SECOND ANNUAL TRANSATLANTIC WORKSHOP ON INTERNATIONAL LAW AND ARMED CONFLICT
Report

Co-sponsored by:

the International Committee of the Red Cross
the Oxford Institute for Ethics, Law and Armed Conflict
the Oxford Martin Programme on Human Rights for Future Generations
the Robert S. Strauss Center for International Security and Law at the University of Texas
South Texas College of Law

July 17-18, 2014

at Pembroke College, University of Oxford

Introduction

The following document provides a summary of a two-day meeting held at the University of Oxford on 17 and18 July 2014.[1] The Oxford Institute for Ethics, Law and Armed Conflict and the Oxford Martin Programme on Human Rights for Future Generations Programme co-hosted the workshop with the International Committee of the Red Cross (ICRC). The workshop was the second in a series of annual meetings designed to develop a transatlantic dialogue on armed conflict and law. It gathered around 30 legal scholars, experts and practitioners from Europe, North America and Israel to discuss differing approaches to the applicability of international humanitarian law (IHL) and international human rights law (IHRL) in armed conflict and to bridge the divide, not only between different sides of the Atlantic, but also between academia and practice.

Based on roundtable discussions, the workshop was divided into six sessions focusing on key issues relating to international law and armed conflict. On the first day, participants considered the relationship between IHRL and IHL, beginning with a general exploration of this topic before focusing more specifically on how the relationship between the two bodies of law shapes questions relating to responsibility for compliance and accountability for violations. Discussion on the second day was concerned with the idea of boundaries, both between different types of armed conflict and between armed conflict, other situations of violence, and peace. The aim was not only to identify these boundaries with greater precision but also to examine the extent to which they might be porous in terms of the potential overlap between the legal regimes applicable on each side.

[1] Report prepared by Dr Gilles Giacca and Eleanor Mitchell.

All experts participated in their personal capacity; the workshop was held under the Chatham House Rule. The following report is not exhaustive, but aims to furnish a faithful narrative of the main points discussed and some of the positions expressed during the meeting.

DAY ONE: IHL AND IHRL

1. Updates in the overlap between IHL and IHRL

The workshop began with a discussion of developments in the interplay between IHL and IHRL over the past year. Participants considered questions including whether IHRL has gone 'too far' in influencing IHL, and what the effects of this increasingly close relationship might be. The session therefore provided important context for the remainder of the day's discussion.

One expert highlighted some of the differences between the North American and European approaches to the relationship between IHL and IHRL. First, there seems to be an ongoing strategic and theoretical conflict between advocates of the exclusionary and concurrent application of IHL and IHRL. This conflict is firmly grounded in the different views emanating from each side of the Atlantic. Experts took the view that reliance on the principle of *lex specialis* will not be enough to resolve this debate, as there are at least four or five different ways of understanding the concept. In addition, the United States (U.S.) and Canada appear to look at the extraterritorial application of human rights obligations very differently than Europe. The dominant view in the U.S. (and, to a certain extent, in Canada) continues to be that IHRL is not of extraterritorial application, and – in circumstances where many current conflicts are non-international armed conflicts (NIACs) occurring on the territory of a third State – this view has significant implications for the overlap between IHL and IHRL.

Further differences arise from the influence of the European Court of Human Rights (ECtHR), which is not felt – or even extensively discussed – in North America. Unlike European courts, the courts of the U.S. and Canada (like those of a significant number of the world's States) are not subject to the oversight of a regional human rights tribunal. From a European perspective, the IHL/IHRL debate is grounded in the fact that the ECtHR continues to look at conflict almost exclusively through a human rights lens. This in turn raises questions as to how there can be any meaningful development in the relationship between IHRL and IHL on the European side of the divide if the ECtHR remains so reluctant to consider IHL.

Other experts suggested that the extent of the transatlantic divide might be over-stated, and that some of the differences outlined above might instead arise from the distinctions between civil and common law systems, some of which may influence the understanding and interpretation of human rights law. For example, common law statutes need to be read against the background of existing jurisprudence, while civil law codes and statutes are the primary source of law. The result may be a greater willingness in a North American (common law) context to rely on customary international law as the legal basis for the conduct of operations, rather than searching for a textual authority (in either treaty law or domestic statutes) to regulate military action. However, according to one expert, reliance on a legal framework based on customary IHRL might result in there being no effective remedy for breach, whereas remedies are more readily available when the applicable legal framework is based on treaty law and provides access to courts, tribunals or treaty bodies at the domestic, regional or international level.

It was generally agreed that further clarity is needed in mapping the trilateral relationship between IHRL, IHL and the *jus ad bellum*. Concerns were raised about the importation of the notion of imminence as deployed in the *jus ad bellum* into the debate surrounding the significance of the relationship between IHL and IHRL for the lawfulness of particular acts of targeting. Some experts considered that there was a need to limit the discussion to the differences between (on the one hand) IHL rules governing targeting on the basis of status, and (on the other) targeting rules based on notions of imminence, generally deployed in a law enforcement context and derived from IHRL. These experts expressed the view that the *jus ad bellum* answers only the question of when force can be used

in the territory of another State without its consent; when consent is granted, a further question arises as to whether force against a particular individual can be used, and this question is answered by other bodies of law (such as IHL and/or IHRL). Thus, the *jus ad bellum* regulates the lawfulness of the use of force on the territory of another State, not the circumstances under which an individual will be a lawful target when such force is (lawfully or unlawfully) employed. In relation to the concept of imminence, the U.S. Administration seems to interpret it not in a strictly temporal sense (eg police in hostage crisis), but as encompassing situations in which a threat has been manifested, and there is a reasonable belief that the threat is ongoing but no capacity to predict when it will materialise. The U.S. view is that, in these circumstances and given a window of opportunity, the State subject of the threat may strike provided that capture is not feasible.

The degree of the overlap between IHL and IHRL will ultimately depend upon the scope or sphere of application of each of these bodies of law. According to one expert, one emerging issue in this area is the law governing 'one-off' uses of force, which raises the question of whether IHL can be applicable without the existence of an armed conflict. It also gives rise to potential challenges to the *Tadić* definitions of armed conflict (resulting in the development of a 'new *jus ad bellum*'), including the possibility of lowering the threshold for the existence of a NIAC; this in turn would increase the area of overlap between IHL and IHRL. A second emerging issue is whether the ECtHR will ultimately be forced to take IHL more seriously in its analysis of human rights violations occurring during armed conflict. A third issue is whether the IHRL component inherent in IHL – for example, the human rights guarantees contained in Art 75 of Additional Protocol I (API) – should be recognized more fully.

Some experts argued that the viewpoint based on the completely exclusionary application of IHL and IHRL is not sustainable in circumstances where it is now widely accepted that IHRL can (at least) be used to fill 'gaps' in the legal framework provided by IHL. In addition, there is a need to recognize that treaty bodies tasked with considering IHRL violations are likely to incorporate IHL into their analysis of the relevant issues – a recent example being the statements on targeted killings in the UN Human Rights Committee's Concluding Observations (2014) on the U.S.'s 4th periodic report – thereby contributing to the development of international jurisprudence on the relationship between IHL and IHRL. Moreover, it was noted that many of the problems arising in the case law in this area are a result of deficiencies in the way cases are pleaded by governments. These deficiencies may be explained by the fact that the strategy employed by governments is dictated by the imperatives of the individual case rather than being based on a coherent underlying view of the appropriate relationship between IHL and IHRL.

Some experts noted that the most challenging issues arising from the interplay of IHRL and IHL revolve around the authority to incapacitate rather than the standard of treatment of individuals after capture. It is primarily in the former phase that there is a danger of the overlap between the two bodies of law resulting in the 'dilution' of IHRL norms. Some experts were concerned that applying IHRL norms in *any* situation where they were not intended to apply (for example in a 'battlefield' context) will inevitably result in the dilution of this body of law. Other experts disagreed, noting that IHRL – like IHL – forms part of public international law and is meant to regulate behavior of States, not only in completely peaceful situations, and does not therefore dictate a single standard but often indicates a flexible standard that may result in contextual application of the rule.

On the issue of detention, experts noted that resistance amongst military personnel to the application of IHRL does not exist across the board. There is a general willingness to apply the highest possible standards to the treatment of detainees, and it was suggested that – in order to capitalize on this willingness – an 'all or nothing' approach to the applicability of IHRL should be avoided in favor of a context-specific application of relevant principles. Some experts took the view that questions surrounding the extraterritorial application of IHRL had the effect of limiting academic and practical exploration of the host State's human rights obligations in circumstances where an intervening State is conducting military operations on its territory. For instance, what are the obligations of Yemen, Pakistan or Afghanistan when they provide or withhold consent to military action?

Overall, there was some agreement amongst experts regarding the need to elaborate a unified regime which would gradually apply different rules drawn from IHL and IHRL at different levels of violence. In this regard it was observed that practice appears to be outrunning academia, because there are trends towards substantive material convergence (examples of which include the ICRC's report on direct participation in hostilities and the ECtHR's use of the concept of proportionality in the *Chechnya* judgments). One expert noted that the trend toward convergence has perhaps undermined the clarity of international law in the U.S., which has resulted in weakening the power of international law by blurring the division between its application as matter of policy and its application as a matter of law. It remains important for States to be as clear as possible about when they are acting in a particular way because they are legally required to do so, and when they are doing so because they consider it desirable as a matter of policy.

2. Accountability for violations of international humanitarian law

This session addressed issues of transparency and accountability in relation to violations of IHL, including the conduct of appropriate investigations. What obligations exist, and are they sufficient? How do State's obligations under IHRL affect these issues, and to what extent should they do so? What domestic or international law precedents exist for holding States or individuals accountable in the recent conflict in Afghanistan, for example?

Among multiple mechanisms for holding violators of IHL accountable, particular reference was made by one expert to the growing role of commissions of inquiry and fact-finding missions (which have been established, for example, in relation to the conflicts in Darfur, Syria, Libya and the Central African Republic). The activities of bodies can be seen as representing a new form of adjudication in relation to alleged or potential violations of IHRL and IHL. They have also become 'default mode' for securing accountability for such violations of in circumstances where international criminal law (ICL) mechanisms are unavailable. In addition, in light of the Swiss/ICRC initiative regarding the development of a regular meeting of States Parties to the Geneva Conventions, questions were raised as to whether there is a need for a forum in which States would not only report on their own efforts to ensure respect for IHL, but would also hold other States (and perhaps armed non-State groups) accountable for their failures to do so. Should armed groups be asked to send representatives to defend their records and be held accountable before States Parties? Should there be accountability mechanisms such as periodic review, shadow reports by non-governmental organizations, inquiry procedures, Special Rapporteurs, or even a High Commissioner for IHL? A question was also raised as to whether, if a separate forum were not established, the U.N. Human Rights Council should be encouraged to deepen its review of States' compliance with their obligations under IHL.[2]

Another recent development in relation to accountability for IHL violations relates to the decision in *Smith et al v Ministry of Defence* [2013] UKSC 41, which concerned alleged violations of the human rights of the UK's own troops (rather than those of persons with whom they come into contact). The decision is significant as it establishes that every member of the armed forces is within the jurisdiction of the home State and therefore within the jurisdiction of the ECtHR for the purposes of human rights complaints, but also because it potentially opens the door not only to the need for investigations into the adequacy of the conditions and equipment provided to a State's own troops. In terms of civil accountability, reference was also made to the decision in *Long v SS* ('RNP6') case regarding the extent of States' obligations under Art 2 ECHR. In that case, the Court observed that the making of an

[2] The Universal Periodic Review includes in Resolution HRC 5/1 (Annex) the following paragraph: '2. In addition to the above and given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the review shall take into account applicable international humanitarian law.'

erroneous decision in an operational environment does not give rise to a justiciable civil claim for negligence.

Another expert referred to a number of further issues regarding accountability for violations of IHL. Prosecuting cases involving complex battlefield decisions poses obvious investigatory and evidentiary challenges. This raises serious questions over how to ensure that the intersection of the legal regime governing conduct in a 'battlefield' situation and doctrines of criminal responsibility produces credible and reliable prosecutorial outcomes. For example, where the rule of proportionality in IHL prohibits attacks causing excessive harm to civilians or civilian objects, the statute of the International Criminal Court imposes criminal responsibility only where the harm is 'clearly' excessive, thus imposing a more demanding burden on prosecutors seeking to convict a defendant for a violation of the proportionality rule. The expert posed a question as to whether similar qualifiers might be applied to other rules regulating the targeting process, such as those relating to the identification of military objectives or the taking of precautions to minimize harm to civilians – and, if so, how acquittals based on failure to satisfy these heightened standards of culpability might affect respect for the primary rules. The expert also stressed the need to ensure that there is enough evidence to assess whether decisions made in a 'battlefield' context are reasonable or unreasonable. Another participant noted that the main reason for the comparatively small number of prosecutions relating to non-compliance with the rules of targeting is the reluctance to turn people into murderers as a result of an erroneous value judgment.

Another complicated aspect of criminal prosecution based on allegedly unlawful targeting decisions is the relationship between the presumptions established by IHL and those generally applicable in criminal proceedings. For example, the presumption of innocence is an axiomatic component of a fair trial, and imposes on the prosecution both the burden of production and the burden of persuasion. Under IHL, objects and persons are presumed to be civilian in character in the absence of evidence to the contrary. When a defendant is alleged to have violated one of the IHL rules governing targeting, how are these presumptions to be reconciled? Again, formulating a principled response to questions such as this requires more detailed consideration of the relationship between battlefield regulation and criminal liability. Another expert noted that access to information remains critical in combating the instinct – potentially dangerous in a criminal context – to consider the effect of an action with the benefit of hindsight and then infer from this the state of the defendant's knowledge at the relevant time. Another participant noted that the U.K. has become better at record-keeping in order to understand what might have happened and that U.K. forces investigate any time there has been death or injury.

Discussion amongst the experts suggested that there is very little in existence regarding agreed standards (under IHL or IHRL) for investigations into potential violations. There is a certain amount of good practice and of guidance in case law, but few if any clear rules regarding (for example) the appropriate trigger for an investigation; the difference between a preliminary and a full investigation; or the criteria or standards attaching to key concepts such as 'independence', 'impartiality' and 'transparency'. One expert noted that national civilian courts, human rights bodies and commissions of inquiry would all benefit from increased access to expertise in relation both to IHL and to factual matters relevant to armed conflict. As such, there is a need to consider strategies such as generating a pool of recognised international experts.

In light of these issues regarding expertise, some experts raised questions regarding the competence of civilian courts to adjudicate on (for example) tactical decisions. If not, some experts suggested that there might be an ongoing role for military commissions, despite the fact that they are increasingly seen as being non-compliant with IHRL. This debate was influenced in the past by the negative experience of military tribunals in many Latin American States. However, one expert took the view that well-run military tribunals can be perfectly legitimate in cases involving (for instance) nationals of common law countries whose domestic courts do not have jurisdictions over crimes committed abroad, or in cases arising in the aftermath of conflict where there is as yet no functioning domestic

criminal system. The distinction between civil and common law approaches was again highlighted, where common law jurisdictions tend to have a much stronger tradition of military justice systems. One expert also noted that reference to local law may be important in relation to accountability, as it removes the issue of the extraterritorial application of IHRL and avoids any problems generated by competing membership of international instruments.

Reference was made to a recent case in which a domestic court found the State to have violated the ICCPR, the Genocide Convention and the ECHR.[3] This route of accountability for violations might suggest a divide between civil and common-law systems, as it would be difficult to imagine bringing such a case in Anglo-American courts due to the effect of the 'act of State' doctrine and its equivalents. Concerning the civil liability of States for violations of IHL or IHRL, it was emphasised that the utility of inter-State mechanisms may be limited given that most armed conflicts today are non-international in character and that most violations are committed by non-State armed groups. The need to hold these actors accountable is liable to drive the debate back to criminal law, with its emphasis on individual responsibility.

3. Partnered operations and security cooperation: examining hypothetical situations

This session addressed issues surrounding partnered operations and security cooperation. States are scaling down their direct foreign military interventions, and instead are increasingly providing support to foreign States through security cooperation. The most obvious forms of cooperation are military training and weapons transfers, but States cooperate in many other ways, including intelligence cooperation, logistics arrangements, and 'proxy' detention. However, States may also undertake their own capture or targeting operations, sometimes without the consent of the sovereign on whose territory they operate. Under Common Art 1 of the Geneva Conventions, States have an obligation to 'ensure respect' for the Conventions. In light of this (potentially far-reaching) obligation, what is the responsibility of States for ensuring that their partners respect the applicable rules of IHL? What is the extent of States' obligations to prevent violations or to stop ongoing violations occurring in the context of a partnered operation? Are States required to ensure that potential violations by their partners are investigated and perpetrators held accountable?

Experts agreed that some of those issues are certainly not new. In fact, they have been a matter of discussion for quite some time, and have continued to attract much attention in recent operations. One expert referred to four major issues for discussion. First, the nature of every coalition partner (CP)'s obligation to respect own its IHL obligations. In this regard, it was said that differing interpretations of treaty obligations and differing understandings of customary international law tend to pose more problems than inconsistent treaty obligations per se. A related question in this regard is the point at which a State providing support to a foreign State involved in a NIAC may properly be considered a party to that conflict. Proposed criteria might include: the prior existence of a NIAC in the foreign State; the provision of support that goes beyond mere financing or training; and the direct impact of the supporting State's activities on the enemy, perhaps in conjunction with acts of other CPs (participants noted that the requisite nexus to the conflict would be automatically satisfied because the supporting State would necessarily intend to support one party to the conflict, namely the territorial State). As well as triggering the obligation of the intervening State to respect its own IHL obligations, another reason these criteria might matter is that, once a State is considered to be a party to the conflict, IHL applies to the State's own territory. Secondly, compliance issues arising due to the question of liability in case of IHL violations (for example, through potential aiding and abetting – the expert raised in particular the potential relevance of the transfer of weapons in light of recent ratifications of the UN Arms Trade Treaty). Thirdly, the trigger for and standards attaching to the obligation of a State conduct an investigation if it is suspected that war crimes have been committed

[3] *Mothers of Srebrenica v The State of the Netherlands* (District Court of The Hague, 16 July 2014, Case Number/Cause List No: C/09/295247 / HA ZA 07-2973) available at: http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748.

by a CP. Fourthly, the extent of the obligation to 'ensure respect' for IHL, which the expert noted must be sensitive to the means available; these would be likely to include ensuring that any training received by troops involved in the operation included references to IHL compliance.

One expert suggested that the obligation to 'ensure respect' for IHL must be more than a process obligation if it is intended to have similar strength to the obligation to 'respect'. Another expert suggested the possibility of drawing on IHRL, and in particular on the notion of 'equivalent protection' (developed in the jurisprudence relating to the delegation of powers to an international organisation) in understanding what it means to 'ensure respect'.

Experts also identified a number of other issues that have become more prevalent in recent partnered operations. One of these issues is detention, in relation to which judicial decisions appear to have applied an increasingly high standard, in particular by applying IHRL norms in an environment where militaries have argued that IHL supplies the more appropriate standard. Detention operations in Afghanistan, for example, appear to be extremely disparate in terms of the approach used. Another example discussed was information-sharing, which has always been a point of multinational dissonance due to national legal restrictions and has received increased prominence as a result of developments such as the Wikileaks and Snowden disclosures.

Another expert questioned whether these 'interoperability' issues are as problematic in practice as they seem in principle, as it appears that they are reasonably routinely dealt with by States involved in partnered operations. For example, in practice, States with more onerous treaty obligations do sometimes require compliance with these standards as a condition of participation in the relevant coalition. However, it was noted that even under these circumstances questions may arise as to whether the obligation to 'ensure respect' for IHL extends to the continuous monitoring of CP troops in order to guarantee that these heightened obligations are being met (for example, the dilemma that would be faced by Canada in contemplating handing over Taliban fighters to the U.S. in light of their differing views regarding entitlement to prisoner of war (POW) status). It was also suggested that much of the cut-through regarding operational or tactical command or control decisions now arises largely from international criminal law (ICL), which means that, to a certain extent, the differences between States' interpretations of contentious IHL issues may be of lesser importance. A still more challenging question relates to the point at which, where a State partners with a non-State actor, the former may be become liable for the actions of the latter.

Advancing technologies also raise concerns about interoperability in partnered operations. Various nations are currently using or developing capabilities in areas including cyber operations, nanotechnology, human enhancement, and autonomous weapons; as these technologies continue to develop and become weaponized, interoperability issues will undoubtedly become increasingly pronounced. These issues may well be legal as well as practical: for instance, in order for effective partnered cyber operations to occur, questions concerning divergent understandings of what constitutes an 'attack' or what criteria govern the identification of a legitimate military objective may need to be worked out. Some experts agreed that the Tallinn Manual provides a framework States can use as a basis for their discussions, but that more detailed resolution may be necessary in the future.

Experts also discussed the nature and extent of the obligations of a State operating on the territory of a CP with its consent. In this context, questions arise as to which specific legal obligations are applicable: those deriving from the supporting State's treaty obligations, or from those of the territorial State? One expert noted that within the IHRL paradigm rights are vested in people, meaning that the correlative obligations could be seen as applying to whatever State has control over them – but accepted that this reasoning may only be relevant in situations of occupation. Another expert noted that there is no recognised legal mechanism by which a supporting State could be said to assume the exact obligations of the territorial State, but that a similar result might be achieved in some situations where (for example) the relevant Status of Forces Agreement (SOFA) requires respect for local law. It was also suggested that the territorial State could not grant effective consent to the conduct by a supporting State of operations that it would be legally precluded from conducting itself. By contrast, if

a foreign State were to intervene without consent, the territorial State would be obligated to protect its population from acts of the intervening state. In both cases, however, the obligation would lie with the territorial rather than the supporting or intervening State.

DAY TWO: BOUNDARIES IN IHL AND IHRL

4. Military operations beyond the traditional battlefield

With the extension of military operations beyond the traditional battlefield, questions have emerged regarding the legal framework governing the use of force in these contexts'. These questions are particularly relevant when armed forces are asked to operate in contexts traditionally left to law enforcement and in counterterrorism operations. This session examined issues including what law governs the use of force when the military acts domestically to suppress riots or community violence; whether counter-terrorism operations, including drone strikes, should be conducted as law enforcement operations or under an armed conflict model; and whether and to what extent the identification of the applicable legal framework(s) matters.

One expert raised a concern regarding the use of terms such as 'traditional battlefield' or 'hot battlefield'. Their use can suggest a binary between the application of IHL and law enforcement paradigms, but it should be recalled that the scope of IHL has never been defined in these terms. Another suggested that the distinction should be between 'law enforcement' and 'hostilities' models, rather than between 'law enforcement' and 'armed conflict' models, with a different set of legal rules applicable to each. This distinction was suggested as appropriate to the complexities of military operations today, which often shift quickly between law enforcement and hostilities paradigms. However, it was acknowledged that challenges may arise in situation where the line between hostilities and law enforcement is unclear – for instance where, in a NIAC, the enemy consists simultaneously of combatants and criminals. One expert noted the interesting approach taken in the latest operational manual released in Colombia, which takes different approaches to the legal regulation of detention (officially purely criminal) and targeting (where a sliding scale between a 'law enforcement' and a 'conduct of hostilities' model applies depending on the prevailing level of violence). Experts also raised concerns that, at a tactical level, a sliding-scale or rapidly altering legal framework can be problematic because of the need for members of the armed forces to switch between mind-sets.

Questions were raised as to whether counter-terrorism operations such as drone strikes could ever be conducted under a law enforcement paradigm, such that the applicable legal framework would be limited to IHRL and the relevant domestic criminal law. While it was generally accepted that distance from the primary battlefield does not exclude the possibility that a particular operation constitutes part of an ongoing NIAC, it is less clear whether this means that every drone strike anywhere is part of an underlying NIAC. To some, the answer depends on whether the target can be properly identified as a member of a group involved in an existing NIAC.

One expert questioned whether the effort to apply IHL to new contexts beyond the traditional battlefield is in fact appropriate, and whether in some situations we should instead consider using a criminal justice model. This was particularly considered in relation to two areas relevant to national security: detention and cyber operations. Concerning detention, the main argument was that many of those in Guantanamo could have been successfully tried in U.S. Federal courts instead of relying primarily on a system of military commissions. First, the detention of terrorists after prosecution and conviction in the Federal court system provides predictability that is currently absent in the military commission system. Secondly, Federal courts are generally considered more legitimate than military commissions, as the stringent procedural protections reduce the risk of error and generate public confidence. Thirdly, criminal prosecution has the additional advantage of fostering increased international cooperation. There is evidence that other States recognise and respond to the difference in legitimacy between civilian and military courts and that they are, indeed, more willing to cooperate with U.S. counter-terrorism efforts when terrorism suspects are tried in the criminal justice system.

Some experts agreed that the criminal justice paradigm might be appropriate and effective when individuals are brought back to the relevant State's jurisdiction, but that problems can arise where this is not possible. Other options include criminal prosecution in the domestic courts of the host State, or carrying out interrogation abroad and then bringing individuals back to the intervening State if there is sufficient evidence to suggest the likelihood of a successful conviction. Other experts suggested that the civilian criminal justice model should always be the default, with IHL as the option of last resort; this would constitute appropriate recognition of IHL as an extraordinary, as opposed to a normal, exercise of authority. On the possibility of 'proxy' prosecution in the domestic courts of the host State, one expert mentioned the fact that a significant amount of experience has been acquired in Iraq with the process of shifting detainees into the local criminal justice system, with mixed results. In Afghanistan, further problems have arisen due to the weakness of the existing system and problems of politicisation.

Concerning cyber operations, an expert highlighted a number of particular drawbacks of applying IHL as the default legal framework. It was questioned how to consider the meaning of 'attack' for *jus in bello*: can it be broadened for the purposes of IHL in a way so as to including data as 'object'? In addition, the Pentagon is subject to over one million cyber attacks each day, which militates against the default application of a military response. While the Tallinn Manual focuses on the application of IHL to cyber operations, scholars and practitioners have increasingly discovered that this body of law is not necessarily a good fit for a number of reasons.

For example, the vast majority of cyber 'attacks' by one State against another fall below the Art 51 threshold. As a result, States have increasingly looked to the norms of customary international law governing countermeasures as a possible source of legal authority for active defences against cyber operations. The problem is that the law of countermeasures has seldom been applied to justify the use of force and, indeed, commentary in this area makes it clear that the doctrine was not intended to encompass actions that amount to the use of force, but there was some disagreement as to whether this was in fact the case . Overall, some experts agreed that there is a serious risk that the use of countermeasures might spin the situation out of control. The result is that, according to the expert, a criminal law enforcement model would be more appropriate for addressing cyber threats. A more robust domestic legal framework, coupled with a stronger international co-operation in criminal law enforcement, could go a significant distance toward addressing the legal challenges posed by the increasing frequency of cyber operations.

One expert referred to the alternative possibility of using countermeasures that do not amount to use of force. This type of response might be appropriate if used after a request to remedy an illegal act consisting of a cyber operation; specifically targeted at halting the unlawful act; capable of being called off, and with effects that are potentially reversible; and designed to cease as soon as compliance is achieved. Under these circumstances, the expert considered that the use of countermeasures could minimise the risk of escalation. However, the problem is that – in the absence of an international treaty on cyber operations – there may be a lack of clarity as to what constitutes the initial unlawful act. Other experts suggested that States should also consider other forms of response, such as diplomatic measures. One expert agreed that countermeasures may (subject to the requirement of proportionality) be used in response to any violation of public international law, but noted that it may be difficult to attribute the initial cyber operation to another State. Alsoif the act originates from a non-State actor in circumstances precluding attribution this raises many more issues, as countermeasures are only inter-State in nature. Overall, experts agreed on the need to enhance international co-operation for building a long-term legal strategy for dealing with cyber operations.

According to one participant, in circumstances where so many militaries are involved in cyber operations, it is important to consider how an IHL framework might apply in this area. Another responded that, although this may well be the case, there is at least a strong case for drawing the line a little further in the direction of a criminal justice paradigm; this does not equate to sidelining IHL completely or to suggesting that there is no role for IHL in regulating cyber operations.

One expert noted that the U.S. still sees the use of force and an 'armed attack' as equivalent, with the result that cyber operations are far more likely to elicit a response that falls under an IHL paradigm. Some experts agreed that it may be important to restrict the use of the term 'cyber attack'; this terminology is liable to confuse the terms of the debate, as the vast majority of cyber activity or operations do not constitute 'attacks' as a term of art.

5. Regulating NIAC through extension of IAC norms: Origins, pragmatics, and limits of this concept

In this session, experts examined various issues arising from the application of the rules governing international armed conflicts (IACs) to NIACs. One participant discussed the need for States to extend norms based on their existing treaty commitments in IACs to NIACS as a matter of law, rather than as a matter of policy, and to do so systematically rather than via a process of 'cherry-picking'. One way of doing this would be to establish a set of rules based on those that regulate IACs, and to ask States to make a legal commitment to applying them in NIACs. The idea would be to establish a 'floor' rather than 'ceiling', so that the rules would not purport to constitute a complete legal framework for NIACs. States would adhere to the regime by registering a unilateral declaration of intent with an appropriate body, possibly the Swiss Federal Council, which is the depository for ratifications of the Geneva Conventions. This would improve interoperability and certainty in NIACs as well as enhancing the protection of individuals. One expert noted that this approach could raise a number of concerns in its interaction with other legal regimes: for instance, where a State has made a declaration, a question might arise as to whether the ICL regime governing IACs would also apply.

The expert noted that the proposed approach is not new, and that antecedents can be found in the 1863 Lieber Code and in State practice during the Vietnam War. It is also envisioned in CA3 of the Geneva Conventions, which provides that parties to a NIAC 'should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.' In the view of one expert, the reasons for applying IAC rules to NIACs include the existence of gaps in the present regulation of NIACs. Experts also recalled that one subsisting difference between IACs and NIACs is that in most NIACs there is still an applicable domestic legal framework.

An expert noted that the proposed set of NIAC rules involves a departure from the general IHL principle of equality of belligerents, in the sense that it envisages the State side in a NIAC unilaterally taking on obligations which would not necessarily bind the non-State party or parties. One expert considered that the decision to abandon this principle is fundamentally at odds with the underlying philosophy of IHL. They added that that at the time of the drafting of the Geneva Conventions States expressly avoided the development of equivalent legal regimes for IACs and NIACs, and that their position in this regard is unlikely to change.

Particular challenges in the development of the proposed rules relate to questions of status, such as whether and under what circumstances members of non-State armed groups might enjoy combatant immunity; and questions regarding detention, such as identifying which legal rules (those drawn from the prisoner of war regime in the Third Geneva Convention (GCIII), or from the detention of civilians under the Fourth Geneva Convention (GCIV)) are most appropriate for the detention of belligerents in a NIAC and determining what entity would perform certain administrative roles for non-State armed groups.

One expert noted that the application of the rules governing IACs to NIACs has often been pushed by humanitarian actors on basis of the dearth of rules applicable to NIACs. However, the controversial results of actual analogous application by the Bush Administration have resulted in much greater caution in this regard. In addition, some experts took the view that a lack of regulation in relation to NIACs is no longer a significant problem today, and that the real challenge lies with the practical non-respect for even the basic requirements of CA3 and Art 75 of API.

Another expert discussed the limits of harmonizing the law applicable to IACs and NIACs. The assumption that no other rules of international law regulate the conduct of States involved in internal conflicts fails to take account of the continued applicability of IHRL. The expert took the view that States could 'access' this regime through their human rights treaty obligations, in particular by requiring that they derogate in order to exploit the more permissive rules of IHL where the relevant human rights treaty provision cannot be interpreted harmoniously with those IHL rules.

Some participants questioned whether the proposed approach would import authorizing as well as protective rules, as there is a concern that those who consider authorization in relation to (for example) targeting to flow from IAC rules would then be able to make the same claim for NIACs. It was also suggested that there is a risk that this approach would reinforce *lex specialis* arguments involving the displacement of IHRL, as these arguments have always been easier to make in relation to IACs than NIACs.

Extending the generally more permissive rules of IHL to NIACs could also operate so as to lessen the protections available to vulnerable persons. For example, one expert suggested that the GCIII internment regime might pose problems in NIACs in relation to both status-based internment (given the absence of a clearly defined status of 'combatant' in NIACs) and the potential for internment for the duration of hostilities. In addition, individuals initially interned as 'members' of a non-State armed group may not continue to be so for the duration of hostilities. It was suggested that the preferable approach might be to take the detention regime under GCIV, which is premised on individualized security threats justifying internment for a limited duration, as a starting-point.

Another expert noted that, although the procedural framework for detention envisaged by GCIV is more logical in a NIAC, this is not the case for its foundational presumption (namely that detention is a measure of last resort). In dealing with unprivileged belligerents, detention should be presumptively legitimate (as it is in relation to POWs under GCIII); the applicable procedural obligations could then be drawn from GCIV. One expert expressed the view that detention for imperative reasons of security is not necessarily incompatible with status-based detention on the basis of membership of a non-State armed group, although in most cases it will be. Another noted that the Israeli Supreme Court has considered this issue, and held that a detention regime compatible with GCIV cannot provide for purely status-based internment; however, a finding regarding an individual's membership of a non-State armed group could be sufficient to show that their detention is justified by imperative reasons of security. The advantage of this approach would be that, without applying a blanket presumption that detention is justified, courts or tribunals could take account of group membership in making this assessment.

6. Law at the end of conflict

The question of when an armed conflict ends permeated many of the issues discussed in the workshop. It significance relates not only to the identification of the point at which IHL ceases to apply, but also to its implications for the legal status of people who are being detained in relation to the armed conflict and of missing persons. In this context, experts noted that in recent years courts have become involved with increasingly frequency in identifying and classifying situations of armed conflict, meaning it is not only States which are engaged in this process.

One expert took the view that the key question is not so much when an armed conflict ends –, which may not be either a legal question or a question lawyers can answer – but when IHL ceases to be applicable. According to another expert, it seems sensible to say that the rules of IHL cease to apply once the circumstances that trigger their application are no longer present. In practice, this determination should be made in good faith by military commanders, on the advice of lawyers, via the application of legally relevant factors. Particular problems might arise where a NIAC coexists with an IAC: for example, holding POWs longer than what they are entitled to do. In cases of belligerent occupation, similarly difficult questions arise as to when the situation of occupation ends: for example,

does occupation continue where effective control is exercised over territory in the absence of 'boots on the ground'? Uncertainty as to the applicability of IHL may also arise where new actors join or where old actors leave a NIAC. Finally, in situations where the State is weak and a non-State actor comes to exercise effective control of part of a territory (as is the case, for example, in South Ossetia) it is unclear whether IHL remains applicable or whether the relevant legal paradigm reverts to IHRL.

Experts recognised that there is a range of ways of varying formality in which an armed conflict can be brought to an end, from the conclusion of an armistice or peace agreement to the surrender of one party or the simple petering-out of violence. One expert questioned whether the factors relevant to the *Tadić* test for the existence of a NIAC (namely, the intensity of violence and the level of organization of the non-State armed group) should also be used to determine the point at which IHL no longer applies. Alternative approaches might include the declaration of a party to the conflict or the conclusion of a peace settlement.[4] However, none of those seem to reflect the *lex lata*. According to some participants, the making of a peace agreement might have some relevance but should not be treated as either a sufficient or necessary condition for identifying the conclusion of a NIAC.

Some experts suggested that, while it might seem sensible to apply the *Tadić* factors as the ongoing measure of whether a state of armed conflict exists, this raises the possibility of a 'revolving door' problem[5] whereby, as an armed conflict may come into and fall out of existence between one day and the next, parties might find themselves unsure at some moments as to which legal regime is applicable, thereby creating excessive uncertainty. Other experts noted that, while the 'revolving door' issue probably does not present itself on a daily basis (given the impossibility of acquiring sufficiently accurate and comprehensive information to make rolling determinations regarding the satisfaction or otherwise of the *Tadić* factors), there is nonetheless a need to engage in a continuous process of assessment.

It was generally accepted that, in the context of an IAC, IHL ceases to apply at the 'general close of hostilities', which means complete cessation of all military manoeuvres. However, some obligations related to the foreseeable end of hostilities are triggered beforehand (for example, the repatriation of POWs), and others continue afterwards (for example, obligations toward the wounded or other persons *hors de combat*).

Some experts were of the view that, whereas there is little comparatively little variation in the character of IACs, within the range of conflicts that may properly be characterised as NIACs there is a significant difference between a situation which is only just across the threshold of CA3 and what might be termed a full-scale civil war. Where a situation falls somewhere between these extremes it is often difficult to determine the precise factual situation on the ground; as a result, difficulties arise in determining when the state of armed conflict ends.

Experts also commented on the potential legal significance of the differences between territorial NIACs where a functioning State subsists, NIACs occurring on the territory of a failed State, and extraterritorial NIACs. According to one expert, in the first case the goal is to return to a situation where law and order prevail ('law enforcement plus'), where in the second case the only relevant paradigm in relationship between parties is IHL ('IAC minus'). Whilst rules on the protection of victims and prohibitive rules governing the conduct of hostilities could apply in both situations, it may be that rules which permit behaviour that would not normally be allowed (for example, targeting on the basis of status) do not apply in the 'law enforcement plus' type of scenario at the level of hostilities designated by CA3 but at some higher level. A number of experts considered that protective rules relating to the protection of vulnerable persons might apply at a lower level of intensity than permissive ones regarding targeting.

[4] The ICTY Appeals Chamber in *Tadić* observed: 'International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities […], in the case of internal conflicts, [until] *a peaceful settlement is achieved*.'

[5] *Prosecutor v. Gotovina* (2011), Trial Chamber Judgment, para. 1694.

Another expert challenged the relevance of identifying a situation of 'law enforcement plus' as satisfying the threshold for the application of CA3 if it does not bring into play permissive as well as restrictive rules. The expert noted that if there is an armed conflict the entire relevant set of IHL rules apply. By contrast, another expert took the view that, as the only reference to rules governing the conduct of hostilities in a NIAC are in Additional Protocol II (APII) (rather than Common Art 3), it is sustainable to assert that the only rules engaged at the *Tadić* or CA3 threshold are those relating to the protection of victims.

One expert raised the possibility that some of these problems could be resolved by positing a higher threshold for the existence of a NIAC, with a law enforcement paradigm used below that – something closer to the threshold for the application of APII, but without requiring control of territory by the non-State armed group. Another expert did not see how the distinction between different 'types' of NIAC could be considered as *lex lata*. A further expert questioned whether the fact that the statute of the International Criminal Court sets out one threshold for CA3 and one for rules governing the conduct of hostilities (such as targeting) might suggests the existence of two thresholds more generally.