need to harmonize policies and legal obligations in the humanitarian and counterterrorism realms in order to properly achieve the desired aim of both these realms. Its recommendations in this regard remain pertinent today. It therefore reiterates the following points:

- Measures adopted by governments, whether internationally or nationally, aimed at criminally repressing acts of terrorism should be crafted so as to not 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 with non-State armed groups party to a NIAC is a task foreseen and expected from the ICRC under common Article 3, 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 1949 Geneva Conventions. In other words, broad language prohibiting “services” or “support” to terrorism could make it impossible for the ICRC to fulfil its treaty-based (and statutory) mandate in contexts where non-State armed groups party to a NIAC are designated “terrorist organizations.”

III. IHL and multinational forces

Recent years have seen an increase in the number of peace operations involving multinational forces.¹⁷ United Nations operations in the Democratic Republic of the Congo, the Central African Republic and Mali, NATO operations in Libya and Afghanistan, and the African Union operation in Somalia are cases in point. The combination of the “robustness” of mandates that are on occasion assigned by the international community to multinational forces and the violent

¹⁷ There is no clear-cut definition of peace operations in public international law. The terms “peace operations,” “peace-support operations,” “peacekeeping operations” and “peace enforcement operations” do not appear in the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) (hereafter UN Charter). They may be interpreted in various ways and are sometimes used interchangeably. For the purposes of this section, the term “peace operations” covers both peacekeeping and peace enforcement operations conducted by international organizations, regional organizations or coalitions of States acting on behalf of the international community in pursuance of a UN Security Council resolution adopted under Chapters VI, VII or VIII of the UN Charter. Although the majority of peace operations take place under the command and control of the UN or NATO, this section also bears in mind the growing role played by other international organizations such as the AU or the EU. The term “multinational forces” describes the armed forces put by troop-contributing countries at the disposal of a peace operation.

environments in which these are deployed elevate the likelihood of their being called upon to use military force, raising the question of when and how IHL applies to their actions.

The conditions for IHL applicability to multinational forces

Whether multinational forces can, as such, become a party to an armed conflict is a matter of much discussion. Recent peace operations have seen the development of legal constructs suggesting that the conditions triggering IHL applicability may differ when certain multinational forces intervene.¹⁸ According to these views, IHL would not apply, would apply differently, or would apply only as a matter of policy to such forces.

In response to these views, it is to be noted that IHL does not preclude multinational forces from becoming a party to an armed conflict if the conditions for the applicability of its norms are met. The above views also ignore or do away with the longstanding distinction established in international law between *ius in bello* and *ius ad bellum*, which is firmly anchored in treaty law, as well as in domestic and international case law. By virtue of this distinction, the applicability of IHL to multinational forces, like to any other actors, depends exclusively on the circumstances prevailing on the ground, irrespective of the international mandate that may have been assigned to such forces or the term used to designate the party (or parties) potentially opposing them.

Given that multinational forces are more often than not deployed in conflict zones, it is essential to determine when they may be deemed to have become belligerents for the purposes of IHL. In this regard, some legal debates on IHL applicability to multinational forces have been characterized by recurrent attempts to raise the bar for the threshold of its applicability. It has been contended, in particular, that when multinational forces (in particular UN forces) are involved, a higher degree of intensity of violence should be required before an armed conflict may be said to exist.

The ICRC's view, which has been stated on various occasions, is that the criteria for determining whether multinational forces are involved in armed conflict are identical to those that will apply in any other similar situation, whether IACs or NIACs. Alternative positions would appear to lack a legal basis under IHL, as the "higher threshold approach" cannot be found in treaty law, and does not rest on general practice. Thus, the determination of IHL applicability to multinational forces should be based solely on the regular criteria for armed conflicts, stemming from the relevant norms of IHL, in particular common Articles 2 and 3.

Contemporary peace operations show that multinational forces often intervene in a pre-existing NIAC by providing support to the armed forces of a

18 These legal constructs were often based on the fact that multinational forces operate on behalf of the international community and under a UN Security Council mandate.

State in whose territory the conflict is occurring. This assistance has not often taken the form of full-fledged kinetic operations against a clearly identified enemy, but rather of sporadic use of force, logistical support, intelligence activities for the benefit of the territorial State or participation in the planning and coordination of military operations carried out by the armed forces of the territorial State.

This trend raises important legal questions: What is the legal status under IHL of multinational forces providing such support? Does IHL apply to them in this scenario? The complexity of the questions posed lies mainly in the fact that, in some cases, the support given by multinational forces does not by itself meet the threshold of intensity required for NIACs.

This situation has led to an examination of whether, even if the involvement of multinational forces does not *per se* meet the criterion of intensity required for NIACs, the nature of their engagement in a pre-existing NIAC could make them a party to that conflict.

The ICRC is of the view that it is not necessary to assess whether, on their own, the actions of multinational forces (or, generally, of individual States) fulfil the criteria for determining the existence of a NIAC, as these will have already been fulfilled by the pre-existing NIAC. Whether IHL will govern their operations in such a situation should only be determined by the nature of the support functions performed by the multinational forces. Therefore, a “support-based approach” consists in linking to IHL the actions of multinational forces that objectively form an integral part of the pre-existing NIAC.

Under such a support-based approach, not all forms of support will turn multinational forces into a party to a pre-existing NIAC. The decisive element would be the contribution made by such forces to the collective conduct of hostilities. A support-based approach clearly distinguishes between the provision of support that has a direct impact on the opposing party’s ability to carry out military operations and more indirect forms of support, which would allow the beneficiary to build up its military capabilities. Only the former type of support would turn multinational forces into a party to a pre-existing NIAC.

According to a support-based approach, IHL would apply to multinational forces when the following conditions have been cumulatively met: (1) there is a pre-existing NIAC taking place on the territory in which multinational forces are called on to intervene; (2) actions related to the conduct of hostilities are undertaken by multinational forces in the context of the pre-existing conflict; (3) the military operations of multinational forces are carried out in support (as described above) of a party to the pre-existing conflict; and (4) the action in question is undertaken pursuant to an official decision by the troop-contributing country or the relevant organization to support a party involved in the pre-existing conflict.

The fulfilment of the above criteria should permit a clear determination of the existence of a genuine belligerent intent¹⁹ on the part of multinational forces. The resulting situation would demonstrate that they are effectively involved in military operations or other hostile actions aimed at neutralizing the enemy’s

19 On the notion of belligerent intent, see footnote 3 above.

military personnel and assets, hampering its military operations or controlling parts of its territory.

In the ICRC's opinion the support-based approach helps clarify the contours of the notion of NIAC. It provides insight into how to interpret this notion in keeping with the logic of IHL, and in line with the imperative of not blurring the combatant/civilian distinction and of maintaining the principle of equality of belligerents.

Determining who is a party to an armed conflict

Once multinational forces have become involved in an armed conflict, it is important to identify who among the participants in a multinational operation should be considered a party to the conflict: the troop-contributing countries (TCCs)? The relevant international/regional organization (IO) under whose command and control the multinational forces operate? Or both? Little attention has been paid to these questions so far. They are nonetheless essential given the legal consequences involved.

IOs involved in peace operations all share one characteristic: they do not have armed forces of their own. In order to carry out such operations, IOs must rely on member States to place armed forces at their disposal. When they put troops at an IO's disposal, TCCs always retain some form of authority and control over their forces so that, even when they operate on behalf of the IO, they continue to simultaneously act as organs of their respective States. The dual status of armed forces involved in multinational operations conducted under the auspices of an IO – as organs of both the TCCs and the IO – considerably complicates the determination of who should be considered a party to the armed conflict.

In order to identify the parties, it is necessary to determine the entity – the IO and/or the TCCs – to which the acts of war carried out by multinational forces can be attributed. IHL is silent on the issue of attribution. It does not contain any specific criteria to attribute actions by multinational forces to a particular holder of international obligations. In the absence of such criteria in IHL, the general rules of international law on attribution will govern.

Under this body of international norms, the notion of control is key.²⁰ In other words, determining who is a party to an armed conflict in the context of multinational operations requires an examination of the level of control exerted by the IO over the troops put at its disposal.

In order to answer this complex question, the command and control arrangements (“C2” in military parlance), and the corresponding levels of authority in force in multinational operations, must be analysed. There is no “one-size-fits-all” approach. The C2 structure varies from one operation to another and from one IO to another. It is undisputed, however, that TCCs do not

20 There are ongoing debates, based in particular on diverging international case law, on whether to apply an “effective control” or an “overall control” test.

delegate “full command” to the IOs involved, rather they generally only transfer “operational command” or “operational control.” Legally speaking, this means that an IO under whose auspices a multinational operation is conducted will usually have the requisite control – within the meaning of these terms under international law – over military operations conducted by the troops put at its disposal.

As regards multinational operations conducted under UN command and control, an analysis of relevant UN doctrine combined with a review of its practical application in various contexts shows that, despite the multiple caveats placed by TCCs and their potential interference in the UN chain of command, the UN generally exerts the requisite control over its military operations. Therefore, in multinational operations under UN C2, there is a presumption that only the UN mission, and not the TCCs (and even less the member States of the UN), should be considered a party to an armed conflict when UN forces are drawn into hostilities that may be classified as such.

The situation as regards multinational operations conducted by NATO is more complex. Owing to the very intricate and specific nature of the C2 architecture of NATO operations, it is submitted that, in principle, when NATO troops are engaged in armed conflict, it is not only the organization which is a party thereto. NATO C2 arrangements – as implemented for instance in Afghanistan or Libya – reveal that the involvement of TCCs at the strategic, operational and tactical levels is such that the relevant States clearly have the power and the capacity to influence and intervene at all levels and stages of NATO military operations. TCCs are so closely associated with the NATO C2 structure that it is almost impossible to discern whether it is NATO itself or the TCCs that have overall or effective control over military operations. In light of this, NATO operations should usually be attributed to the IO and the TCCs simultaneously. The logical legal consequence of this in terms of IHL is that both NATO and the TCCs (but not all NATO member States) should be considered parties to the armed conflict. In addition, since it is difficult in practice and in law to draw distinctions on the legal status under IHL of the States participating in such operations, the ICRC is of the view that carrying out military activities within a NATO operation, in particular if these form an integral part of the collective conduct of hostilities, confers the status of belligerent on the TCCs. In these circumstances, a presumption, albeit rebuttable, exists that States participating in a NATO operation that reaches the threshold of an armed conflict have – alongside NATO itself – the status of parties to the armed conflict.

The personal scope of IHL applicability in the context of multinational operations

The issue of the personal scope of IHL applicability is particularly important in the case of “multidimensional” or “integrated” multinational operations. The tasks of these operations may include not only military operations against designated enemies but also engagement in economic governance, civil administration, the

rule of law, disarmament-demobilization-reintegration (DDR) efforts, political processes, the promotion/protection of human rights, and humanitarian assistance. In order to perform these tasks, “integrated” multinational operations employ a mix of military, police and civilian personnel. The implementation of the various objectives of a multinational mission that has become a party to an armed conflict will inevitably raise questions concerning the legal status under IHL of their various staff members.

The personnel of a multinational operation must be divided into different categories in order to evaluate the extent of IHL protection accorded to each. To this end, the situation of military, civilian and police personnel should be analysed separately.

Members of the military component of a multinational operation involved in an armed conflict must be distinguished from the rest of the mission’s personnel. Once the military personnel become engaged in an armed conflict, they become “combatants” for the purpose of the principle of distinction. Thus, irrespective of their function within the military component, they lose their protection from attack as long as the multinational operation is a party to the armed conflict. Their status as lawful targets under IHL applies to the entire military contingent, even if the operation’s forces are made up of units sent by different TCCs and even if they have different tasks within the mission. Their status under IHL is determined based on the classification of the situation, and in accordance with the corresponding norms of IHL.

Civilian personnel involved in economic/political governance, the promotion/protection of human rights or humanitarian assistance must be regarded as civilians for the purpose of IHL, irrespective of the fact that the multinational operation qualifies as a party to the armed conflict. The civilian component of a multinational operation must be distinguished from its military component. Civilian personnel will therefore remain protected from direct attack and benefit from the protection which IHL confers on civilians, unless and for such time as they directly participate in hostilities.

The situation with regard to the police component of a multinational operation may vary depending on its use by the operation’s command. In the vast majority of cases, their tasks are confined to habitual law enforcement activities and have no direct connection with military operations that may be undertaken by the military component. As long as they are performing law enforcement tasks, police personnel must be regarded as civilians for the purpose of IHL. They will thus also benefit from the protection afforded to civilians, unless and for such time as they directly participate in hostilities.

In exceptional circumstances, the police personnel of a multinational operation (or more likely parts thereof) may be required – through either a formal or informal decision of an operation’s command – to provide military support to the military component in operations against a non-State armed group party to a NIAC. Members of police units thus engaged would thereby effectively assume the functions of armed forces under the command of a party to the armed conflict. As a result, the police personnel of units that have been instructed

to undertake combat action (but only such personnel) would lose their immunity against direct attack, until they leave their unit or are lastingly discharged from military operations undertaken by the military component.

Lastly, recent practice has shown that private military and security companies (PMSCs) may be hired to carry out tasks on behalf of TCCs or IOs involved in multinational operations. In this regard, an approach similar to that adopted with respect to the police component should be applied. If incorporated into multinational forces by being assigned a continuous combat function, PMSC personnel will no longer qualify as civilians and will become lawful targets under IHL for the duration of such an assignment.

Multinational forces and the obligation to respect and ensure respect for IHL

As mentioned above, contemporary multinational operations are often conducted in support of the armed forces of a “host” State fighting against a (or several) non-State armed group(s). Combined with the fact that they are conducted either by a coalition of States or by States that have put their troops at the disposal of an IO, multinational operations are situations in which the obligation to respect and ensure respect for IHL becomes all the more relevant. In the ICRC’s view, this obligation is binding upon States involved in multinational operations, as well as on the IOs under whose auspices multinational operations are undertaken.

Participation in a multinational operation does not release States from their obligation under Article 1 common to the 1949 Geneva Conventions to respect and ensure respect for IHL. To the extent that they always retain some authority over their national contingents, troop-contributing countries must continue to ensure that their national contingents respect IHL. They may fulfil the “internal” prong of the obligation to ensure respect, in particular, by seeing to it that their troops are adequately trained, equipped and instructed, and by exercising disciplinary and judiciary powers over them.

Furthermore, the complexity of multinational operations does not diminish the validity of the other, “external” prong of the obligation contained in common Article 1. According to this obligation, States must ensure that IHL is respected by others – be they States, IOs or non-State armed groups – involved in an armed conflict. This obligation requires that States not only refrain from encouraging, aiding or assisting violations of IHL (which may require opting out of a specific operation if there is an expectation that it may violate IHL), but also exert their influence to the degree possible to induce belligerents to comply with IHL. It is, however, acknowledged that this prong of the obligation to ensure respect for IHL, i.e. to exert their influence, is an obligation of means to be exercised with due diligence. The exact scope of this obligation will depend on the prevailing circumstances of each case and on the resources available to the bearer of the obligation, in particular its capacity to influence the (other) belligerents.

It is likewise submitted that the “special relationship” and the close military ties that exist between States and IOs involved in a multinational operation place

them in a unique position to influence coalition partners and/or the supported party in order to persuade the latter to better respect IHL.

Multinational operations may be said to constitute a platform facilitating the implementation of the obligation to ensure respect for IHL by others. The ICRC has often insisted on the importance of ensuring respect for IHL in the context of multinational operations and has regularly reminded – confidentially or publicly, individually or collectively – TCCs and IOs of their obligation under common Article 1 or equivalent customary international law.

IV. The protective scope of IHL: Selected issues

1) Humanitarian access and assistance

Armed conflicts, whether international or non-international, always bring disruptions to the lives of civilians. When, due to the devastation and deprivation caused by war, the civilian population is deprived of essential goods and services, IHL envisages that humanitarian assistance will be needed and regulates its provision.

In practice, apart from measures that the belligerents may take to help the population under their control, humanitarian action by impartial humanitarian organizations, including the ICRC, remains essential in order to reduce vulnerabilities and alleviate the needs of persons affected by an armed conflict. The effectiveness and efficiency of humanitarian action will, however, depend on the possibility of rapid and unimpeded access to persons in need.

Access remains a significant challenge for many humanitarian organizations. The difficulties may be due to a lack of acceptance or an outright denial of access, security risks, logistical problems, and cumbersome administrative requirements, among others. In addition, as evidenced by some recent armed conflicts, the issue of humanitarian aid is becoming more and more politicized at the international level, raising doubts among some belligerents about whether neutral, impartial and independent humanitarian action is in fact possible.

IHL treaties and customary rules provide a fairly detailed framework for regulating access to persons in need of humanitarian assistance and of protection in situations of armed conflict.

Although the relevant rules vary slightly depending on the nature of the conflict (IAC other than occupation, occupation, NIAC), the IHL framework governing humanitarian access may be said to be generally constituted of four interdependent “layers.” Pursuant to the first, each party to an armed conflict bears the primary obligation to meet the basic needs of the population under its control. The second provides that impartial humanitarian organizations have the right to offer their services in order to carry out humanitarian activities, in particular when the needs of the population affected by an armed conflict are not fulfilled. The third posits that impartial humanitarian activities undertaken in

situations of armed conflict are generally subject to the consent of the parties to the conflict concerned. According to the fourth, once impartial humanitarian relief schemes have been agreed to, the parties to the armed conflict, as well as all States that are not a party thereto, are expected to allow and facilitate the rapid and unimpeded passage of the relief schemes, subject to their right of control. The ICRC considers that these layers apply to all forms of humanitarian relief operations, including “cross-line” or “cross-border” operations.²¹

This section cannot suffice to provide a detailed analysis of the layers listed above; only a few essential legal aspects are further highlighted below.

Actions carried out by impartial humanitarian organizations are complementary, and in no way diminish the primary obligation of belligerents to meet the basic needs of those under their control. While this obligation is clearly expressed in the relevant IHL rules on occupation, IHL provisions on IAC (other than occupation) and NIAC do not expressly contain a similar rule. The ICRC is of the view, however, that in such situations the obligation of the parties to an armed conflict to meet the basic needs of the population under their control can be inferred from the object and purpose of IHL.

Articles 9/9/9/10 and 3 common to the 1949 Geneva Conventions establish a right of humanitarian initiative, whereby States expressly recognized that impartial humanitarian organizations, such as the ICRC, have an important role to play in addressing humanitarian needs generated in both IACs and NIACs. Concretely, this gives impartial humanitarian organizations the right to offer their services and to perform humanitarian activities without States regarding this as unlawful interference in their domestic affairs or as unfriendly acts. In this context, it is essential not to confuse offers of services under IHL, and the subsequent humanitarian relief operations undertaken, with the “right to humanitarian intervention” or the “responsibility to protect.” The latter are notions that are distinct from the strictly humanitarian activities carried out by impartial humanitarian organizations within the parameters of IHL.

Under IHL, only organizations qualifying as impartial and humanitarian in nature are explicitly entitled to offer their services to the parties to an armed conflict – whether IAC or NIAC. While this body of law does not prevent other actors, such as States or intergovernmental organizations, from making similar proposals, their offers of services are not regulated by IHL *per se* and they cannot claim that these are based on a corresponding IHL-grounded right of initiative.

Nothing in the relevant IHL provisions may be interpreted as restraining the right of impartial humanitarian organizations to offer their services. It has been argued by some that such offers may only be made when the civilian population concerned is not adequately provided with the supplies essential for its survival. It is submitted that subjecting offers of services to such a precondition would clearly run counter to the letter and spirit of IHL.

21 It should be noted that despite recent frequent references to “cross-line” or “cross-border” operations, these are not terms of IHL. These operations are regulated by the IHL rules applicable to any other type of humanitarian relief operation.

In terms of scope, offers of services made by impartial humanitarian organizations should be interpreted to encompass humanitarian activities writ large. While IHL does not specifically define the notion of humanitarian activities, these clearly have both an assistance and a protection dimension. Humanitarian activities are therefore all those aimed at preserving life and security or seeking to restore or maintain the mental and physical well-being of victims of armed conflict. Furthermore, humanitarian activities must benefit all persons who may be in need of assistance and/or protection as a result of an armed conflict. This means that States cannot limit activities to civilians alone; activities may also benefit wounded and sick fighters, POWs, persons otherwise deprived of their liberty in relation to the armed conflict, and others.

While IHL grants impartial humanitarian organizations the right to offer their humanitarian services, this should not be interpreted as constituting an unfettered right of humanitarian access (i.e. a right to be able to undertake the proposed humanitarian activities in practice). Whether impartial humanitarian organizations will be able to effectively provide their services in areas of armed conflict will depend on them receiving the “consent” of the parties concerned. The notion of “consent” for the purpose of humanitarian access has been at the forefront of legal debates related to recent armed conflict situations. The ICRC’s views on this issue were shared in an *ICRC Q&A and lexicon on humanitarian access* published in 2014.²²

IHL rules governing consent vary in wording and scope. What is clear, however, is that regardless of the type of conflict involved (IAC other than occupation, occupation, NIAC), the consent of the parties to the conflict must be sought and obtained before impartial humanitarian organizations can operate and undertake humanitarian activities in the territories under the parties’ jurisdiction/control.

In IACs, the relevant IHL provisions specify that consent only needs to be obtained from the States that are a party to the conflict and are “concerned” by virtue of the fact that the proposed humanitarian activities are to be undertaken in their territory. It is understood that the opposing party does not need to be asked to consent to relief operations that take place in the adversary’s territory or in territory controlled by the adversary.

Common Article 3 is silent on who should consent to humanitarian relief operations in NIACs. It has been argued – in relation to some recent NIACs – that humanitarian action undertaken in areas controlled by non-State armed groups requires only their consent, and not that of the government of the State in whose territory that action is to take place. However, the ICRC considers that the question of whose consent is necessary in NIACs governed by common Article 3 should be answered based on the guidance provided in Article 18(2) of Additional Protocol II, which expressly requires the consent of the High

22 *ICRC Q&A and lexicon on humanitarian access*, June 2014, available at: www.icrc.org/eng/assets/files/2014/icrc-q-and-a-lexicon-on-humanitarian-access-06-2014.pdf.

Contracting Party concerned.²³ Thus, consent should be sought from the State in whose territory a NIAC is taking place, including for relief activities to be undertaken in areas over which the State has lost control. In any case, for practical reasons, the ICRC would also seek the consent of all parties to the NIAC concerned (including non-State armed groups party to it) before carrying out its humanitarian activities.

While access for, and the implementation of, humanitarian activities depends on the consent of the parties to an armed conflict, their decision to consent to relief operations is not discretionary. As always, IHL strikes a careful balance between parties' interests and humanitarian imperatives, and is not entirely deferential to State sovereignty when it comes to relief operations.

The question of whether a party to an armed conflict can lawfully turn down an offer of humanitarian services is intrinsically linked to its ability to fulfil its primary obligation to meet the basic needs of the population under its control. When the relevant party is unable or unwilling to fulfil this obligation and when an offer of services has been made by an impartial humanitarian organization, there would appear to be no valid/lawful grounds for withholding or denying consent. There may thus be circumstances under which, as a matter of IHL, a party to a conflict may be considered to be obliged to accept an offer of services (see for example Article 59 of the Fourth Geneva Convention: "... the Occupying Power shall agree ...").

Under IHL, imperative military necessity is not lawful grounds to turn down valid offers of services. Imperative military necessity may only be invoked to geographically and temporarily limit activities or to restrict the movement of relief personnel in situations where relief operations have been approved (see below). An offer of services may be declined when there are no needs to be met and/or when the activities proposed in the offer of services are not humanitarian in nature or the offer does not emanate from an organization that is impartial and humanitarian in character. IHL does not provide for other grounds that would justify a refusal of consent to relief operations as such.

Recently, the expression "arbitrary denial/withholding of consent to relief operations" has been used to describe a situation in which a party to an armed conflict unlawfully rejects a valid offer of humanitarian services. The expression "arbitrary denial/withholding of consent" is not found in any IHL treaty. It may, however, be argued that a refusal to grant consent resulting in a violation of the party's own IHL obligations may constitute an unlawful denial of access for the purposes of IHL. This would be the case, for instance, when a party's refusal results in the starvation of civilians as prohibited by Article 54 of Additional Protocol I or when the party is incapable of providing humanitarian assistance to a population under its control as required by the relevant rules of international law, including IHL.

23 The ICRC commentary on Article 18(2) mentions that: "In principle the 'High Contracting Party concerned' means the government in power. In exceptional cases when it is not possible to determine which are the authorities concerned, consent is to be presumed in view of the fact that assistance for the victims is of paramount importance and should not suffer any delay" (para. 4884).

IHL does not regulate the consequences of a denial of consent and does not spell out a general right of access that can be derived from an “arbitrary denial/withholding of consent.” Thus, the argument according to which an arbitrary denial/withholding of consent could justify unconsented cross-line/border operations as a matter of IHL does not reflect current IHL.²⁴

It is important to underline the distinction made in IHL between the requirement to obtain consent from a party to a conflict following an offer of services on the one hand, and the obligation to allow and facilitate relief schemes, which serves to implement the acceptance of the offer, on the other hand.

Once relief actions are accepted in principle, the States/parties to an armed conflict are under an obligation to cooperate, and to take positive action to facilitate humanitarian operations. The parties must facilitate the tasks of relief personnel. This may include simplifying administrative formalities as much as possible to facilitate visas or other immigration issues, financial/taxation requirements, import/export regulations, field-trip approvals, and possibly privileges and immunities necessary for the organization’s work. In short, the parties must enable “all facilities” needed for an organization to carry out its agreed humanitarian functions appropriately. Measures should also be taken to enable the overall efficacy of the operation (e.g. time, cost, safety, appropriateness).

Under IHL governing IACs, the obligation to allow and facilitate relief operations applies not only to the parties to an armed conflict but to all States concerned. This means that States not party to the conflict through whose territory impartial humanitarian organizations may need to pass in order to reach conflict zones must authorize such transit.

IHL governing NIACs does not expressly contain a similar obligation for third States. There is, nevertheless, an expectation that States not party to the NIAC will not oppose transit through their territory of impartial humanitarian organizations seeking to reach the victims of a NIAC. The humanitarian spirit underpinning IHL should encourage non-belligerent States to facilitate humanitarian action that has already been accepted by the parties to a NIAC.

Finally, under IHL, the obligation to allow and facilitate relief schemes is without prejudice to the entitlement of the relevant actors to control them through measures such as: verifying the humanitarian and impartial nature of the assistance provided, prescribing technical arrangements for its delivery or, as mentioned above, limiting/restricting the activities of relief personnel in case of imperative military necessity.

2) The specific protection of medical personnel and objects

Armed conflicts, whether IACs or NIACs, will invariably give rise to the need to provide health care that is both immediate and additional to that which is available in peacetime. This will occur, *inter alia*, because persons directly

24 This is without prejudice to arguments along those lines that may be derived from other bodies of international law.

participating in hostilities may be wounded, while others may be directly attacked or incidentally injured in the conduct of military operations.

Ensuring care for wounded and sick combatants of armed forces in the field and the protection of persons and objects devoted to this task was the main reason for the drafting of the very first Geneva Convention of 1864. Ever since then, the issue of the provision of health care in armed conflict has been a significant focus of IHL. Specific rules have been developed to deal with the maintenance of adequate military and, later, civilian health-care services for the wounded and sick in armed conflict. Accordingly, IHL aims to protect specific categories of military and civilian persons and objects that are exclusively assigned by a competent authority to the performance of medical duties. As a result of the exclusivity of this function, they enjoy specific protection from attack, harm or other interference with their tasks during the conduct of hostilities. The privilege of bearing one of the distinctive emblems – the red cross, red crescent or red crystal²⁵ – is a visible sign that specific protection has been accorded.²⁶ As is well known, this specific protection rests on the assumption that medical personnel and objects are exclusively engaged in medical tasks and that involvement in military operations amounting to acts harmful to the enemy, outside their humanitarian function, will entail a loss of their specific protection.

Despite the specific protective regime, violence, interference and threats against medical personnel, facilities and transports are widespread in contemporary armed conflicts and have a major impact on access of the wounded and sick to medical care. For instance, the Health Care in Danger project of the International Red Cross and Red Crescent Movement (Movement) – which is more broadly aimed at making the delivery of health care safer in both armed conflicts and other emergencies – has collected information about incidents in various countries where the wounded and sick, as well as medical personnel and objects, have been directly attacked or incidentally harmed in the conduct of hostilities.²⁷ Medical facilities and transports have also been used for military purposes to launch attacks, store and transport weapons or to establish military command and control centres, thus undermining trust in their medical nature and putting them at risk of attack(s) by the opposing party.

The fundamental challenge posed by such incidents is not due to the inadequacy of the relevant rules of IHL, but to their inadequate implementation.

25 The red lion and sun, mentioned in the 1949 Geneva Conventions and their Additional Protocols as an emblem with an equal status, is currently not used by any High Contracting Party.

26 In addition to regulating medical care provided to the wounded and sick by the medical service of a party to an armed conflict, IHL allows impartial humanitarian organizations (such as the ICRC, along with National Red Cross and Red Crescent Societies) to offer their services for the delivery of such care. Further, IHL also envisions that civilians may play a role in this regard. While IHL only allows some of these persons (and the objects they use to accomplish their mission) to display the distinctive emblem as a protective device, it must be kept in mind that those who are not entitled to display the latter will enjoy the general IHL protection to which civilians and civilian objects are entitled.

27 See, for example, ICRC, *Health Care in Danger: Violent incidents affecting the delivery of health care, January 2012 to December 2014*, ICRC, Geneva, 2015, available at: www.icrc.org/eng/resources/documents/publication/p4237-violent-incidents.htm.

The nature of contemporary warfare, which is increasingly being waged in urban settings and is often characterized by asymmetry between the parties, has, nevertheless, demonstrated the importance of clarifying and/or interpreting the scope of the specific protective regime devoted to medical personnel, facilities and transports. Two particular legal issues deserve examination. The first is whether military medical personnel and objects are to be taken into account in a proportionality assessment under IHL rules on the conduct of hostilities. The second relates to the scope of the notion of “acts harmful to the enemy” that entail a loss of their specific protection, namely their entitlement to be respected and protected.

The application of the rules of proportionality in attack and precautions to military medical personnel and objects

Military medical personnel often have to work, and military medical objects must often be located, in the vicinity of the fighting, especially when providing emergency medical care, including first aid. There is evidently a particular need to ensure the protection of military medical personnel and objects against incidental harm (which is likely to be heightened in situations of urban warfare). A controversy nevertheless exists over whether such protection must be ensured in attacks against military objectives located in the proximity of military medical personnel and objects or when their movements bring them in proximity of military objectives.

Some have argued that military wounded and sick, as well as military medical personnel and objects, are not protected by the rules of proportionality in attack and precautions because the relevant customary rules, as reflected in Additional Protocol I, only refer to incidental *civilian* harm. Pursuant to this view, *military* wounded and sick, and *military* medical personnel and objects are excluded from the protective ambit that the relevant norms aim to provide, as they are not of a civilian nature.

It is submitted that this position is untenable. In practice, this could result in a decrease in the emergency medical care that is provided in proximity to military objectives, as military medical personnel and objects would not only *de facto* run the risk of being incidentally harmed but would also not enjoy any legal protection from such risk.

As a matter of law, this proposition is, first, incompatible with the stringent nature of the obligation to respect and protect military medical personnel and objects, as well as with the object and purpose of their specific protection. This obligation, which applies in all circumstances (unless military medical personnel and objects commit, or are used to commit, acts harmful to the enemy), means that they must not be attacked or harmed in any way, and that everything feasible must be done to spare them in the conduct of hostilities. Moreover, the very concept of specific protection implies a protection that is elevated in relation to that which is generally guaranteed to civilians and civilian objects. This is evidenced by the right to use the protective red cross, red crescent or red crystal

emblem. To suggest a lesser protection for military medical personnel and objects than that accorded to civilians and civilian objects would thus run counter to the very concept of specific protection.

Second, a careful reading of the definition of military objectives suggests that military medical objects are to be considered civilian objects under the rules on the conduct of hostilities. This is because military objectives are limited to those that make an effective contribution to military action and whose destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Military medical facilities and transports do not fulfil these cumulative conditions (at least as long as they are not used to commit acts harmful to the enemy, outside of their humanitarian function). Given that under IHL civilian objects are all those that are not military objectives, military medical objects must be considered to be civilian objects.

Third, the proposition that military medical personnel and objects do not enjoy protection under the rules of proportionality in attack and precautions, while civilian medical personnel and objects do, runs counter to the fundamental purpose of the relevant rules of Additional Protocols I and II, which specifically envisage uniform protections for these categories of persons and objects.

Finally, the military manuals of a number of States support the inclusion of protected persons and objects, other than civilians and civilian objects, in the assessment of incidental harm that must be undertaken pursuant to the rules of proportionality in attack and precautions.

The scope of the notion of “acts harmful to the enemy”

Under IHL, medical personnel, facilities and transports will lose their specific protection upon the commission of an “act harmful to the enemy, outside their humanitarian function.” This may obviously have serious consequences for the continued delivery of medical care to the wounded and sick, as well as for the security of medical personnel and objects that were not involved in the act(s) at issue. Confidence may be lost in the exclusively medical nature of medical personnel and objects as such, and lead, overall, to less of a willingness to accord them respect and protection. Despite these ramifications, IHL does not define the concept of “acts harmful to the enemy,” nor the precise consequences of a loss of specific protection or how long this lasts.

IHL treaties do not list “acts harmful to the enemy” but they enumerate certain factual scenarios that do not constitute this type of acts, including when medical personnel are equipped with light individual weapons for their own defence or that of the wounded and sick in their charge.²⁸ Examples of acts that would generally be recognized as “harmful to the enemy” under customary IHL are the use of medical facilities for sheltering persons directly participating in hostilities or for storing arms and ammunition (other than small arms and ammunition temporarily found and taken from the wounded and sick, and not

28 See, for example, Article 22(1) of the First Geneva Convention and Article 13(2)(a) of Additional Protocol I.

yet handed over to the competent authorities). Other instances would be: the use of medical facilities as military observation posts or to physically shield military action; and the use of medical transports for conveying healthy troops, arms or munitions, or for the collection and transmission of information of military value.

When medical objects are being used for the commission of “acts harmful to the enemy, outside their humanitarian function,” this may have an impact both on their entitlement to be respected on the one hand and, separately, on their entitlement to be protected on the other hand. When it comes to their entitlement to the latter, their being used for the commission of such an act may dispense the enemy from the obligation, otherwise applicable to it, to make sure that third parties respect medical objects. When it comes to the loss of their entitlement to be respected, a question that may be posed is whether the fact that they are used for the commission of “acts harmful to the enemy” automatically turns them into military objectives (meaning that they lose protection against direct attack) or whether there are “acts harmful to the enemy” that would not necessarily turn medical objects into military objectives. In such cases, loss of protection does not permit a direct attack. It is submitted that not all forms of “acts harmful to the enemy” would make an effective contribution to military action and an attack directed against them would not, in the circumstances ruling at the time, offer a definite military advantage. The failure to fulfil either of these requirements implies that such medical objects may not be considered to have become military objectives (see Article 52(2) of Additional Protocol I and its customary equivalent). In such cases, responses to such harmful acts would have to be through measures short of attack, such as seizure (which, when exercised vis-à-vis medical objects, is regulated by IHL to ensure the continued care of the wounded and sick who will be affected by this measure). In most cases, however, it would be hard to conceive of circumstances in which the commission of an “act harmful to the enemy” outside its humanitarian function would not transform a medical object into a military objective.

It should, nevertheless, be observed that in consultations with military experts as part of the Health Care in Danger project mentioned above, a recommendation was made, not necessarily based on legal considerations, that kinetic strikes against a medical facility that has lost protection should be considered a last resort, and that options other than launching a direct attack on such a facility should be contemplated.

In terms of medical personnel, controversy has arisen as to whether “acts harmful to the enemy” are the same as, or broader in material scope than, “direct participation in hostilities” by civilians. Some, including the ICRC, support the view that the notion of “acts harmful to the enemy” is broader because certain acts that are generally considered to be “harmful to the enemy” may not amount to “direct participation in hostilities.” If the “acts harmful to the enemy” do not amount to direct participation in hostilities, the medical personnel may lose their entitlement to be protected. When it comes to the implications this has for their entitlement to be respected, such acts do not necessarily render the personnel

liable to direct attack. This would only be the case if these acts equally qualify as acts of “direct participation in hostilities.”

V. Use of force under IHL and IHRL

In many contemporary armed conflicts, armed forces are increasingly expected to conduct not only combat operations against the enemy but also law enforcement operations to maintain or restore public security, law and order. This is particularly the case in situations of occupation,²⁹ and in NIACs, including those in which the forces of a third State (or States) assist a “host” State on its territory with its consent.

As is well known, the conduct of hostilities paradigm, namely the rules and principles regulating the employment of means and methods of warfare in armed conflict, belongs exclusively to IHL. The law enforcement paradigm may be described as rules mainly derived from IHRL, and more specifically from the prohibition of arbitrary deprivation of life which regulates the use of force by State authorities to maintain or restore public security, law and order. In this context, it should be noted that IHL also contains a limited number of rules relating to law enforcement operations, such as the obligation of an occupying power to maintain public order and safety, or the authority of a detaining State to use force as a last resort against POWs attempting to escape.³⁰ The law of naval warfare also contains rules and principles pertaining to the use of force in situations that might be considered akin to law enforcement, notably for enforcing blockades.³¹

There are important differences between the conduct of hostilities and law enforcement paradigms. Principles of necessity, proportionality and precautions exist in both, but have distinct meanings and operate differently. While the conduct of hostilities paradigm allows lethal force to be directed against lawful targets as a first resort, the use of lethal force in law enforcement operations may be employed only as a last resort, subject to strict or absolute necessity. Persons posing a threat must be captured rather than killed, unless it is necessary to protect persons against the imminent threat of death or serious injury or to prevent the perpetration of a particularly serious crime involving grave threat to life, and this objective cannot be addressed through means less harmful than the use of lethal force. Furthermore, in law enforcement, the proportionality principle requires a balancing of the risks posed by an individual with the potential harm to him/herself, as well as to bystanders. For its part, the IHL principle of proportionality balances the direct and concrete military advantage anticipated from an attack against a military objective with the expected

29 See footnote 8 above.

30 See Article 43 of the 1907 Hague Regulations and Article 42 of the Third Geneva Convention.

31 See *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, June 1994, para. 98, available at: www.icrc.org/ihl/INTRO/560?OpenDocument.

incidental harm to protected persons and objects (i.e. bystanders only). The determination of the rules applicable in a particular situation is therefore crucial.

In certain situations that arise in armed conflict it may not, however, be entirely clear whether IHL rules on the conduct of hostilities or rules on the use of force in law enforcement should govern. It is also sometimes difficult to draw a line between these situations in practice.

The ICRC's views on the interplay between IHL and IHRL with regard to the use of force were outlined in its 2011 report on IHL and the challenges of contemporary armed conflicts. The ICRC submitted that IHL constitutes the *lex specialis* governing the assessment of the lawfulness of the use of force against lawful targets in an IAC. It noted that the interplay of IHL rules and international human rights standards on the use of force was less clear in NIAC, and that the use of lethal force by States in NIAC required a fact-specific analysis of the interplay between the relevant rules. The report concluded that there was a need to explore the matter further.

To shed light on this issue, in 2012 the ICRC organized an expert meeting on "The use of force in armed conflicts, Interplay between the conduct of hostilities and law enforcement paradigms." The meeting sought to identify the line dividing the conduct of hostilities and law enforcement paradigms in situations of armed conflict. It paid special attention to NIACs, during which the issue of the interplay between the two paradigms is of particular significance. The meeting report subsequently published by the ICRC provided an account of the debates that took place,³² but did not necessarily reflect the organization's views.

Five case studies related to the use of force were discussed:

1. the use of force against lawful targets in armed conflict
2. riots (in which civilians and fighters are blended)
3. the fight against criminality
4. escape attempts and riots in detention
5. lack of respect for military orders (the example of checkpoints).

Provided below is an outline of the ICRC's thinking on some of the legal issues raised by the scenarios listed above.

The defining criterion for determining the rules governing the use of force against a particular individual under IHL is whether such a person is a lawful target under its norms on the conduct of hostilities. This could be the case because of a person's status (he or she is a member of regular State armed forces, as generally defined by domestic law), function (he or she is a member of irregular State forces or of a non-State armed group, by virtue of the continuous combat function performed), or conduct (he or she is a civilian directly participating in hostilities).

32 ICRC, *Expert Meeting: The use of force in armed conflicts, Interplay between the conduct of hostilities and law enforcement paradigms*, ICRC, Geneva, November 2013, available at: www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf.

In the ICRC's view, IHL constitutes the *lex specialis* governing the assessment of the lawfulness of the use of force against lawful targets in IAC. The ICRC considers that this holds true within the entire geographical scope of application of IHL in IACs.

As mentioned above, the situation is less clear in NIACs, which will require a fact-specific analysis. The ICRC submits that in NIACs, the parties to the conflict are permitted under IHL – or are not legally barred from – using force against lawful targets under the rules governing the conduct of hostilities in situations of actual hostilities (defined as the collective resort to means and methods of warfare against the enemy).

However, the situation is less clear with regard to the use of force against isolated individuals who are lawful targets under IHL but are located in regions under a State's firm and stable control, where no hostilities are taking place and it is not reasonably foreseeable that the adversary could readily receive reinforcement. Three positions may be said to currently exist. Under the first, IHL rules on the conduct of hostilities will govern, without restraints other than those found in specific IHL rules.³³ Under the second, the possible use of force in the scenario above should be governed by Recommendation IX of the ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.³⁴ Pursuant to the third view, the use of force would remain governed by the rules on law enforcement. It may be observed that the application of either of the latter two approaches may in certain limited circumstances be likely to lead to similar results in practice.

In both IAC and NIAC, the degree of control over a specific area or circumstances, and the intensity of the hostilities at the time and place of a particular operation, constitute relevant factors, among others, to assess what is "feasible" in terms of the application of the IHL rules on precautions in attack (Article 57 of Additional Protocol I). These factors are also relevant in the ICRC's view for determining whether – by operation of the IHL principles of military necessity and humanity – lethal force may be used as a first resort against a lawful target or whether Recommendation IX mentioned above should come into play.

As previously noted, parties to an armed conflict may find themselves in situations in which they are faced with both lawful targets and civilians protected

33 Under this view, while the principles of military necessity and humanity inform the entire body of IHL, they do not create obligations above and beyond specific IHL rules.

34 According to Recommendation IX: "In addition to the restraints imposed by international humanitarian law 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." Under this view, the fundamental principles of military necessity and humanity reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances. See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, pp. 77ff, available at: www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf.

against direct attack. A scenario of civilian unrest may be envisaged, or one in which criminal groups operate in areas in which hostilities against a non-State party to a NIAC are also taking place. It is submitted that, in the case of the concurrent presence of fighters and/or civilians directly participating in hostilities, as well as civilians who have not lost their protection against direct attack, a “parallel approach” should be adopted. This means that IHL rules on the conduct of hostilities would govern the use of force against lawful targets, i.e. the fighters and civilians directly participating in hostilities, bearing in mind that the principles of proportionality and precautions may prevent a direct attack if the expected incidental civilian damage would be excessive in relation to the concrete and direct military advantage anticipated. Any concomitant use of force against persons protected against direct attack would remain governed by the more restrictive rules on the use of force in law enforcement operations.³⁵

Thus, for example, if a civilian demonstration against the authorities in a situation of armed conflict were to turn violent, a resort to force in response to this would be governed by law enforcement rules. If enemy fighters were located in the crowd of rioting civilians, they could be directly targeted under IHL rules on the conduct of hostilities. However, their mere presence, or the fact that the fighters launched attacks from the crowd, would not turn the rioting civilians into direct participants in the hostilities. Thus, all precautions provided for under IHL would need to be taken to spare the civilians in case of attacks against the fighters. If it were to prove too difficult to distinguish the rioting civilians from the fighters, it might be appropriate to deal with the entire situation under law enforcement, and apply an escalation of force procedure with respect to all persons posing a threat.

A law enforcement approach would also govern the use of force in an operation to arrest a member of a criminal group that is not party to the conflict, as long as the violence perpetrated by that member cannot be deemed to constitute a direct participation in hostilities. The fact that a criminal group operates in territory controlled by the enemy, pays “taxes” to it or benefits from its protection does not mean that all violence committed by its members will constitute a direct participation in hostilities. This would hold true even if an arrest operation against a member of a criminal group not party to the conflict were to lead to concomitant hostilities against enemy fighters controlling the area in which the operation took place. Depending on the circumstances, however, the use of force by members of a criminal group alongside fighters in this scenario could be an indication of the existence of a belligerent nexus.

The use of force against rioting detainees would also be governed by the rules on law enforcement, as persons deprived of their liberty are clearly *hors de combat*, regardless of the fact that they may have been lawful targets before their capture or arrest. This will also be the case if they attempt to escape, as explicitly provided for in the Third Geneva Convention with respect to POWs.³⁶ It is only

35 See Article 50(3) of Additional Protocol I.

36 See Article 42 of the Third Geneva Convention.

if POWs or fighters successfully escape that they again become targetable under IHL rules on the conduct of hostilities.

Another difficult situation that may arise is one in which the status, function or conduct of a person appearing to pose a threat or disrespecting a military order is not immediately evident, for example when a person approaches a checkpoint, a military installation or an area restricted for military reasons. It is submitted that lack of respect for a military order alone is not sufficient to permit the use of lethal or potentially lethal force. In case of doubt as to whether such a person is a lawful target, the ICRC considers that he/she must be presumed to be protected against attack. An escalation of force procedure must thus be applied, the legal source of which would be the principle of necessity under IHRL. It should be noted, however, that application of the IHL requirement to take all feasible precautions to verify that a target is a military objective would lead to a similar need for an escalation in measures until the status of the target has been ascertained.

Finally, whether State officials who use force are members of the armed forces or of the police is not relevant under international law, even though this may be important under domestic law. In practice, if armed forces use force against persons protected against direct attack – e.g. civilians in armed conflict – the rules on the use of force in law enforcement operations will govern.³⁷ Conversely, if police forces take a direct part in hostilities against lawful targets under IHL, they must respect the IHL rules on the conduct of hostilities.

It follows from the above that when it can be reasonably expected that armed forces will have to conduct law enforcement operations or be in a situation where they will have to use force against protected civilians, they must be equipped and trained to do so in accordance with the rules governing the use of force in law enforcement operations. This will, *inter alia*, require that means less lethal than firearms are available, and that troops are adequately instructed on their use. Conversely, police forces that may be called on to take a direct part in hostilities in situations of armed conflict must be adequately equipped, and trained in IHL.³⁸

VI. Detention in armed conflict

Legal and practical issues related to the deprivation of liberty in armed conflict remain a major focus of examination and debate among governments, legal

37 It should be noted that further restrictions may be imposed by rules of engagement which could, for example, limit the use of force based on a more narrowly conceived notion (or notions) of self-defence.

38 Training would need to cover in particular the rules governing means and methods of warfare and how they differ from the rules governing the use of force in law enforcement operations, including notably that IHL prohibits using riot control agents as a method of warfare (see Article I(5) of the 1993 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (opened for signature from 13 January to 15 January 1993; entered into force 29 April 1997), 1974 UNTS 45; and Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules* (hereafter ICRC Customary IHL Study), Cambridge University Press, 2005, Rule 75).

experts, practitioners, scholars and others. Domestic and international courts, as well as other bodies, have increasingly weighed in on the application of IHL rules governing detention in both IAC and NIAC, and on the interplay of this body of law with other branches of international law. The ICRC continues to closely follow and contribute to the ongoing discussions, most recently through an opinion paper in November 2014 devoted to “Internment in Armed Conflict: Basic Rules and Challenges.”³⁹

As is well known, the deprivation of liberty in IAC is subject to an extensive treaty regime. The 1949 Geneva Conventions are universally ratified and contain more than 175 provisions regulating detention in this type of armed conflict in all its aspects. Taking into account the widespread ratification of Additional Protocol I and customary law applicable to IAC, the ICRC is of the view that IHL for the time being adequately addresses the legal protection of detainees in relation to IAC.

The IHL framework applicable to NIAC-related detention is far less developed. Common Article 3 and Additional Protocol II do provide for essential protections for detainees, but they are limited in both scope and specificity compared to those provided for in IAC by the 1949 Geneva Conventions and Additional Protocol I. Debate and disagreement persist over a range of legal and practical issues, the complexity of which has only increased in the more recent situations of extraterritorial NIAC, including of the type outlined in section III above.

The ICRC called attention to the issue of the paucity of rules governing detention in NIAC in a report to the 31st International Conference, in which it identified four specific areas of humanitarian concern that it believed any strengthening of the law applicable in NIAC should address. These are: (1) conditions of detention; (2) particularly vulnerable detainees; (3) grounds and procedures for internment; and (4) detainee transfers.

Based on Resolution 1 of the 31st International Conference, the ICRC has been undertaking a process of research, consultation and discussion with States and, where appropriate, other relevant actors, with a view to providing the 32nd International Conference with a report containing options and its recommendations on ways of strengthening the legal protection of persons deprived of their liberty. The process has included four regional consultations of government experts held throughout 2012 and 2013, two thematic consultations of government experts in 2014, and a consultation meeting for all States in 2015.

A description of the course of the consultation process and the background documents and reports prepared for each of the meetings are available on the ICRC’s website.⁴⁰ As already mentioned, the final report, entitled *Strengthening international humanitarian law protecting persons deprived of their liberty*, is

39 ICRC, Opinion Paper, “Internment in Armed Conflict: Basic Rules and Challenges,” November 2014, available at: www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges.

40 Available at: www.icrc.org/en/document/detention-non-international-armed-conflict-icrcs-work-strengthening-legal-protection-0.

among the official documents submitted to members of the 32nd International Conference for their consideration and appropriate action. Given the comprehensive nature of the research conducted and of the issues identified, as well as the options and recommendations included in the above-mentioned report, the present section will not deal further with the legal and practical challenges arising in relation to detention in armed conflict.

VII. Means and methods of warfare

1) New technologies of warfare

As rapid advances continue to be made in new and emerging technologies of warfare, notably those relying on information technology and robotics, it is important to ensure informed discussions of the many and often complex challenges raised by these new developments.

Although new technologies of warfare are not specifically regulated by IHL treaties, their development and employment in armed conflict does not occur in a legal vacuum. As with all weapon systems, they must be capable of being used in compliance with IHL, and in particular its rules on the conduct of hostilities. The responsibility for ensuring this rests, first and foremost, with each State that is developing these new technologies of warfare.

In accordance with Article 36 of Additional Protocol I, each State Party is required to determine whether the employment of a new weapon, means or method of warfare that it studies, develops, acquires or adopts would, in some or all circumstances, be prohibited by international law. Legal reviews of new weapons, including new technologies of warfare, are a critical measure for States to ensure respect for IHL. More specifically, they are a way to ensure that a State's armed forces are capable of conducting hostilities in accordance with its international obligations, and that new weapons are not employed prematurely under conditions in which respect for IHL cannot be guaranteed. However, despite this legal requirement and the large number of States that develop or acquire new weapon systems every year, only a small number are known to have procedures in place to carry out legal reviews of new weapons.⁴¹

Although it is undisputed that new weapons must be capable of being used in accordance with IHL's rules governing the conduct of hostilities, difficulties in interpreting and applying these rules to new technologies of warfare may arise in view of their unique characteristics, the intended and expected circumstances of their use, and their foreseeable humanitarian consequences. Ultimately, these challenges may raise the question of whether existing law is sufficiently clear or whether there is a need to clarify IHL or develop new rules to deal with these challenges.

41 ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, ICRC, Geneva, January 2006, available at: www.icrc.org/eng/assets/files/other/icrc_002_0902.pdf.

Cyber warfare and autonomous weapon systems are but two of the new technologies of warfare that raise a range of legal, ethical and humanitarian issues, only some of which are briefly mentioned below.

i) Cyber warfare

Cyberspace is a virtual space that provides worldwide interconnectivity. This feature is generally considered of great utility in peacetime, in particular in the economic, social, information and communication realms.

However, it also entails new risks and new vulnerabilities. Thus, the hostile use of cyberspace has been increasingly at the forefront of security concerns for governments, individuals, businesses and the media. While most operations referred to as “cyber attacks” do not have anything to do with armed conflict, the development of military cyber capabilities and their possible use in armed conflict has contributed to a growing sense of insecurity among States and other actors.

The ICRC understands “cyber warfare” as operations against a computer or a computer system through a data stream, when used as means and methods of warfare in the context of an armed conflict, as defined under IHL. Cyber warfare can be resorted to as part of an armed conflict that is otherwise waged through kinetic operations. The notion of cyber warfare might also encompass the employment of cyber means in the absence of kinetic operations when their use amounts to an armed conflict, although no State is known to have publicly qualified an actual hostile cyber operation as such.

Cyber warfare has fortunately not led to dramatic humanitarian consequences to date. While the military potential of cyberspace is not yet fully understood, it nevertheless appears that cyber attacks against transportation systems, electricity networks, dams, and chemical or nuclear plants are technically possible. Such attacks could have wide-reaching consequences, resulting in high numbers of civilian casualties and significant civilian damage. Perhaps more likely, cyber operations could be used to manipulate civilian infrastructure or services, leading to malfunctions or disruptions not necessarily causing immediate death or injury. The effects of such “bloodless” attacks could obviously be severe – for instance, if power or water supplies were to be interrupted or if a banking system were to be taken down.

Despite the fact that it is relatively new and fast developing, cyber technology, as already noted, does not occur in a legal vacuum. The ICRC welcomes the fact that the 2013 and 2015 Reports of the United Nations Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security confirmed that “[i]nternational law, and in particular the Charter of the United Nations, is applicable ...”⁴² and noted “the established international legal principles, including, where applicable, the principles of humanity, necessity, proportionality

42 See *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, A/68/98, 24 June 2013, available at: www.un.org/en/ga/search/view_doc.asp?symbol=A/68/98, para. 19.

and distinction.”⁴³ An increasing number of States and international organizations have publicly asserted that IHL applies to cyber warfare.

Already in 2011 the ICRC stated that the employment of cyber capabilities in armed conflict must comply with all the principles and rules of IHL, as is the case with any other weapon, means or method of warfare, new or old. It makes no difference whether cyberspace should be considered: a new war-fighting domain similar to air, land, sea and outer space; a different type of domain because it is man-made while the former are natural; or not a domain as such. Customary IHL rules on the conduct of hostilities apply to all means and methods of warfare, wherever they are used. In its Advisory Opinion on the legality of the threat or use of nuclear weapons, the International Court of Justice recalled that the established principles and rules of humanitarian law applicable in armed conflict apply “to all forms of warfare and to all kinds of weapons,” including “those of the future” (paragraph 86).⁴⁴ This is also made clear in Article 36 of Additional Protocol I. Furthermore, Article 49(3) of Additional Protocol I shows that the Protocol’s rules were meant to apply to land warfare and to all other types of warfare which may affect civilians on land. In this sense, there is little doubt that cyber warfare will be waged at least partly from infrastructure located on land against targets on land and that it risks affecting civilians on land.

It must be underlined that asserting that IHL applies to cyber warfare is not an encouragement to militarize cyberspace and should not, in any way, be understood as legitimizing cyber warfare. Indeed, any resort to force by States, whether cyber or kinetic in nature, always remains governed by the UN Charter and *ius ad bellum*, as recalled in the preamble of Additional Protocol I (paragraph 2). On the contrary, asserting that IHL applies reaffirms that, despite the fact that cyber warfare is not expressly prohibited or regulated by existing treaties, limits exist under international law if and when States and/or non-State armed groups resort to cyber operations during armed conflict.

Asserting that IHL applies to cyber warfare is, however, only a first step, because cyber warfare raises a number of challenges for the interpretation and application of IHL, as highlighted in the 2011 report on IHL and the challenges of contemporary armed conflicts. Challenges include: the difficulties created by the anonymity on which cyberspace is built; the lack of clarity with regard to the application of IHL to cyber operations in the absence of kinetic operations; the debate pertaining to the notion of “attack” under IHL rules governing the conduct of hostilities; and challenges in applying these rules to cyber warfare, in particular the prohibition of indiscriminate attacks and the rules on precautions in attacks.

Over the last four years, the ICRC has engaged in a bilateral, confidential dialogue with a number of States on the potential human cost of cyber warfare

43 See *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, A/70/174, 22 July 2015, available at: www.un.org/ga/search/view_doc.asp?symbol=A/70/174, para. 28.

44 ICJ, *Legality of the threat or the use of nuclear weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 226, 1996.

and on the above-mentioned challenges, as well as in debates in academic and other public fora.⁴⁵

Challenges in safeguarding essential civilian infrastructure against cyber attacks

There has been increasing concern in recent years about safeguarding essential civilian infrastructure against cyber attacks, and calls to protect it from hostile cyber operations, including through the development of norms of acceptable behaviour in cyberspace. In this context, it should be noted that cyber operations amounting to an attack under IHL⁴⁶ and directed at essential civilian infrastructure in armed conflict already constitute violations of IHL, unless such infrastructure is simultaneously used for military purposes in a way that turns it into a military objective. For example, drinking water and electricity networks that serve the civilian population, public health infrastructure and banks are first and foremost civilian objects. Furthermore, water systems, in particular, enjoy special protection as objects indispensable to the survival of the population. Similarly, dams and nuclear electricity plants are usually protected against direct attack because they do not constitute military objectives. Even if they were to become military objectives in particular circumstances, IHL prohibits their attack or at least requires that particular care be taken to avoid the release of dangerous forces and consequent severe losses among the civilian population. This is not to deny that new norms might be useful or even needed, but rather to stress that if they are developed they should build upon and strengthen what already exists.

The extent of protection based on the general rules on the conduct of hostilities, as contained in treaty or customary IHL, will depend on how certain notions and concepts are interpreted by States.

By way of example, the manner in which the notion of cyber “attack” is defined under the rules governing the conduct of hostilities (see Article 49 of Additional Protocol I) will greatly influence the protection that IHL affords to essential civilian infrastructure. The debate centres around the notion of loss of functionality of an object, given that in cyberspace it is possible to render objects dysfunctional without physically damaging them.

One view is to consider that cyber attacks are only those operations that cause violence to persons or physical damage to objects. A second approach is to make the analysis dependent on the action necessary to restore the functionality of the object, network or system. A third approach is to focus on the effects that the operation has on the functionality of the object.

45 By way of example, the ICRC contributed as an observer to the group of experts that drafted the *Tallinn Manual on the International Law Applicable to Cyber Warfare*, published in 2013. For more information on the ICRC’s involvement and its views see “What limits does the law of war impose on cyber attacks? Questions and answers,” 28 June 2013, available at: www.icrc.org/eng/resources/documents/faq/130628-cyber-warfare-q-and-a-eng.htm.

46 According to Article 49(1) of Additional Protocol I, “‘Attacks’ means acts of violence against the adversary, whether in offence or in defence.”

It is submitted that all operations expected to cause death, injury or physical damage constitute attacks, including when such harm is due to the foreseeable indirect or reverberating effects of an attack, such as the death of patients in intensive-care units caused by a cyber attack against the electricity network that then cuts the hospital electricity supply.

The ICRC also considers that an operation designed to disable an object – for example a computer or a computer network – constitutes an attack under the rules on the conduct of hostilities, whether or not the object is disabled through kinetic or cyber means.⁴⁷ Indeed, the reference to “neutralization” in the definition of military objective (Article 52 of Additional Protocol I) would be superfluous if an operation aimed at impairing the functionality of an object (i.e. its neutralization) would not constitute an attack. Furthermore, an overly restrictive understanding of the notion of attack would be difficult to reconcile with the object and purpose of the rules on the conduct of hostilities, which is to ensure the protection of the civilian population and civilian objects against the effects of hostilities. Indeed, under such a restrictive understanding, a cyber operation that is directed at making a civilian network (electricity, banking, communications or other network) dysfunctional, or risks causing this incidentally, might not be covered by the IHL prohibition of directing attacks against civilian objects, the prohibitions of indiscriminate or disproportionate attacks and the principle of precautions in attack, despite the potentially severe consequences of such operations for the civilian population.

Based on the current understanding of the IHL notion of “attack” in kinetic operations, it is, however, evident that not all cyber operations would constitute attacks. First, the concept of attack does not include espionage.⁴⁸ Second, the rules on the conduct of hostilities do not prohibit all operations that interfere with civilian communication systems. For instance, the jamming of radio communications or television broadcasts has not traditionally been considered an attack in the sense of IHL.⁴⁹

More generally, in order to differentiate between operations that amount to attacks and those that do not, it has been suggested that the criterion of “inconvenience” should be relied upon when it comes to the effects of a particular operation. However, what is covered by “inconvenience” is not defined and this terminology is not used in IHL.

Even cyber operations that would constitute “military operations” without amounting to “attacks” *per se* are governed by the principle of distinction. According to this principle, there is an obligation to distinguish at all times

47 See *International Humanitarian Law and the challenges of contemporary armed conflicts: Report*, October 2011 (see footnote 5 above).

48 Admittedly, it might be more difficult for the one subject to such acts to distinguish between espionage and cyber attacks in cyberspace (as opposed to in kinetic operations), as most cyber operations are based on obtaining access to a computer system. Once such access is obtained, it may be used to gather data (espionage), or to manipulate or destroy data or to direct the system in ways to cause damage or to destroy physical objects, either directly or indirectly.

49 The distinction between attacks and interferences with communications that do not amount to an attack is probably less clear in cyber operations than in more traditional kinetic or electromagnetic operations.

between civilians and civilian objects on the one hand, and military objectives on the other, and to take constant care in the conduct of military operations to spare the former.⁵⁰

Challenges in protecting cyber infrastructure on which essential civilian infrastructure relies

In order to protect essential civilian infrastructure that relies on cyberspace, it is also crucial to protect the infrastructure of cyberspace itself. The challenge lies, however, in the interconnectedness of civilian and military networks. Most military networks rely on civilian cyber infrastructure, such as undersea fibre-optic cables, satellites, routers or nodes. Conversely, civilian vehicles, shipping, and air traffic controls are increasingly equipped with navigation systems that rely on global positioning system (GPS) satellites, which are also used by the military. Civilian logistical supply chains (for food and medical supplies) and other businesses use the same web and communication networks through which some military communications pass. Thus, it is to a large extent impossible to differentiate between purely civilian and purely military cyber infrastructures.

The traditional understanding of the notion of military objective is that when a particular object is used for both civilian and military purposes (so-called “dual-use objects”), it becomes a military objective (except for the separable parts thereof). A strict application of this understanding could lead to the conclusion that many objects forming part of the cyberspace infrastructure would constitute military objectives and would not be protected against attack, whether cyber or kinetic. This would be a matter of serious concern because of the ensuing impact that such a loss of protection could have in terms of disruption of the ever-increasing concomitant civilian usage of cyber space. However, because cyberspace is designed with a high level of redundancy, one of its characteristics is the ability to immediately reroute data traffic. This inbuilt resilience needs to be taken into account when assessing whether the target’s destruction or neutralization would actually offer a definite military advantage in the circumstances ruling at the time, as required by the second prong of the definition of a military objective.

Even if certain parts of the cyberspace infrastructure on which essential civilian functions rely were to become lawful targets, any attack would remain governed by the prohibition of indiscriminate attacks and the rules of proportionality and precautions in attack. Assessing the expected incidental harm of any planned operation is of critical importance for the application of both principles. Precisely because civilian and military networks are so interconnected, incidental civilian harm must be expected in most cases, and all reasonably foreseeable harm must be taken into account, including incidental harm indirectly caused by the reverberating effects of the attack. For example, attacks against root servers or undersea cables would raise concerns under the

50 Articles 48 and 57(1) of Additional Protocol I; ICRC Customary IHL Study, Rules 1 and 15.

prohibition of indiscriminate attacks because of the difficulty of limiting the effects of such attacks, as required by IHL. In this context, the protection afforded by the law of neutrality would also need to be considered.

Challenges in protecting essential civilian data

There is also increasing concern about safeguarding essential civilian data. With regard to data belonging to certain categories of objects that enjoy specific protection under IHL, the protective rules are comprehensive. For example, the obligation to respect and protect medical facilities must be understood as extending to medical data belonging to those facilities. However, it would be important to clarify the extent to which civilian data that does not benefit from such specific protection, such as social security data, tax records, bank accounts, companies' client files or election lists or records, is already protected by the existing general rules on the conduct of hostilities. Deleting or tampering with such data could quickly bring government services and private businesses to a complete standstill, and could cause more harm to civilians than the destruction of physical objects. The conclusion that this type of operation would not be prohibited by IHL in today's ever more cyber-reliant world – either because deleting or tampering with such data would not constitute an attack in the sense of IHL or because such data would not be seen as an object that would bring into operation the prohibition of attacks on civilian objects – seems difficult to reconcile with the object and purpose of this body of norms.

The importance of feasible measures to protect civilians and civilian objects against the effects of hostilities

IHL also requires that the parties to a conflict take all feasible measures to protect civilians and civilian objects under their control against the effects of hostilities. This obligation has to be implemented already in peacetime, especially with regard to fixed installations. While cyberspace is a virtual global domain, it would appear that the obligation to take precautions against the effects of attacks extends at least to the physical infrastructure of cyberspace (and to objects whose functioning depends on that infrastructure) located in a State's territory, or in any territory that may be occupied by a party to the conflict.

This raises the question of the measures that States must take to protect the civilian population under their control from the danger of cyber operations, including in the case of a cyber operation against the State's essential infrastructure. Measures that could be considered include: segregating military from civilian cyber infrastructure and networks; segregating computer systems on which essential civilian infrastructure depends from the internet; backing up important civilian data; using antivirus measures; and making advance arrangements to ensure the timely repair of important computer systems against foreseeable kinds of cyber attacks. Other avenues that could be explored – requiring international cooperation and, probably, innovative solutions to

technical problems – would be to work on the identification in cyberspace of the cyber infrastructure and networks serving specially protected objects like hospitals, or to draw inspiration from the protection attached to demilitarized or protected zones and to assess whether such an approach could usefully be transposed into the cyber realm.

The importance of the legal review of cyber capabilities

These and other issues underscore why it is important that States that may develop or acquire cyber-warfare capacities, whether for offensive or defensive purposes, assess their lawfulness under IHL. Legal review, as specifically required by Article 36 of Additional Protocol I, is essential to ensuring that armed forces and other government agencies that may potentially resort to cyber operations in an armed conflict are able to abide by their obligations under international law. However, the legal review of cyber weapons, means and methods of warfare may present a number of challenges. Military cyber capabilities might be less standardized than kinetic weapons, especially if designed for a specific operation; furthermore, they are likely to be subject to constant adaptation, including to respond to the software security upgrades that a potential target will undergo.

In sum, the ICRC believes that clarifying how IHL applies to cyber warfare would help shed light on whether its rules are sufficiently clear in view of the specific characteristics and foreseeable humanitarian impact of cyber warfare. Given that this type of warfare poses novel questions, there may also be a need to develop IHL as technologies evolve or as the human cost of cyber warfare becomes better understood.

ii) Autonomous weapon systems

During the past 15 years, there has been a dramatic increase in the development and use of robotic systems by armed forces, in particular various armed unmanned systems that operate in the air, on land, and in water, including the high seas. The gradual increase in the sophistication of military machinery and in the physical distance of soldiers from the battlefield is a process as old as war itself. However, recent developments in robotics and computing, combined with military operational demands, raise the prospect of reducing, or removing altogether, direct human control over weapon systems and the use of force. This paradigm shift is not a sudden development, but is the result of the incremental increase over time of autonomy in weapon systems, specifically in the “critical functions” of selecting and attacking targets.

Debates on autonomous weapon systems have expanded dramatically in recent years in diplomatic, military, scientific, academic and public fora. These have included expert discussions in the framework of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001 (Convention on Certain Conventional Weapons

or CCW) in 2014 and 2015, and expert discussions convened by the ICRC in 2014. Views on this complex subject, including those of the ICRC, continue to evolve as a better understanding is gained of current and potential technological capabilities, the military purpose of autonomy in weapons, and the resulting issues regarding compliance with IHL and ethical acceptability.

Definitions

There is no internationally agreed definition of autonomous weapon systems,⁵¹ but common to various proposed definitions is the notion of a weapon system that can independently select and attack targets. On this basis, the ICRC has proposed that “autonomous weapon systems” is an umbrella term that would encompass any type of weapon systems, whether operating in the air, on land or at sea, with autonomy in its “critical functions,” meaning a weapon that can select (i.e. search for or detect, identify, track, select) and attack (i.e. use force against, neutralize, damage or destroy) targets without human intervention. After initial activation, it is the weapon system itself – using its sensors, programming and weapon(s) – that takes on the targeting processes and actions that are ordinarily controlled directly by humans.

At a fundamental level, it is autonomy in the critical functions that distinguishes autonomous weapon systems from all other weapon systems, including armed drones in which critical functions are controlled remotely by a human operator.

Some weapon systems in use today have autonomy in their critical functions. These include air and missile defence weapon systems, ground vehicle “active protection” weapon systems, and border or perimeter weapon systems (sometimes called “sentry guns”), as well as loitering munitions and armed underwater vehicles. Many of these weapon systems have autonomous “modes,” meaning they can be “switched on” to operate autonomously for fixed periods of time. Most tend to be highly constrained in the tasks they are used for (e.g. defensive rather than offensive operations), the types of targets they attack (vehicles and other objects rather than personnel), and the circumstances in which they are used (in simple, relatively predictable and constrained environments rather than complex, unpredictable environments). Importantly, it seems that most of these existing weapons are overseen in real time by a human operator.

However, future autonomous weapon systems might be given more freedom of action to determine their targets, to operate outside tightly constrained spatial and temporal limits, and to react to rapidly changing circumstances. The current pace of technological developments lends urgency to the consideration of the legal, humanitarian and ethical implications of these weapons.

51 Various terminology used to describe such systems includes “lethal autonomous weapon systems (LAWS),” “lethal autonomous robots (LARS)” and “killer robots.”

Compliance of autonomous weapon systems with IHL

Based on the state of current and foreseeable robotics technology, ensuring that autonomous weapon systems can be used in compliance with IHL will pose a formidable technological challenge as these weapons are assigned more complex tasks and deployed in more dynamic environments than has been the case until now.

Key challenges include whether the weapon system would be capable of autonomously distinguishing military objectives from civilian objects, combatants from civilians, and active combatants from persons *hors de combat*. Another key challenge is whether a weapon could be programmed to sense and weigh up the many contextual factors and variables required to determine whether the attack may be expected to cause incidental civilian casualties and damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, as required by the rule of proportionality. Likewise, the ability to programme a weapon to cancel or suspend an attack if it becomes apparent that the target is not a military objective or is subject to special protection, or that the attack may be expected to violate the rule of proportionality, as required by the rules on precautions in attack, appears a formidable challenge.

Thus, for autonomous weapon systems intended for use in contexts where they are likely to encounter protected persons or objects, there are serious doubts as to whether it is technically possible to programme them to carry out the complex, context-dependent assessments required by the IHL rules of distinction, proportionality and precautions in attack. These are inherently qualitative assessments in which unique human reasoning and judgement will continue to be required.

In view of these challenges, there are serious doubts about the capability of developing and using autonomous weapon systems that would comply with IHL in all but the narrowest of scenarios and the simplest of environments, at least for the foreseeable future. In this respect, it seems evident that overall human control or oversight over the selection and attack of targets will continue to be required to ensure respect for IHL. The kind and degree of human control or oversight required to ensure compliance of an autonomous weapon system with IHL will depend on the type of autonomous weapon system, the tasks it is designed to carry out, the environment in which it is intended to be used, and the types of targets it is programmed to attack, among other factors.

Legal review of autonomous weapon systems

The above challenges will need to be carefully considered by States when carrying out legal reviews of any autonomous weapon system they develop or acquire, as required by IHL. As with all weapons, the lawfulness of a weapon with autonomy in its critical functions depends on its specific characteristics, and whether, given

those characteristics, it can be employed in conformity with the rules of IHL in all of the circumstances in which it is intended and expected to be used. The ability to carry out such a review entails fully understanding the weapon's capabilities and foreseeing its effects, notably through testing. Yet foreseeing such effects will become increasingly difficult if autonomous weapon systems are increasingly able to determine their own actions in complex environments.

Predictability about the actions of an autonomous weapon system in the context in which it is to be deployed must be sufficiently high to allow an accurate legal review. Indeed, deploying a weapon system whose effects are wholly or partially unpredictable would create a significant risk that IHL will not be respected. In this regard, a key question for the reviewer is how to evaluate and mitigate the risks of using the weapon if its performance is unpredictable. The risks may be too high to allow the weapon's use; otherwise, mitigating the risks may require appropriate levels of human control over the critical functions of the weapon system, consequently limiting or even obviating the weapon's autonomy.

An additional challenge for reviewing the legality of an autonomous weapon system is the absence of standard methods and protocols for testing these weapons. This too may affect the accuracy of the legal review.

Accountability for the use of autonomous weapon systems

Some have raised concerns that the loss of human control over autonomous weapon systems may lead to an "accountability gap" in case of violations of IHL. Others are of the view that no such gap would ever exist as there will always be a human involved in the decision to deploy the weapon to whom responsibility could be attributed. Still, it is unclear how responsibility could be attributed in relation to unpredictable "acts" of autonomous weapons.

For instance, under IHL and international criminal law, the lack of control over, or the unpredictability of, an autonomous weapon system could make it difficult to find individuals involved in the programming and deployment of the weapon liable for serious violations of IHL. They may not have the knowledge or intent required for such a finding, owing to the fact that the machine takes the targeting decisions. Moreover, programmers might not have knowledge of the concrete situations in which at a later stage the weapon would be deployed and in which IHL violations would occur. On the other hand, a programmer who intentionally programmes an autonomous weapon to commit war crimes would certainly be criminally liable. Likewise, a commander would be liable for deciding to use autonomous weapon systems in an unlawful manner, for example deploying in a populated area an anti-personnel autonomous weapon that is incapable of distinguishing civilians from combatants. In addition, a commander who knowingly decides to deploy an autonomous weapon whose performance and effects he/she cannot predict may be held criminally responsible for any serious violations of IHL that ensue, to the extent that his/her decision to deploy the weapon is deemed reckless under the circumstances.

Under the law of State responsibility, in addition to accountability for violations of IHL committed by its armed forces, a State could be held liable for violations of IHL caused by an autonomous weapon system that it has not, or has inadequately, tested or reviewed prior to deployment. Under the laws of product liability, manufacturers and programmers could also be held accountable for errors in programming or for the malfunction of an autonomous weapon system.

Autonomous weapon systems under the dictates of public conscience

As autonomy increases in the critical functions of weapon systems, a point is reached where humans are so far removed in time and space from the selection and attack of targets that human decision-making regarding the use of force is substituted with machine decision-making. This raises profound moral and societal questions about the role and responsibility of humans in the use of force and the taking of human life.

The fundamental question at the heart of concerns about autonomous weapon systems, irrespective of their compliance with IHL, is whether the principles of humanity and the dictates of public conscience⁵² would allow machines to make life-and-death decisions in armed conflict without human involvement. The debates of recent years among States, experts, civil society and the public have shown that there is a sense of deep discomfort with the idea of any weapon system that places the use of force beyond human control.

The way forward: Meaningful human control over the use of force in armed conflict

Discussions among government experts in the CCW in 2014 and 2015 have shown that there is broad agreement that meaningful, appropriate or effective human control over the critical functions of weapon systems must be retained, whether for legal, ethical and/or policy reasons. In view of the rapid advances in military robotics, there is now a need for States to take concrete steps to prevent the loss of human control over the use of force in armed conflict.

Experience with existing autonomous weapon systems can provide guidance on where the limits of autonomy in the critical functions of weapon systems should lie. In this respect, the ICRC encourages States that have deployed, or are currently developing, autonomous weapon systems to share their experience of how they are ensuring that these can be used in compliance with IHL, and of the limits and conditions they are fixing on the use of these weapons,

52 The “principles of humanity and the dictates of public conscience” are mentioned notably in Article 1(2) of Additional Protocol I and in the preamble of Additional Protocol II, referred to as the Martens Clause. In its 1996 Advisory Opinion on the legality of the threat or use of nuclear weapons (see footnote 44 above), the ICJ has affirmed that the applicability of the Martens Clause “is not to be doubted” (para. 87) and that it has “proved to be an effective means of addressing the rapid evolution of military technology” (para. 78).

including the required level of human control, be it for legal, ethical and/or policy reasons.

2) The use of explosive weapons in populated areas

A pattern of increasing harm in contemporary armed conflicts

Hostilities are increasingly being conducted in population centres, thereby exposing civilians to heightened risks of harm. This trend of contemporary armed conflicts is only likely to continue with growing urbanization. It is compounded by the fact that belligerents often avoid facing their enemy in the open, intermingling instead with the civilian population. Yet, armed conflicts often continue to be waged with weapon systems originally designed for use in open battlefields. There is generally no cause for concern when such weapons are used in open battlefields, but when they are used against military objectives located in populated areas they are prone to indiscriminate effects, often with devastating consequences for the civilian population.

Indeed, warfare in populated areas using explosive weapons that have a wide impact area exacts a terrible toll on civilians. Recent armed conflicts have confirmed that the use of such weapons is a major cause of civilian death and injury and destruction and damage of civilian residences and critical civilian infrastructure, with consequent disruption to essential services, such as health care and water distribution, and displacement of the civilian population. In terms of effects on people's health, these are not limited to death, physical injury and long-term disability, but also include the long-term impact on mental well-being. The use of explosive weapons in populated areas also affects the ability of health-care facilities and services to operate, to cope with the influx of numerous wounded people and the particular injuries they present, and to provide adequate care. The foregoing effects are accentuated in contexts where the use of explosive weapons is protracted, with the consequent decline of essential services over time and serious risks for public health.

The ICRC continues to witness these effects first-hand as it assists the victims of armed conflicts involving the use of explosive weapons in populated areas. The ICRC has raised its concerns with the parties to such armed conflicts as part of its bilateral and confidential dialogue on the conduct of hostilities. Since 2009, it has also been publicly expressing its concerns regarding explosive weapons in populated areas.

In its report submitted to the 31st International Conference in 2011, the ICRC stated that “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.”⁵³

53 See *International Humanitarian Law and the challenges of contemporary armed conflicts: Report*, October 2011, available at: www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf, p. 42.

In 2013, the Movement as a whole called upon States to “strengthen the protection of civilians from the indiscriminate use and effects of explosive weapons, including through the rigorous application of existing rules of international humanitarian law, and to avoid using explosive weapons with a wide impact area in densely populated areas.”⁵⁴

In parallel, the UN secretary-general has, consistently since 2009, drawn the attention of UN member States to the need to strengthen the protection of civilians in view of the humanitarian impact of the use of explosive weapons in populated areas, as have UN agencies and non-governmental organizations. A growing number of States are also acknowledging the humanitarian concerns raised by this phenomenon.

The ICRC continues to document the impact on civilians of the use of these weapons in a range of armed conflicts. It has also been looking more closely at the technical characteristics of certain types of explosive weapons that may foreseeably have wide-area effects when used in populated areas. It has been engaging in dialogue with selected armed forces to gain a better understanding of existing military policy and practice relevant to the choice and use of explosive weapons in populated areas. It has also deepened its analysis of the IHL rules that frame the use of explosive weapons in populated areas. To help shape debates and its own views on these issues, the ICRC convened a meeting of government and independent experts in February 2015.⁵⁵ The ICRC’s current observations and views are outlined below.

Framing the issue: The use of “explosive weapons” with a “wide impact area” in “densely populated areas”

Explosive weapons, that is weapons that injure or damage by means of explosive force,⁵⁶ may have a “wide impact area” – or “wide-area effects” – when used in populated areas due to:

- the large destructive radius of the individual munition used, i.e. its large blast and fragmentation range or effect (such as large bombs, large-calibre mortars and rockets, large guided missiles, and heavy artillery projectiles);
- the lack of accuracy of the delivery system (typically indirect fire weapons, such as mortars, rockets, and artillery (especially when using unguided munitions) and unguided air-delivered bombs); or
- the weapon system being designed to deliver multiple munitions over a wide area (such as multiple rocket-launcher systems).

54 Resolution 7 of the 2013 Council of Delegates, “Weapons and international humanitarian law” (CD/13/R7), para. 4.

55 ICRC, *Expert meeting – Explosive weapons in populated areas: Humanitarian, legal, technical and military aspects*, ICRC, Geneva, June 2015.

56 An “explosive weapon” is defined as a weapon activated by the detonation of a high explosive substance creating a blast and fragmentation effect.

In this respect, the issue of explosive weapons in populated areas concerns not one single weapon, but a range of different conventional weapon systems, and consideration of the circumstances of their use, including the typical vulnerabilities of civilians living in populated areas, is needed.

Insofar as improvised explosive devices (IEDs) may fall into one of the above three general categories of explosive weapons, they are also a cause for concern when used in populated areas.

The terms “densely populated areas” and “populated areas” should be understood as synonymous with “concentration of civilians,” the latter being the only of these terms defined by IHL treaties, as in “a city, town, village or other area containing a similar concentration of civilians or civilian objects.”⁵⁷

Direct attacks against civilians or civilian objects are beyond the focus of the present discussion on explosive weapons in populated areas, as such attacks are clearly unlawful under IHL regardless of the types of weapons used.

In sum, the challenges relating to “explosive weapons in populated areas” discussed here refer to the use of explosive weapons that, due to their wide-area effects, may foreseeably cause significant civilian casualties and/or damage to civilian objects, as well as long-term harm to the civilian population, when used against a military objective located in a concentration of civilians.

A significant likelihood of indiscriminate effects

In view of the humanitarian consequences outlined above, and as previously stated, the ICRC is of the view that explosive weapons with a wide impact area should not be used in densely populated areas due to the significant likelihood of indiscriminate effects, meaning that their use against military objectives located in populated areas is likely to fall foul of the IHL rules prohibiting indiscriminate and disproportionate attacks.

Indiscriminate attacks are those of a nature to strike military objectives and civilians or civilian objects without distinction, notably because they employ means or methods of warfare that cannot be directed at a specific military objective or the effects of which cannot be limited as required by IHL.⁵⁸ Disproportionate attacks and area bombardment are treated as particular forms of indiscriminate attacks.

57 The term “concentration of civilians” appears in the rule prohibiting area bombardment, which is a type of indiscriminate attack specified in Article 51(5)(a) of Additional Protocol I and Articles 3(9) and 7(3) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (adopted 3 May 1996; entered into force 3 December 1998), 2048 UNTS 93 (hereafter Protocol II to the CCW as amended). The term “concentration of civilians” appears, and is defined, in Article 1(2) of the Protocol on Prohibitions or Restrictions of the Use of Incendiary Weapons (hereafter Protocol III) of the CCW (adopted 10 October 1980; entered into force 2 December 1983), 1342 UNTS 137, as “any concentration of civilians, be it permanent or temporary, such as in inhabited parts of cities, or inhabited towns or villages, or as in camps or columns of refugees or evacuees, or groups of nomads.” The term “densely populated areas,” which appears in the rule requiring precautions against the effects of attack in Article 58(b) of Additional Protocol I, is not defined in the Protocol or other IHL treaties.

58 Article 51(4) of Additional Protocol I. This is a rule of customary IHL in both international and non-international armed conflicts.

The rule of proportionality prohibits attacks “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.”⁵⁹ Area bombardment is defined as “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.”⁶⁰ The foregoing rules must be respected by the parties to an armed conflict in all circumstances,⁶¹ even if alternative, more discriminate weapons or tactics are not available to them.

In addition to these obligations, the IHL rule of precautions in attack requires the parties to an armed conflict, in the conduct of their military operations, to take constant care to spare the civilian population, individual civilians and civilian objects.⁶² This rule notably requires “those who plan or decide upon an attack” 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 loss of civilian life, injury to civilians and damage to civilian objects.”⁶³ When conducting hostilities in populated areas, the rule of precautions may require the parties to choose the most precise weapon available, or consider alternative weapons and/or tactics.

The assessment of whether an attack is indiscriminate or disproportionate, and whether all feasible precautions have been taken, must not be based on hindsight but on the perspective of the commander based on the information available to him/her at the time of the attack. Such information includes the foreseeable effects of the weapons at his/her disposal in view of their inherent characteristics, as well as the circumstances of their use, including the physical environment in which the military objective is located and the vulnerability of the surrounding civilian population and civilian objects. Of these factors, the choice of weapon and the manner in which it will be used are those over which the commander has the greatest control. In this regard, the variables related to the choice and use of weapon that the commander can manipulate to respect the above-mentioned IHL rules include: the type and size of the warhead (munition), the type of fuse, the delivery system, and the distance from which the weapon is launched, as well as the angle and timing of the attack. The technical skills of the armed forces in the selection and use of weapons are also critical factors that will

59 Article 51(5)(b) of Additional Protocol I. This is a rule of customary IHL in both international and non-international armed conflicts.

60 Article 51(5)(a) of Additional Protocol I. This is a rule of customary IHL in both international and non-international armed conflicts.

61 See Article 51(1) of Additional Protocol I.

62 Article 57(1) of Additional Protocol I. This is a rule of customary IHL in both international and non-international armed conflicts.

63 Article 57(2)(a)(ii) of Additional Protocol I. This is a rule of customary IHL in both international and non-international armed conflicts. Feasible precautions are described in Article 3(10) of Protocol II to the CCW as amended as those that are “practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”

influence the outcome of an attack.⁶⁴ Nonetheless, even after taking all such measures and precautions, certain explosive weapons may be prone to causing significant incidental effects on civilians and civilian objects when used in populated areas.

Although there is no dispute that any use of explosive weapons in populated areas must comply with the above IHL rules, there are divergent views on whether these rules sufficiently regulate the use of such weapons, or whether there is a need to clarify their interpretation or to develop new standards or rules. Based on the effects of explosive weapons in populated areas being witnessed today, there are serious questions regarding how the parties using such weapons are interpreting and applying IHL. Divergent practice of militaries, and contrasting views among experts and in the case law of international criminal tribunals regarding what is or is not legally acceptable, may point to ambiguities in IHL and the need for States to clarify their interpretation of the relevant IHL rules or to develop clearer standards to effectively protect civilians.

In any respect, the prohibition of indiscriminate attacks and the rules of proportionality and precautions in attack, each of which strikes a careful balance between considerations of military necessity and of humanity, were developed by States with the overarching objective of protecting civilians and civilian objects against the effects of hostilities. Any challenges that may arise in their interpretation and application to the use of explosive weapons in populated areas must be resolved with this overarching objective in mind. A number of these challenges are outlined below.

The use of explosive weapons in populated areas and the prohibition of indiscriminate attacks

The prohibition of indiscriminate attacks takes into account the fact that means and methods of warfare that can be used perfectly legitimately in some situations could, in other circumstances (including due to the manner in which they are used), be of a nature to strike military objectives and civilians and civilian objects without distinction.⁶⁵ Warfare in populated areas is certainly a situation that may render indiscriminate explosive weapons that could be lawfully used in other circumstances, such as an open battlefield.

The prohibition of indiscriminate attacks includes those that employ a method or means of delivery that cannot be directed at a specific military objective.⁶⁶ It is unclear what States consider to be the degree or standard of

64 For the range of factors regarding weapons selection and use, see ICRC, *Expert meeting – Explosive weapons in populated areas: Humanitarian, legal, technical and military aspects*, ICRC, Geneva, June 2015, pp. 5–6 and 24–30. See also Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (hereafter *Commentary on the Additional Protocols*), ICRC, Martinus Nijhoff Publishers, Geneva, 1987, para. 2212.

65 See *Commentary on the Additional Protocols*, para. 1962.

66 See Article 51(4)(b) of Additional Protocol I. Article 3(8) of Protocol II to the CCW as amended includes, in its definition of “indiscriminate use” of mines, booby-traps and other devices, any placement of such

accuracy of a weapon that would be acceptable under this rule, generally or in a given operational situation. At any rate, any such standard of accuracy must be consistent with the general aim of protecting civilians from the effects of hostilities.

Still, the inherent inaccuracies of certain types of explosive weapon systems – such as many of the artillery, mortar and multiple rocket-launcher systems in use today, especially when using unguided munitions, as well as unguided air-delivered bombs – raise serious concerns under the prohibition of indiscriminate attacks when used in populated areas. While increasing the accuracy of delivery systems would help reduce the weapons' wide-area effects in populated areas, accuracy could be obviated by the use of large-calibre munitions – i.e. munitions that have a large destructive radius relative to the size of the military objective – which might still be in violation of IHL.

The interpretation of the prohibition of indiscriminate attacks may become more demanding with the development of new means and methods of warfare, notably with advances in precision weaponry. For example, the meaning of “clearly separate and distinct” military objectives in the prohibition of area bombardment is understood to mean a distance at least sufficiently large to permit the individual military objectives to be attacked separately.⁶⁷ This understanding implies that the practical application of the prohibition of area bombardment, and by extension of the prohibition of indiscriminate attacks, could evolve based on the development of new weapons capabilities.

Reverberating effects of the use of explosive weapons in populated areas and the rules of proportionality and precautions in attack

The most visible effects of an attack using explosive weapons in populated areas are the immediate (or “direct”) civilian deaths and injuries and damage to civilian objects caused by the weapons' blast and fragmentation effects. Less visible, but equally devastating, are the reverberating effects (also referred to as the “indirect,” “knock-on” or “long-term” effects) of the attack, as consequences of incidental damage to certain civilian objects. For example, incidental damage to civilian homes is likely to cause the displacement of civilians, while incidental damage to hospitals is likely to cause the disruption of medical services, which in turn is likely to lead to the death of patients. Critical civilian infrastructure, such as vital water and electrical facilities and supply networks, is particularly fragile and vulnerable to the incidental effects of explosive weapons. The interconnectedness of the essential services that depend on critical infrastructure is such that disruption to one service will have knock-on effects on the other services. Thus, incidental damage to critical infrastructure can cause severe

weapons “which employs a method or means of delivery which cannot be directed at a specific military objective” (emphasis added).

67 See Commentary on the Additional Protocols, para. 1975: “When the distance separating two military objectives is sufficient for them to be attacked separately, taking into account the means available, the rule should be fully applied. However, even if the distance is insufficient, excessive losses that might result from the attack should be taken into account.”

disruption to essential services on which the civilian population depends for its survival, such as health care, energy and water supplies and waste management, leading to the spread of disease and further deaths. These effects are multiplied in situations of protracted hostilities, where explosive weapons are used in populated areas over a prolonged period of time.

The question that arises is whether the reverberating effects of an attack using explosive weapons in populated areas must be taken into account by the attacker in assessing the expected incidental civilian casualties and damage to civilian objects as required under the IHL rules of proportionality and precautions in attack, recalled above. While acknowledging that it is both impractical and impossible for commanders to consider all possible effects of an attack, the ICRC considers that those reverberating effects that are foreseeable in the circumstances must be taken into account.

While there is support for this view, there remains uncertainty regarding which reverberating effects of an attack are “foreseeable.” Although, as explained above, this assessment is context-specific, the ICRC submits that it is framed in an objectivized way by what is foreseeable based on the standard of a “reasonably well-informed person in the circumstances [of the attacker], making reasonable use of the information available to him or her.”⁶⁸ In this respect, it is submitted that those who plan and decide upon an attack have an obligation to do everything feasible to obtain information that will allow for a meaningful assessment of the foreseeable incidental effects on civilians and civilian objects. Moreover, what is objectively foreseeable by a commander in a given case must be informed by past experiences and lessons learned from his/her country’s armed forces. It should also take into account the ever-growing experience of other armed forces in urban warfare, when available. In other words, as the understanding of the reverberating effects of the use of explosive weapons in populated areas increases, this knowledge informs future assessments and decisions under the rules of proportionality and precautions in attack.

It is unclear how armed forces integrate the obligation to take into account the foreseeable reverberating incidental effects on civilians and civilian objects into their military policies and practice, for example in collateral damage estimates. Based on the effects of explosive weapons in populated areas, namely the extensive civilian harm being witnessed today, there is significant doubt that reverberating effects are sufficiently factored in as required by the rules of proportionality and precautions in attack.

Towards a better understanding of States’ positions, policies and practices

Warfare in densely populated areas, where military objectives are intermingled with protected persons and objects, represents an important operational challenge for armed forces. A military commander has the responsibility to minimize the

68 ICTY, *The Prosecutor v. Galić*, Case No. IT-98-29, Judgment, 5 December 2003, para. 58.

incidental effects on civilians of an attack, and such a responsibility is heightened in an environment where civilians and civilian infrastructure are the main features of the theatre of operations. This holds equally true when the opposing party deliberately intermingles with civilians in order to shield its military activities – unlawful behaviour that nonetheless does not relieve the attacking party of its own obligations under IHL. Urban warfare thus entails a more demanding analytical process during the planning phase, as well as complex decision-making in real-time situations. As seen above, the military commander has a larger number of factors to take into account than when conducting hostilities in open areas.

Even more so than in open areas, an attacking party's ability to respect IHL in populated areas depends on the means and methods of warfare that it chooses to use, or not to use, taking into account their foreseeable effects in such environments, including their reverberating effects. Though some military practice, such as "collateral damage estimation" methodologies and "minimum safe distances," as well as lessons learned from post-attack "battle damage assessments" and "after action reviews," may help to minimize incidental harm to civilians, it remains unclear how these integrate the requirements of the rules of IHL discussed above.

What seems certain is that thorough training of armed forces in the selection and use of means and methods of warfare in populated areas, including on the technical capabilities of the weapons at their disposal, is critical to avoiding or minimizing incidental harm to civilians in this environment. Moreover, specific targeting directives applicable to the use of certain explosive weapons in populated areas may be required to ensure compliance with IHL.

Yet only a few armed forces are known to train specifically in urban warfare, or to otherwise apply specific limitations on the choice and use of explosive weapons in populated areas for the purpose of avoiding or minimizing incidental civilian harm. A better knowledge of existing military policy and practice, and more clarity on how States interpret and apply the relevant rules of IHL to the use of explosive weapons in populated areas, would help to inform debates about this important humanitarian issue, foster a possible convergence of views, and assist parties to armed conflicts who endeavour in good faith to comply with the law. Ultimately, this will lead to better protection of civilians in populated areas.

3) Responsible arms transfers

The ICRC, the Movement and the International Conference have long expressed concerns about the human suffering resulting from the poorly controlled availability and misuse of conventional arms. The ICRC's 1999 study *Arms Availability and the Situation of Civilians in Armed Conflict*, which was commissioned by the 26th International Conference, found that the uncontrolled proliferation of arms and ammunition *inter alia* facilitates violations of IHL, leads to high levels of insecurity that hamper humanitarian assistance, and contributes to prolonging the duration of armed conflicts. Based notably on these findings,

which were endorsed by the Movement, the 27th, 28th, and 31st International Conferences in turn committed States to enhancing the protection of civilians by strengthening controls on the availability of arms and ammunition at the national, regional and international levels. Crucially, as reiterated by the 31st International Conference, States recalled their obligation to respect and ensure respect for IHL. On this basis, they committed to making respect for IHL one of the important criteria on which arms transfer decisions are assessed, so that arms and ammunition do not end up in the hands of those who may be expected to use them to violate IHL.⁶⁹

Considerable progress has been made in fulfilling these commitments in recent years. Several regional arms transfer instruments adopted over the last decade⁷⁰ include respect for IHL among their transfer criteria. But these instruments apply to limited groups of States, and differ in the scope of weapons they cover and in the level of risk that would prevent arms transfers.⁷¹ With the Arms Trade Treaty (ATT), which was adopted in April 2013 and entered into force in December 2014, States have set common international standards for the transfer of conventional arms, their parts and components, and ammunition, with the express purpose of reducing human suffering. A key “principle” underpinning these standards and explicitly recalled in the ATT’s preamble is the obligation of each State to respect and ensure respect for IHL.

Today, as weapons continue to flow to armed conflicts in which serious violations of IHL are reportedly occurring, the ATT, regional arms transfer instruments, and the obligation of each State to respect and ensure respect for IHL provide a solid legal framework for responsible arms transfers. Faithfully interpreted and applied, these will help to strengthen the protection of civilians in armed conflicts. This framework will become more effective as more States join the ATT.

69 Resolution 2 of the 31st International Conference, “4-year action plan for the implementation of international humanitarian law,” Objective 5.

70 See the following legally binding regional instruments: EU Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (2008), Criterion 2 (c); ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials (2006), Article 6(3); Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition and all Parts and Components that can be used for their Manufacture, Repair and Assembly (Kinshasa Convention, 2010 – not yet in force), Article 5(5)(a). See also regional guidelines or codes of conduct, such as: Code of Conduct of Central American States on the Transfer of Arms, Ammunition, Explosives and Other Related Material (2005), Article 1(1); Organization of American States Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition (2004), Article 5(1); Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons (2005), section 2.2.3(b).

71 For example, looking only at the three legally binding regional instruments: the EU Common Position provides that arms export licences shall be denied if there is a “clear risk” that the weapons “might” be used in the commission of serious violations of IHL; the ECOWAS Convention prohibits arms transfers where the weapons are “destined to be used” for the commission of such violations; and the Kinshasa Convention prohibits such transfers where there is “a possibility” that the weapons “might be used” to commit war crimes.

It is important to stress that arms transfers by States that are not party to the ATT nor to regional instruments do not occur in a legal vacuum. At the very least, with regard to any form of support they provide to parties to armed conflicts, including the supply of weapons, all States must “ensure respect” for IHL “in all circumstances,” as required by common Article 1. This obligation is interpreted as also conferring on States not involved in an armed conflict a duty to ensure respect for IHL by the parties to the conflict, comprising both a negative and a positive obligation.⁷²

Under the negative obligation, a State must refrain from encouraging a party to violate IHL through the transfer of weapons and ammunitions and must not take action that would aid or assist in such violations.⁷³ It is submitted that the obligation stemming from common Article 1 is not limited to action amounting to knowingly “aiding or assisting” in the commission of the violation as required under Article 16 of the Articles on Responsibility of States.⁷⁴ To prevent action that would encourage, aid or assist in the commission of violations, a State would have to assess whether the State or party to the conflict to whom the weapons or ammunitions would be transferred is likely to use them to violate IHL. If – based on this risk assessment – there is a substantial or clear risk that the weapons could be used in that manner, the State must refrain from transferring them.

Beyond this negative duty, the obligation to ensure respect for IHL requires a State to take positive steps to prevent IHL violations where there is a certain degree of predictability that they will be committed, and to prevent further violations in case they have already occurred. Here, a State’s duty to ensure respect is one of due diligence, the content of which varies depending on the circumstances, the degree of influence that can be exercised on those responsible for the violations, and the gravity of the violation. A State that has previously engaged in arms transfers with another State or party to the conflict would be in a position to influence the recipient’s behaviour and thus to ensure respect for IHL. In this case, the State should do everything reasonably in its power to implement this duty and has a variety of ways to do so, including in the context of decisions on arms transfer.

These limits on arms transfers stemming, as submitted, from the common Article 1 obligation to ensure respect for IHL, are complemented by the provisions of the ATT and of regional arms transfer instruments restricting arms transfers on the basis of respect for IHL and IHRL.

72 The obligation to ensure respect for IHL in both its negative and positive aspects is a rule of customary IHL in both international and non-international armed conflicts: “States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.” Rule 144 of the ICRC Customary IHL Study.

73 This “negative obligation” to ensure respect for IHL was recognized by the ICJ in the *Nicaragua* case. ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment (Merits), 27 June 1986, para. 220.

74 Articles on Responsibility of States for Internationally Wrongful Acts, adopted by virtue of UN General Assembly Resolution 56/83, A/RES/56/83, 28 January 2002.

One of the most commendable advances of the newly adopted ATT is the absolute prohibition of arms transfers (Article 6) and the export assessment requirement (Article 7) that link the decision to transfer arms to the likelihood of serious violations of IHL or IHRL.⁷⁵ Article 6(3) in particular provides an absolute prohibition on transferring arms, ammunition, and parts and components if a State Party has knowledge at the time of authorization that the arms or items would be used in the commission of, among other crimes, “grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.” The scope of war crimes is based on a variable set of norms depending on the treaties to which the transferring State is a party. A number of States Parties have declared upon ratification their understanding that Article 6(3) encompasses a wide range of war crimes in all types of armed conflict, including serious violations of Article 3 common to the 1949 Geneva Conventions. The ICRC recommends, also bearing in mind the distinct requirements of common Article 1, that States adopt a broad scope of war crimes in any implementing legislation.

If an export of arms or related items is not prohibited under Article 6 of the ATT, a State party is further required under Article 7 to assess “in an objective and non-discriminatory manner” the “potential” that the arms or items “would contribute to or undermine peace and security” and whether they “could be used to ... commit or facilitate a serious violation of IHL,” among other possible negative consequences. This risk assessment must also take into consideration whether there are “measures that could be undertaken to mitigate the risks” of such negative consequences.

The State Party must deny the export authorization if, after conducting this assessment, it “determines that there is an overriding risk” of such negative consequences. This would appear to suggest a balancing of the interests listed in Article 7. A number of States Parties have declared upon ratification that they will interpret the term “overriding” as “substantial” or “clear.” Meanwhile, others have stated their understanding that an “overriding risk” would exist whenever any of the negative consequences listed in the provision are more likely to materialize than not, even after consideration of mitigation measures. In the view of the ICRC, such interpretations are consistent with the obligation to ensure respect for IHL, to the extent that they would prevent arms transfers under Article 7 in the face of clear risks that serious violations of IHL could be committed or facilitated.

As for the factors that States should take into account in their risk assessments in arms transfer decisions, the ICRC has proposed a range of indicators, including: the recipient’s past and present record of respect for IHL; its formal commitments to respect IHL; the measures it is taking to ensure respect for IHL by its armed forces; whether it has in place the necessary legal, judicial and administrative measures to repress serious violations of IHL; and

75 See generally ICRC, *The Arms Trade Treaty from a humanitarian perspective*, forthcoming.

whether it has in place measures to prevent the diversion of arms from the intended recipient, such as the adequacy of stockpile management and of security and border controls in the recipient State.⁷⁶

In light of the common Article 1 obligation to ensure respect for IHL and the fact that a growing number of States have specifically committed themselves, either through the ATT or through regional instruments, to take into account respect for IHL in their arms transfer decisions, the challenge is now to ensure that these requirements are effectively and consistently applied in practice. Indeed, there is an urgent need to close the gap that subsists between the duty to ensure respect for IHL in arms transfer decisions and the actual transfer practices of too many States. This will go a long way in controlling the availability of conventional weapons, preventing them falling into the hands of those likely to use them to commit serious violations of IHL, and ultimately strengthening the protection of civilians in armed conflict and post-conflict situations.

4) Nuclear weapons

Since 1945, the Movement has repeatedly voiced its concern about the devastating humanitarian consequences of nuclear weapons and has called on States to prohibit these weapons. The most recent appeal, adopted by the 2011 Council of Delegates, calls on States to ensure that nuclear weapons are never again used and to urgently negotiate and conclude a legally binding international agreement to prohibit the use of, and completely eliminate, these weapons, in accordance with existing commitments and international obligations.⁷⁷

The Movement's concerns about nuclear weapons are based on the first-hand experience of the Japanese Red Cross Society and the ICRC in their efforts to assist the victims of the nuclear bombs dropped on Hiroshima and Nagasaki in 1945, and the Japanese Red Cross's treatment of the tens of thousands of survivors who suffered from the long-term health effects of exposure to nuclear radiation, which still continues today. They are also based on in-depth assessments carried out by the ICRC⁷⁸ and other organizations.⁷⁹ These concluded that an effective means of assisting a substantial portion of survivors of

76 See ICRC, *Arms transfer decisions: Applying international humanitarian law criteria, Practical guide*, ICRC, Geneva, 2007 (2nd edition forthcoming). Similar indicators appear in the 2015 updated *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, Council of the European Union, Brussels, 2015.

77 Resolution 1 of the 2013 Council of Delegates, "Working towards the elimination of nuclear weapons," available at: www.icrc.org/eng/assets/files/red-cross-crescent-movement/council-delegates-2013/cod13-r1-nuclear-weapons-cd13r1-eng.pdf.

78 Dominique Loye and Robin Coupland, "Who will assist the victims of use of nuclear, radiological, biological or chemical weapons – and how?" *International Review of the Red Cross*, Vol. 866, June 2007, pp. 329–344; Dominique Loye and Robin Coupland, "International assistance for victims of use of nuclear, radiological, biological and chemical weapons: time for a reality check?" *International Review of the Red Cross*, Vol. 874, June 2009, pp. 329–340.

79 See, for example, John Borrie and Tim Caughley, *An Illusion of Safety: Challenges of Nuclear Weapon Detonations for United Nations Humanitarian Coordination and Response* (UNIDIR/2014/6), UNIDIR, 2014, available at: <http://www.unidir.org/illusionsofsafety>.

a nuclear detonation, while adequately protecting those delivering assistance, is not currently available at the national level and not feasible at the international level.

Knowledge of the humanitarian impact of nuclear weapons has also been informed by three international conferences hosted by the Governments of Norway (Oslo, March 2013), Mexico (Nayarit, February 2014) and Austria (Vienna, December 2014). Discussions there reinforced what is known about the effects of nuclear weapons and also highlighted new concerns, such as the potential impact of a limited nuclear exchange on the global climate and food production.

The effects of the atomic bombings in Hiroshima and Nagasaki and subsequent studies have shown that nuclear weapons have severe immediate and long-term consequences due to the heat, blast and radiation generated by the explosion and the distances over which these forces are likely to be spread. The unique characteristics of nuclear weapons were recognized by the International Court of Justice (ICJ) in its 1996 Advisory Opinion on the legality of the threat or use of nuclear weapons.⁸⁰ The ICJ also observed that “[t]he destructive power of nuclear weapons cannot be contained in either space or time.” Indeed, in the view of the ICRC, the sheer scale of civilian casualties and destruction that would result from the use of a nuclear weapon in or near a populated area, and its long-term effects on human health and the environment, raise serious questions about the compatibility of this weapon with IHL.

IHL rules regulating the conduct of hostilities and nuclear weapons

While IHL does not specifically prohibit nuclear weapons, their use is restricted by IHL’s general rules regulating the conduct of hostilities, which apply to the use of all weapons in armed conflict.⁸¹ Outlined below are the primary issues and concerns that arise when the use of nuclear weapons is considered under some of these key rules.

The prohibition of indiscriminate attacks: This rule prohibits attacks that are of a nature to strike military objectives and civilians or civilian objects without distinction. Such attacks include the use of weapons that cannot be directed at a specific military objective or that have effects that cannot be limited as required by IHL.

There are serious doubts as to whether nuclear weapons can be used in accordance with this rule. Nuclear weapons are designed to disperse heat, blast effects and radiation, and in most scenarios this will occur over very wide areas. For example, the use of a single 10 to 20 kiloton bomb (the yield of the bombs used in Hiroshima and Nagasaki, which are small bombs by today’s standards) in or near a populated area will likely cause a very high number of civilian casualties, although the specific effects in a given case will depend on a variety of

⁸⁰ See footnote 44 above.

⁸¹ *Ibid.* on the application of the general rules of IHL to nuclear weapons as recognized by the ICJ.

factors. The heat generated by the explosion can be expected to cause severe burns to exposed skin up to three kilometres from the epicentre, and massive destruction of buildings and infrastructure within several kilometres. Such effects would indicate an attack striking military objectives and civilians and civilian objects without distinction.

There is also a serious risk that the effects of such an explosion would not be limited in space and time, as required by IHL. This is particularly true for the intense fires, and possibly firestorms, that can result from the heat generated by a nuclear explosion. The same concern applies to radioactive fallout. While it is certain that radioactive particles will fall in the immediate area affected by the explosion, they can also disperse far from it, and even into other countries, carried by wind and other weather conditions.

Proportionality in attack: The nature of the effects produced by a nuclear weapon also raise doubts that an attack using such a weapon in or near a populated area could respect the rule of proportionality in attack. This requires that, for an attack against a military objective to proceed, the expected incidental civilian casualties and/or damage to civilian objects is not excessive in relation to the concrete and direct military advantage anticipated.

In the view of the ICRC, a party intending to use a nuclear weapon would be required to take into account, as part of the proportionality assessment, not only the immediate civilian deaths and injuries and damage to civilian objects (such as civilian homes, buildings and infrastructure) expected to result from the attack, but also the foreseeable reverberating effects of the attack.⁸² These include those caused by damaged or destroyed water and electrical supply systems and other critical infrastructure supporting services essential for the civilian population, including health services. Foreseeable reverberating effects also include the long-term effects of exposure to radiation, in particular resulting illnesses and cancers in the civilian population. Such consequences can clearly be anticipated given what is now known about nuclear weapons.

Protection of the natural environment: Under this customary IHL rule, which slightly differs from that of Additional Protocol I, all means and methods of warfare must be employed with due regard to the protection and preservation of the natural environment and all feasible precautions must be taken to avoid, and in any event minimize, incidental damage to the environment. Thus, any decision to use nuclear weapons must take into account the potential impact on, and damage to, the environment, including foreseeable long-term effects. The use of even a single nuclear weapon may have significant effects on the natural environment due to the impact of dust, soot and radioactive particles on the atmosphere, soil, plants and animals.

82 On this point, see section VII.2 above on the use of explosive weapons in populated areas.

Unnecessary suffering to combatants: Although combatants may be lawfully attacked in an armed conflict, IHL prohibits the use of weapons of a nature to cause them superfluous injury or unnecessary suffering, meaning injury or suffering that is out of proportion to the military advantage sought. The detonation of a nuclear weapon generates significant, and often fatal, levels of radiation with devastating immediate and long-term consequences to the health of exposed individuals. Effects include damage to the central nervous system and to the gastrointestinal tract and an increased risk of developing certain cancers, such as leukaemia and thyroid cancer. The short- and long-term illnesses, permanent disability and suffering caused by radiation exposure raise serious questions about the compatibility of nuclear weapons with this rule.

Difficulty envisaging compatibility of use of nuclear weapons with IHL

It has been argued by some States and commentators that low-yield nuclear weapons could be compatible with the rules of IHL.⁸³ While the use of low-yield nuclear weapons in a remote area, such as against troops in a desert or against a fleet at sea, may not have immediate effects on civilians, there would remain significant concerns about the impact of radiation on combatants, the radiological contamination of the environment, and the eventual spread of radiation to civilian areas. Equally unsettling is the serious risk of nuclear weapons being used in response to such an attack, likely resulting in further escalation involving even greater use of nuclear weapons by both parties, with catastrophic humanitarian consequences.

In its 1996 Advisory Opinion, the ICJ concluded that the use of nuclear weapons “would generally be contrary to” the principles and rules of IHL. However, the ICJ was unable to decide whether such use would be lawful or unlawful, “in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.” In this respect, the ICJ did not conclude that the use of nuclear weapons would be allowed in an extreme case of self-defence. Rather, it indicated that the state of international law and the facts at its disposal at the time did not allow it to reach a definitive conclusion.

The ICRC considers that the exercise of the right of self-defence – even in an extreme situation where the very survival of a State is at stake – can on no account release that State from its obligations under IHL. Self-defence must be exercised with due regard for IHL, whatever the circumstances, and not in violation of the very rules intended to mitigate the suffering caused by armed conflict.

⁸³ In 1996, after examining the issue, the ICJ stated that none of the States claiming the legality of nuclear weapons under such circumstances had presented precise scenarios in which these weapons would be used, or had addressed the associated risk of escalation to a more devastating nuclear war (see footnote 52 above, para. 94).

The above concerns under IHL led the Movement to conclude in 2011 that “it is difficult to envisage how any use of nuclear weapons could be compatible with the requirements of international humanitarian law.” In the view of the ICRC, the new evidence and information that has emerged in recent years, including in international conferences on the humanitarian impact of nuclear weapons, cast further doubt on whether nuclear weapons could ever be used in accordance with the above-mentioned rules of IHL.

Preventing the use of nuclear weapons requires States to fulfil their existing obligations and commitments to pursue negotiations aimed at prohibiting their use and completely eliminating them through a legally binding international agreement. The ICRC has appealed to States to establish a time-bound framework to do so. It has also called on States that possess nuclear weapons to, in the meantime, diminish the risks of intentional or accidental nuclear detonations by reducing the role of nuclear weapons in their military doctrine and reducing the number of nuclear weapons on high alert, in accordance with existing commitments.

VIII. Private military and security companies

The use of private military and security companies (PMSCs) in armed conflicts rose substantially some 10 years ago, causing concern about the possible implications for the protection of the civilian population.⁸⁴ Recognizing the humanitarian challenges, Switzerland and the ICRC launched a joint initiative that led to the adoption in 2008 of the Montreux Document, which aimed to define how international law applies to the activities of PMSCs present in theatres of armed conflict. The text reaffirmed the existing international obligations of States and outlined examples of good practices to assist them in promoting respect for international law by PMSCs.

While reliance on PMSCs to provide services that bring them close to combat activities has arguably decreased, private contractors continue to operate in situations of armed conflict, to evolve, and to diversify. There is thus a continued need to work on the implementation of the rules and good practices contained in the Montreux Document. Challenges can also arise due to the involvement of PMSCs in post-conflict and in other, comparable situations. In these and other contexts, the use of force by PMSCs, to give just one salient example, must be strictly regulated in order to prevent abuses.

Regulating PMSCs: Complementary international initiatives

The Montreux Document constitutes an important building block of broader efforts to clarify, reaffirm and/or develop international legal standards aimed at achieving greater respect for international norms in situations where PMSCs operate. Several

84 These concerns were addressed in some detail in the previous two reports on IHL and the challenges of contemporary armed conflicts, submitted, respectively, to the 30th and 31st International Conferences.

other international initiatives have also been launched in the past several years to regulate the activities of private contractors. For instance, discussions are taking place within the UN context on the possibility of elaborating an international convention to regulate PMSCs. Such an instrument would lay down new obligations binding on States, and could thus go beyond the Montreux Document, which primarily restated the already existing international obligations of States related to PMSCs. In this context, it should be recalled that the Montreux Document is not – and was not meant to be – the definitive and sole text capable of addressing legal issues relating to PMSCs.

Although other initiatives are distinct from, and take a different approach to, that of the Montreux Document, the ICRC is of the view that they should be considered as being complementary. The common goal of each is to promote respect for international law. Such initiatives also have an important role to play in ensuring that PMSCs do not commit acts that would be contrary to international law. What is ultimately important is that the different initiatives make up a mutually reinforcing network of obligations, standards and good practices that should serve to improve the protection of persons affected by armed conflict (or of those who find themselves in situations that fall below that threshold).

Montreux +5 Conference: Progress and challenges

Recognizing the potential humanitarian consequences arising from the activities of PMSCs, the ICRC's exclusively humanitarian goal is to promote respect for IHL and IHRL in situations of armed conflict in which such companies are present. It is with this aim that the ICRC continues to work for the full and effective implementation of the existing obligations of States under international law, as reflected in the Montreux Document.

In December 2013, Switzerland and the ICRC hosted the Montreux +5 Conference to mark the fifth anniversary of the finalization of the Document and to take stock of progress achieved. From an initial 17 States, the number of signatories has grown to 52, with the text also having been accepted by three international organizations. In addition to the increase in the number of endorsements, the humanitarian objectives underlying the Montreux Document may be said to have been significantly advanced since its adoption seven years ago. The Document has been instrumental in making it clear that international obligations apply to the activities of PMSCs. It has also helped raise awareness of States' obligations with respect to the operation of PMSCs, and of the importance of adopting and implementing adequate domestic legislation. Despite these results, much remains to be done going forward in order to adequately regulate the activities of PMSCs in national law and practice with a view to ensuring better respect for international law.

While several States have enacted domestic legislation on PMSCs, more States need to do so, and the relevant national laws and corresponding regulatory frameworks need to be clearer and more robust. States need to take action to clearly delimit the services that may or may not be contracted out to PMSCs. In this respect, whether a particular service could cause PMSC personnel to directly

participate in hostilities should be given particular attention.⁸⁵ Another area requiring further work is ensuring the accountability of and oversight over PMSCs and their personnel as regards violations of international and national law. A major challenge in this regard is the multinational nature of a large part of the industry. Given that several States can have a bearing on, or be impacted by, the operations of PMSCs, cooperation among States is essential. Put differently, States must take the necessary legislative and administrative measures in a concerted manner if respect for international law and accountability for violations involving PMSCs are to be ensured.

Another area of concern is the reliance of some States on PMSCs to train members of their security and military forces in IHL and IHRL. Given that adequate training is a key element in preventing violations of IHL, the provision of training services by PMSCs requires appropriate regulation and regular oversight by the States concerned. It must constantly be recalled that States remain accountable for supervising and enforcing respect for international law by PMSC personnel.

Montreux Document Forum: Taking the Montreux Document forward

The need to take the Montreux Document forward was at the centre of discussions at the Montreux +5 Conference, with participants strongly supporting the idea of institutionalizing a regular dialogue on the challenges faced in the implementation and promotion of the Document. To follow up on this proposal, Switzerland and the ICRC convened a series of preparatory meetings among Montreux Document participants during the course of 2014 to discuss the tasks and structure of the Montreux Document Forum (MDF). This led to the formal establishment of the Forum during a Constitutional Meeting held on 16 December 2014 in Geneva, which brought together over 50 States and three international organizations.

The objective of the MDF is to provide an informal platform for signatories to discuss and exchange information on challenges faced in the regulation of PMSCs. The Forum will aim to support national implementation of the rules and good practices contained in the Montreux Document and the development of practical implementation tools. It will further seek to facilitate the exchange of experiences on lessons learned, good practices and challenges related to the implementation of the text. It will likewise work to expand support for the Document among other

85 The presence of private contractors carrying out military tasks among the civilian population diversifies and swells the ranks of weapon bearers who could pose a threat to civilians. It also contributes to the blurring of the essential line between civilians and combatants. The tasks that PMSC personnel perform, the equipment they use and wear, and the weapons they carry may easily lead them to be mistaken for combatants. In addition, it is difficult to ensure compliance with IHL when contractors act outside the military chain of command, as they most often do. This leads the ICRC to believe that PMSC personnel should not be contracted to take a direct part in hostilities, even if IHL does not explicitly prohibit it.

States and international organizations; although the number of signatories has tripled in the last seven years, there is still a need to increase participation from States in all regions of the world and among international organizations.

The ICRC supports the establishment of the MDF and is committed to contributing to its future activities, in cooperation with Switzerland. It is anticipated that, by working on the implementation and promotion of the Document, the MDF will play an important role in ensuring greater respect for international law and thus enable greater protection for persons affected by PMSC operations. The ICRC encourages States and international organizations that have not yet done so to consider endorsing the Montreux Document. It also encourages Montreux Document participants to actively engage with and support the work of the MDF in order to ensure the necessary regulation of PMSCs.