The International Institute of Humanitarian Law,
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in cooperation with

The International Committee of the Red Cross,
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XXVIIth Round Table
on Current Problems of International Humanitarian Law:

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

Summary report
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The International Institute of Humanitarian Law (IIHL) - in close cooperation with the International Committee of the Red Cross (ICRC) – decided to address the problem of the interplay of IHL with other legal regimes in situations of violence as the agenda of its 27th round table on current problems of international humanitarian law (IHL). This gathering, held on 4-6 September 2003, attracted around 200 participants and constituted an interesting forum for dialogue and exchanges of experiences between government experts (serving in military, diplomatic or legal capacities), members of the National Red Cross and Red Crescent Societies, representatives of international and non-governmental organisations and academic specialists. The proceedings opened with keynote speeches from Mr Ruud Lubbers, United Nations High Commissioner for Refugees, and Mr Jacob Kellenberger, President of the ICRC. Mr Bertrand Ramcharam, *ad interim* United Nations High Commissioner for Human Rights, also delivered an address during the Round Table.

The task of the participants was to consider the interplay between IHL and the other legal regimes that apply in situations of violence, mainly human rights law, refugee law and international criminal law.[1] Integrated by the ICRC into its project entitled "Reaffirmation and Development of International Humanitarian Law", this Round Table was essentially intended to determine if - and to what extent - these various legal regimes complement each other to provide seamless protection of the human person. It was also intended to assess whether the complementarity between the various systems (or their mutually exclusive application) left any lacunae in the protection to which victims are entitled in situations of violence.

This document seeks to summarise the content of the extremely full and intense debates, as well as to report the main conclusions reached by the participants. However, in view of the large number of participants and the duration of the round table, it is clear that the report cannot be exhaustive, whether with regard to the subjects tackled or to the various positions expressed.[2] The document begins with an overview of both the persisting and the more recent difficulties relating to the qualification of situations of violence. It then goes on to present the general framework of relations between IHL and the other bodies of law before illustrating the interplay between them by means of three examples, namely deprivation of liberty, judicial guarantees and the use of force. Finally, the last section provides a very brief analysis of the links between the mechanisms for the implementation of these different bodies of law.

I. Legal qualification of situations of violence and related challenges

As the existence of an armed conflict constitutes an essential pre-condition for the application of IHL, the precise delimitation of situations of violence capable of being subsumed under this qualification is of fundamental importance. However, there is no treaty instrument offering a definition of the precise scope of this term.[3] Moreover, even if there is no dispute as to the existence of an armed conflict, the legal obligations under IHL are broader or narrower in scope depending on whether the conflict is or is not of an international nature. Many experts have noted that the distinction between the rights and obligations applicable in international versus non-international armed conflicts is gradually being eroded.[4] However, simple acknowledgement of the existence of this trend does not constitute a sufficient basis for taking the view that there is now a single legal regime covering all situations of conflict. Thus, legal qualification continues to be the first step in identifying the norms governing a given situation.

[1] The title of the round table was the same as that of this report. The agenda of the meeting is attached as an appendix.
[2] The International Institute of Humanitarian Law is currently preparing the publication of the proceedings of the round table.
[3] Article 2 (1) common to the four Geneva Conventions of 1949 merely underlines that these treaty instruments will enter into application *"in the event of declared war or any other armed conflict arising between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them."*
[4] Probably not least of the factors tending to the unification of the applicable legal regime, irrespective of the qualification of the conflict, is the work of the *ad hoc* Criminal Tribunals, as well as the adoption of the Rome Statute of the International Criminal Court. However, it will be noted that a certain number of participants expressed strong doubts as to the fact that the practice of the parties (and non-state parties in particular) to a non-international conflict could support this process of assimilation.

Furthermore, the importance of this qualification for the content of the applicable law explains why some firmly maintained that this legal procedure is of an objective nature, i.e. that it does not depend solely on the position expressed by the parties directly involved. Accordingly, the report begins by presenting the elements enabling the identification - as "objectively" as possible - of first international and then non-international armed conflicts. The qualification of so-called "self-help" operations is then the object of particular analysis.

1) The qualification of "international armed conflict"

The participants began by considering the question of whether a threshold of violence is required for the qualification of international armed conflict to be applicable. In this regard, numerous participants recalled that the Commentary on the Geneva Conventions offers a very broad view of the term "armed conflict" by interpreting common Article 2 as including any difference between States leading to the intervention of armed forces. In particular, the Commentaries on the Conventions explicitly exclude some criteria - such as the refusal of one of the parties to acknowledge the existence of a state of war, the duration of the conflict, or the number of victims - to establish or to refute the existence of such a conflict.[5] On this basis, the experts deduced that, formally, a single incident involving armed forces is sufficient to result in a qualification of international armed conflict and so in the application of IHL.

Nevertheless, a minority of participants denounced the simplistic nature of such a theory. To illustrate their argument, they stressed the fact that, in the case of insignificant incidents between two States (such as border clashes), there might still be room to argue that, despite the use of armed forces, this was not yet an armed conflict. Indeed, some experts emphasised that a qualification of armed conflict in this context might have a negative "psychological" impact that could favour an escalation of violence.[6] In other words, the use of force can only lead to a qualification of armed conflict if it continues for some minimum period of time. These same experts, however, conceded that the time factor was not the only pertinent criterion here and that, in certain cases, the particular intensity of a single act of violence (e.g. the use of a weapon of mass destruction) could outweigh its brevity and result in a plausible argument for the qualification of armed conflict.

In the end, one essential criterion for the existence of an international armed conflict emerged from the discussions, namely the use of armed force by a State (even if the adversary offers no resistance). The discussions also revealed a number of complementary criteria that might play a role, such as hostile intent (*animus belligerendi*), the duration of the acts of violence, and their intensity, the latter being measured by examining a series of cumulative events.

The experts then turned to an analysis of the recent trend towards the internationalisation of armed conflicts geographically confined to the territory of a single State. They recalled that, traditionally, such an armed conflict could still be qualified as international if a foreign State intervened with its armed forces. No objection was raised against this line of argument if the State was acting on the side of rebels against government forces. On the other hand, if the intervening State was acting on the side of the government, the qualification was more problematic. However, this point was not debated in sufficient depth to permit a conclusion to be drawn in this regard.[7] The question was also raised as to whether the foreign intervention permitted the internationalisation of all the conflictual relations or only those involving the foreign

[5] See for example the Commentary on the third Geneva Convention (ICRC, Geneva, 1958, p. 23) or the Commentary on the fourth Convention (*ibid.*, pp. 20-21).

[6] The question was also raised as to whether, in a case of non-international armed conflict, an act of violence committed on the territory of a neutral State could suffice to constitute an international armed conflict.

[7] Certain experts, after having qualified "Operation Infinite Freedom" conducted by the allies in Afghanistan as international armed conflict, emphasised that this qualification was modified with the constitution of the *Loya Jirga*, the conflict then resuming a purely internal character, as the allies were then acting with the consent of the internationally recognised national government.

State. The participants who spoke on this topic clearly expressed their preference for the so-called "fractionation" theory, whereby the relations between the government authorities and the rebel group retain a purely internal character.[8]

The second hypothesis permitting internationalisation is that in which a non-state actor party to a conflict is in fact acting on behalf of a foreign State. In this regard, the discussion concentrated mainly on the development of IHL since the judgement rendered by the International Court of Justice in the case of Military and Para-military Activities in and against Nicaragua, which raised the criterion of *effective control*, and various judgements rendered by the International Criminal Tribunal for the former Yugoslavia (ICTY) which advanced the criterion of *overall control*. A majority of the participants declared themselves in favour of overall control, arguing that this criterion favoured *de facto* the application of the law relating to international conflicts, which is much more developed than the law of non-international armed conflicts.[9] However, a minority emphasized the practical difficulties engendered by the concrete implementation of this criterion of overall control.

Finally, the participants engaged in a fierce debate on the nature of the parties to an armed conflict for it to be qualified as international. From an historical point of view, it appeared very clear that the qualification of international armed conflict was limited to a military confrontation between two or more sovereign States and, in any event, this is the sense in which the term is still most often applied.[10] The fact remains, however, that Additional Protocol I opened the way for a broader interpretation, Article 1 (4) extending this qualification to conflicts between a State party to the Protocol and an authority representing a people engaged in a struggle "*against colonial domination and foreign occupation and against the racist regimes in the exercise of the right of peoples to self-determination*". The reference to this article sparked off a heated discussion between the participants, some of whom refused to assign to this provision a general normative scope (beyond the circle of the contracting States), particularly on the ground that the refusal to ratify the Protocol was sometimes motivated by opposition to this extension of the scope of application.[11] Nevertheless, the fact remains that Article 1 (4) of Protocol I is binding on the High Contracting Parties at least[12] and, for a certain number of the participants, acknowledging the extreme difficulty of satisfying all conditions for the application of this provision does not mean that those conditions would not be met at some future point in time. In other words, if the authorities representing a people in conflict within the meaning of this article are seeking *in fine* the creation of a new State, a conflict could formally be qualified as international even though one of the belligerents is not (yet) established as a sovereign entity.

This being the case, the question was asked whether military operations conducted by one or more States against non-state armed actors of a transnational nature could be qualified as international armed conflict and whether such armed groups could be equated with Parties to the conflict. The proponents of this thesis argue that the development of customary rules going beyond the treaty provisions currently in force has contributed to the extension of the notion of

[8] In particular, some experts expressed profound doubts as to the working presumption of the ICTY, which sometimes seems to consider that if an international armed conflict exists in a part of the territory, this qualification can then be transferred to all acts of hostilities conducted on this territory.

[9] On this subject, however, let it be noted in passing that the question was raised as to whether it was necessary or even desirable to qualify conflicts using the same criteria in the distinct contexts for the responsibility of the States and for international criminal responsibility.

[10] The participants unanimously considered that the qualification of international armed conflict also remained relevant when States used force with the authorisation or under cover of a universal or regional international organisation. Nevertheless, certain experts underlined that, in such an eventuality, an agreement on the qualification of the conflict did not suffice to settle the complex question of the applicable norms, all the member States not necessarily being bound by the same international agreements. To take but one example, on the occasion of the military operation conducted in 1999 by NATO against the Federative Republic of Yugoslavia, a certain number of States stressed that their forces were bound by the norms of the first Additional Protocol, whereas others - which had not ratified the said Protocol - considered that the situation was governed only by international customary law.

[11] It will be noted that the possibly customary nature of this provision, referred to by certain participants, raised heated reactions to the contrary.

[12] Unless, of course, the contracting State formulates a reservation to opt out of this provision.

international armed conflict to cover the "war on terrorism". However, the great majority of the participants rejected this assertion, recalling that the genesis of a customary norm requires a constant and uniform practice, as well as the conviction of conforming to a rule of law (*opinio iuris sive necessitatis*), whereas even the practice was manifestly absent in this matter. Without rejecting out of hand the notion of "war on terrorism", most of the experts agreed that all activities conducted under this banner were not *per se* to be equated with an armed conflict in the legal sense of the term.[13] This notion of "war on terrorism", being far from clear cut, can call for the application of various legal regimes, including particularly IHL, international human rights law or the law governing international terrorism; the choice between these various regimes is then dependent on traditional criteria relating to the qualification of the operations.

2) Non-international armed conflict: legal qualification and parties to the conflict

A very large majority of the experts recalled that the international legal standards applicable vary, depending on a model that distinguishes three types of situation. The first situation is characterised by civil peace, isolated acts of violence then being dealt with by human rights law, which applies in its entirety. The second situation is characterised by a more collective yet still not organised violence. In this case, we speak of internal disturbances and tensions, which eventually authorise the government authorities to declare a state of emergency. The threshold for the applicability of IHL has still not been reached but human rights - at least the non-derogable rights - continue to govern the acts of violence committed within this framework. Considering the law governing this type of situation to offer insufficient protection, various initiatives have been undertaken to develop "minimum standards of humanity" to complement the treaty instruments. Finally, in the third situation - where the transition to an armed conflict is complete - IHL then proves to be the body of law most appropriate, the question of the complementary applicability of human rights law being referred to later in the present document.

One expert suggested that the distinction between the legal regimes applicable to non-international armed conflicts on the one hand and to internal disturbances and tensions on the other is anachronistic and inappropriate. Accordingly, he suggested that the rules applicable to isolated and sporadic acts of violence which do not reach the threshold of armed conflict should be revised and modelled on Article 3 common to the Geneva Conventions in order to increase the protection of victims. However, this proposal was sharply criticised on the ground that, far from resulting in an increase in the protection offered to the population and to civilian property, it could, in certain circumstances, even lead to reduced protection. For example, it was indicated that the rules relating to the use of armed force were much stricter in a simple law enforcement model based on the conditions laid down in human rights law than those applying in an armed conflict model subject to IHL. As the great majority of the experts declared themselves to be in favour of maintaining a dichotomy between the legal regimes applicable to non-international armed conflicts and those governing internal disturbances and tensions, it is appropriate to ask what are the conditions permitting a situation to be qualified as an armed conflict.

A first set of criteria concerns the Parties to the conflict. In this regard, the experts agreed that, in any event, the qualification of non-international armed conflict implies a minimum of organisation on the part of each of the belligerents. Such a condition may be satisfied if the dissident groups or armed forces are led by a responsible command and the chain of command is sufficiently effective for the implementation of the obligations incumbent on it under IHL.[14] Certain participants, it is true, noted that the criterion of organisation appeared in Article 1 of

[13] This does not prevent the war on terrorism from going beyond the simple framework of maintaining order in certain circumstances. Thus, the participants agreed to qualify the military operations conducted in Afghanistan after the 11 September attacks as international armed conflict.

[14] Formulated in this way, the criterion implies that it is not the effective respect for IHL which is required but rather the capacity to respect this body of law as resulting from the organisation of the group.

Additional Protocol II but that it was not referred to explicitly in common Article 3 of the Conventions. Nevertheless, a clear consensus seemed to have emerged that the requirement of this minimum threshold of organisation stemmed implicitly from the reference to the term "Parties to the conflict" in Article 3, as it seems difficult to conceive of this qualification being applied to a group without at least a basic hierarchical structure.[15] The participants recalled that Protocol II further requires control of a portion of the territory by the Parties to the conflict but they agreed, in accordance with the dominant doctrine, that this condition - which does not appear in common Article 3 - could serve to characterise a specific category of conflicts to which Protocol II is applicable[16] but not to define the general notion of non-international armed conflict. This control of a portion of the territory may nonetheless serve as an additional indicator of the existence of an armed conflict.

A second set of criteria is based on the duration of the acts of violence. In this regard, numerous experts, invoking both the case-law of the International Criminal Tribunal for the former Yugoslavia and the Rome Statute establishing the International Criminal Court, argued that the duration of the acts of violence could play a role in differentiating between a non-international armed conflict and a situation of internal disturbances and tensions.[17] However, the endorsement of such a criterion raised objections on the grounds that it appeared neither in common Article 3 nor in Additional Protocol II and that it would be inappropriate for certain types of conflicts, particularly in contexts of asymmetrical wars characterised by isolated and sporadic outbreaks of violence.

A third set of criteria derives from the category of armed personnel or tactics used. In particular, it was suggested that the qualification of armed conflict can be endorsed only if the level of violence is such that the authorities competent to maintain order can no longer do so, a situation thus requiring the intervention of military personnel. Although the involvement of armed forces certainly constitutes a strong indication that the threshold of conflict has been reached, certain participants nevertheless emphasised that the distinction between internal disturbances and tensions and armed conflicts must be made by reference to a precise situation and not necessarily in relation to the personnel involved. In other words, the intervention of the armed forces could not be considered in itself as sufficient to lead to the application of the standards of IHL. In this regard, examples were cited of anti-terrorist operations carried out by special forces but in accordance with principles applicable to law enforcement. Certain experts then suggested that the (military or police) tactics employed may then be used as a criterion for differentiation. However, this criterion would be of a circular nature because the qualification - from which the type of tactics to be used by the forces of public order must logically stem - would in fact be dependent on the nature of the said tactics.

Finally, a fourth and last set of criteria derives from the intensity of the acts of violence. For a certain number of experts, this condition - which not only subsumes the preceding series of criteria but also permits reliance on complementary factors, such as the number of persons involved in the acts of violence or the number of victims - is undoubtedly the linchpin for any qualification of non-international conflict. However, other experts stressed the ambiguity of this criterion of intensity. The precise elements permitting the quantification of the intensity remain open to question, while the threshold of intensity required for the qualification of the conflict remains relatively subjective.

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[15] However, one expert noted that there had been a significant development under the impact of the case-law of the international criminal Tribunals. The decisions recently handed down by the *ad hoc* tribunals tend to confirm that it is not only the Parties to the conflict who are bound by IHL but also every individual who has committed a reprehensible act in connection with said conflict according to the statute of such judicial bodies. Nevertheless, the same expert emphasised the controversial aspect of theories implying that individuals are vested with rights by virtue of IHL.

[16] Certain participants nevertheless underlined the recent tendency to eliminate these various categories of non-international armed conflicts.

[17] With regard to the conditions permitting a conflict to be qualified as a non-international armed conflict, the first trial Chamber of the ICTY held, in its judgement rendered on 16 November 1998 in the *Celebici* case, that "*in order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organisation of the parties involved*". See also Article 8 (2) (f) of the Statute of Rome.

In conclusion, the participants briefly considered the possibility of qualifying as non-international armed conflict the operations conducted by a State alleging a legitimate right of individual or collective self-defence against non-state actors of a transnational character. They emphasised that, if such operations could be considered an armed conflict, common Article 3 would then represent the minimum norm governing this type of situation. The experts focused their attention on the qualification in this context of so-called *self-help* operations, a question to which we will now turn briefly.

3) Extra-territorial "self-help" operations: meaning and applicable law

The participants began by broaching the difficult question of the definition of self-help operations in public international law. Broadly speaking, the term "self-help" serves to characterise the unilateral measures adopted by one or more States to protect rights that they claim or to ensure that those rights are respected. Although such actions may or may not be armed, in light of the subject of the Round Table the experts decided to focus on the hypothesis of acts of recourse to force. It was noted that such operations could sometimes be directed against a foreign State - particularly with a view to bringing about the cessation of a violation of law - or against individuals or groups suspected of criminal activities affecting a State which has no means of protecting its own security other than by taking action on the foreign territory from which the threat comes.[18]

The experts next engaged in intense discussions relating to the legality of these self-help measures in relation to the right of recourse to force (*ius ad bellum*). The content of these debates - though interesting - will not be summarised in this report, the problem going beyond the subject matter of the round table. Suffice it to say that, for the great majority of the participants, the legality of a self-help operation must fall within the framework of the law of the UN Charter.

The attention of the participants was also drawn to the legal regime applicable to this type of self-help operation. A certain number of experts argued that this type of action must necessarily be governed by human rights law. In support of their arguments, they cited the declarations of the Swedish minister of foreign affairs who - following an attack on November 4 2002 in Yemen carried out by American forces on a vehicle carrying individuals suspected of terrorist activities - qualified this operation as extrajudicial killing.[19] Nonetheless, the question was raised as to whether human rights law could be applied in an extra-territorial fashion and, if so, what legal basis permitted such an assertion. However, the question did not give rise to debates sufficiently detailed for a conclusion to be drawn on this issue.

The participants then turned to the question of the applicability of IHL to such operations - in other words, to the possibility of qualifying them as armed conflict. In this regard, they considered the role played in such a qualification by the consent of the territorial State, some experts holding that this criterion was irrelevant to the matter. The discussions raised the possible limitation of self-help operations, on the one hand, to single or isolated acts or, on the other, to a series of similar acts extending over time. On the whole, however, the participants expressed strong doubts as to the endorsement of self-help operations as a possible special legal category distinct from conventional armed conflicts. The majority pronounced in favour of

[18] Some experts, referring particularly to arrests of criminals living abroad, emphasised that certain of these self-help operations resembled extra-territorial police actions far more than genuinely military actions.

[19] Without explicitly contesting the applicability of human rights to this type of situation, one expert, however, noted that international law could not be totally disengaged from the actual development of the legal reality. Describing the declarations of the Swedish minister as idealist, the expert indicated that if the law no longer corresponded to the reality, there was a serious risk that the States would no longer concern themselves with legal considerations but would simply act.

an application of the classic conditions for the qualification of armed conflicts and an application of the UN Charter for their legality.

II. The relationship between IHL and other bodies of law in situations of international and non-international armed conflicts: complementarity or exclusion?

1) Interplay between IHL and human rights law

Human rights are intended to protect the fundamental rights of the person against abuse by the State. They apply in all circumstances, even though it is true that certain treaty instruments, once ratified, authorise the contracting parties to suspend the application of a part of their obligations in a situation of exceptional emergency. IHL, on the other hand, though of narrower scope - since it is confined to relations between Parties to an international or non-international armed conflict - permits no derogation from its norms.

This basic introduction is sufficient to refute the thesis that these two bodies of law cannot be applied simultaneously on the grounds that they operate in distinct situations. Thus, the participants confirmed that, though the emergence of an armed conflict was a *sine qua non* condition for the applicability of IHL,[20] this context of conflict could not suffice to exclude the implementation of the regime of the protection of human rights. To cite but one example, though the drafters of Additional Protocol I to the Geneva Conventions introduced (through Article 75 (3)) an obligation to respect a certain number of fundamental guarantees in favour of persons arrested, detained or interned who are not better protected by other instruments in force, this provision still sets a limit by covering only individuals whose captivity is connected with an armed conflict. In consequence, as common law detainees of countries in conflict are not covered by this provision, the continuous application of human rights law remains essential in order to ensure their legal protection.

It was then suggested that the overlapping of these two bodies of law *ratione temporis* did not imply points of contact *ratione materiae*. In other words, though these bodies of law apply in tandem in situations of armed conflict, they cannot simultaneously govern one and the same legal fact or act. The participants rejected this line of argument too, emphasising that, though the application of IHL is indisputably conditioned by the existence of a connection with armed conflict, there is no valid legal reason whatever to show that this *nexus* suffices to rule out the application of the non-derogable provisions of human rights law (as a minimum).

In short, the participants agreed that the existence of an armed conflict could permit the suspension of the application of derogable human rights but only to the extent necessary, for the limited duration of exceptional events justifying their suspension and subject to compliance with certain precise conditions. At the same time, a consensus emerged that, even in this hypothesis of conflict, at least the non-derogable rules of human rights law continue to apply and to complement IHL.

The simultaneous and complementary application of these two bodies of law raises the legitimate question of the relations between them. In this regard, some participants suggested a teleological approach: given that the object and aim of both of these bodies of law consists fundamentally of ensuring the protection of the individual, the interest of the victims would dictate the application of the highest protection in the event of antinomy.[21] However, this approach was strongly criticised on the ground that it would lead to conclusions that could sometimes be open to question.

[20] Even though a small number of specific provisions (e.g. relating to the dissemination of IHL or to national implementation measures) also apply exceptionally in peacetime.
[21] Certains experts even considered that, on particular points, IHL could offer greater protection than human rights law.

Consequently, the great majority of the participants simply recalled that IHL represented a special law in as much as it has been specifically framed to apply in a period of armed conflict. They noted that, in offering ground rules adapted to this particular context of violence, this body of law makes it possible - in many cases - to specify the precise content of the non-derogable human rights. In this regard, many references were made to the reasoning followed by the International Court of Justice in its advisory opinion rendered on 8 July 1996 in the matter of the *Legality of the Threat or Use of Nuclear Weapons*. In this case, the Court, having confirmed the non-derogable nature of the right to life, held in effect that it was appropriate to refer to IHL - framed as *lex specialis* - to determine what could be considered as an arbitrary deprivation of life.[22]

However, several participants pointed out that this reasoning - though perfectly consistent for interpreting the precise content of the right to life - could not necessarily be generalised to all relations between IHL and human rights law. On the contrary, as human rights law is more precise than IHL in certain domains, the relation of interpretation must also be able to operate in the other direction. For example, Article 3 (1) (d) common to the Geneva Conventions explicitly refers to the "*judicial guarantees recognised as indispensable by civilised peoples*" but without further specifying the meaning of this expression. It was suggested that, in such a hypothesis, apart from the complementary elements contained in Additional Protocol II and in customary law, the interplay between these two bodies of law permits reference to be made to human rights law in order to deduce the substantive guarantees resulting from this general formula. The lively debate that ensued between the participants as to the extent to which IHL could be "supplemented" by human rights law did not come to any final conclusion. It will be noted, however, that some of the experts maintained that only the non-derogable human rights could be appropriate in this regard and that any other approach would lead to an extension of the scope of application of human rights law without any legal basis.

2) Interplay between IHL and refugee law

The possible interplay between IHL and international refugee law did not give rise to much comment. Nevertheless, the debates showed that though the points of intersection are less numerous, whether with regard to form or to substance, they are by no means absent. One obvious question raised was that of refugees situated on the territory of a country in conflict. Another question discussed was that of refugees who find themselves on the border of a country in conflict, given that IHL would not normally apply to them directly unless military activities fomented inside their camps became a *casus belli* and provoked an armed conflict with the State of origin or the host State. However, the participants who expressed an opinion on this point stressed that, given the difference in approach between these two bodies of law, the complementarity between IHL and refugee law was preferable in this case too. The usefulness of a coordinated approach was mentioned by some experts in relation to the management of specific situations for which refugee law is ill equipped (such as forced disappearances or family reunifications).

The question of internally displaced persons in a situation of armed conflict was more contentious. Certain experts insisted that it remained essential for the civilian population to be considered as a whole. However, acknowledging simultaneously the particularity of this problem of displaced persons, as well as the analogy with the situation of refugees, these same experts recommended practical solutions rather than a rigid compartmentalisation of the bodies of law applicable in these circumstances.

[22] In paragraph 25 of its opinion, the Court states: " *In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable* lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflicts and not deduced from the terms of the Covenant itself."*

In conclusion, the participants clearly recognised that, despite the very clear differences relating to their respective scopes of application or to the regime of derogations, IHL, human rights law and international refugee law present an undeniable convergence of norms. They concluded that the current model, based on the complementarity of these bodies of law, was far preferable to a system whereby, in a situation of armed conflict, the application of IHL would preclude that of any other body of law by virtue of its status as *lex specialis.* This complementarity was presented as the only means of ensuring a seamless legal protection in all circumstances, considering that at any time relevant elements of at least one or more regimes would continue to operate.

III. Protection of persons in situations of violence: specific aspects

1) Deprivation of liberty

The discussions relating to the deprivation of liberty focused mainly on two types of legal problems that will be presented in sequence, beginning with the legal regime applicable to the arrest of the individual and then continuing with that applicable to situations of detention.

With regard to arrest, doubts were expressed as to the competence of armed forces acting under the umbrella of an international organisation (universal or regional) to make arrests on foreign territory.[23] Though the question was raised particularly in relation to the SFOR presently operating in Bosnia-Herzegovina, it would appear equally relevant to many other contemporary situations of conflict. In this regard, the argument of some participants that the adoption of a domestic legislation was a prerequisite for such forces to be authorised to carry out arrests was, on the whole, rejected. On the other hand, a consensus quickly emerged as to the need for a clear international mandate for a force to have legal authority to carry out this type of arrest. In the absence of such a mandate, the capture could be equated with an arbitrary detention, which could give rise to an individual or state complaint to the human rights courts and indeed to the prosecution of the personnel who made the arrest.

However, the greater part of the discussions related to the second stage, namely the legal regime governing the deprivation of liberty itself. With regard to IHL applicable in international armed conflicts, a great majority of the participants indicated that the persons detained enjoyed either the protection offered by the third Geneva Convention (if they were entitled to prisoner of war status) or the protection provided for in the fourth Convention (in the case of persons protected within the meaning of Article 4). Many references were also made to the customary character of the fundamental guarantees stipulated in Article 75 of Additional Protocol I, which protect all categories of persons detained in connection with an armed conflict who do not enjoy a regime offering greater protection.

In other words, the majority of experts affirmed that the treaty instruments provide a seamless protection such that no category of detainees is left unprotected under this body of law.[24] In relation to international armed conflicts, the participants also mentioned that, under Article 5 of the third Geneva Convention, the status of prisoner of war should be applied in the event of doubt, pending a decision from a competent tribunal. With regard to non-international armed conflicts, the participants cited Article 3 common to the Geneva Conventions and Articles

[23] In particular, the headquarters agreements signed by the United Nations are generally silent as to the right of the multinational force to capture or detain individuals. The fact that these instruments generally contain a provision indicating that the members of the force are bound by the principles of IHL suggests that this body of law may govern the deprivation of liberty provided that the threshold of armed conflict had been crossed.

[24] The problem concerned the notion of "unlawful combatants". Certain participants denounced the weakness of the arguments advanced by the partisans of this notion, who cited in support of their thesis only an American precedent dating from the Second World War (the case *ex parte Quirin* of 1942), rendered obsolete in any event by the adoption of the Geneva Conventions and Additional Protocol I (Articles 45 (3) and 75 in particular enjoying customary value). Nevertheless, other experts emphasised that the *Quirin* case was by no means obsolete and that it constituted an important authority for the American courts in the recent *Hamdi* case.

5 and 6 of Additional Protocol II as the normative framework governing the deprivation of liberty in this context.

Numerous interventions referred to the situation of the persons deprived of liberty at Guantanamo Bay. There was much speculation about the motivation for the choice of this site, apparently as an attempt to circumvent legal constraints and to avoid the jurisdiction of the American courts. The participants recalled that the persons held at Guantanamo Bay had so far been unable to enjoy any judicial supervision of their detention. In consequence, a certain number of participants described the detention regime prevailing at Guantanamo as arbitrary and recalled that the Inter-American Court of Human Rights had expressed on this subject a position differing from the one maintained by the American government.[25]

In any event, a consensus seemed to have been reached that this situation is subject to international human rights law, including Articles 9 and 14 of the International Covenant on Civil and Political Rights, the essence of which was considered to be non derogable. The participants also raised the issue of the authorised period of detention, emphasising that an acceptance that "the fight against terrorism" can be qualified as armed conflict inevitably raises the question as to when precisely the said conflict is to come to an end; the provisions of IHL permitting the detention of certain categories of prisoners up to the end of active hostilities would then be open to abuse through attempts to justify an indefinite detention. It remains to be said that the participants raised the point that both human rights law and IHL concur that detention cannot be indefinite and must be the object of regular review.

In other words, a consensus emerged to the effect that, as far as international law is concerned, there is no legal hiatus in the domain of the deprivation of liberty, the interplay between IHL and human rights law covering every kind of legal situation that may occur. In the event of tensions between these two bodies of law, the majority asserted an application of the principle of the *lex specialis*, the reasoning adopted by the ICJ in its opinion on the *Legality of the Threat or Use of Nuclear Weapons*, having regard to the fact that the reasoning regarding arbitrary deprivation of the right to life may be transposed to arbitrary detention.[26] Thus, while the two bodies of law apply side by side, the content appropriately understood within the provisions of human rights law must be interpreted by reference to the norms of IHL, which represent the legal basis governing detention in a period of armed conflict. For a majority of the participants, the concerns that have undoubtedly arisen in this regard result not from any normative lacunae relating to the applicable law but rather to the manner in which the existing law has been applied.

In this regard, two other specific problems were discussed. In the first place, the participants considered the question of the possible right that rebel groups could have, in the context of non-international armed conflicts, to detain individuals by virtue of international human rights law or IHL. Neither of these bodies of law offers a clear legal basis in this regard.[27] Yet some argued that the very logic of IHL would push for recognition of the responsibility of non-state actors. Even though the obligations incumbent on the armed groups were not explored in depth, it was underlined that such groups were bound not only by international law but also by domestic law, under which they can be prosecuted, a factor that should be borne in mind in any discussion relating to the symmetry of obligations under international law.

[25] In a letter dated 12 March 2002, the Commission informed the Government of the United States that it had decided "*during its 114th regular period of sessions to adopt precautionary measures, according to which we ask Your Excellency's government to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent Tribunal*". In a letter dated 12 April 2002, the Government rejected the Court's request, *inter alia*, on the ground that the Commission did not have competence to apply IHL, particularly the Geneva Conventions, or customary international humanitarian law.

[26] *Cf.* the passage of the Court's opinion cited in footnote 22, p. 9.

[27] Nevertheless, some experts stressed that Articles 5 and 6 of Protocol II do not explicitly prohibit armed groups from detaining individuals but seem rather to describe the detention regime to be applied by all parties to the conflict.

The second problem concerned the relevance of the notion of reciprocity, particularly in an asymmetrical context, where the other side does not abide by the laws and customs of war. The participants unanimously acknowledged that, on a strictly legal level, the notion of reciprocity had no role to play. Human rights law, in particular, contains no notion of reciprocity and it is currently acknowledged in IHL that violations committed by one of the parties do not in any way affect the obligations of the other. However, certain participants stressed that, in purely practical terms, the question of reciprocity was of an undeniable importance. This being the case, fulfilling one's obligations - indeed in certain cases even going beyond them (e.g. by granting a status similar to "prisoner of war" to persons not formally entitled to it) could encourage the adverse party to behave in the same way.

2) Judicial guarantees

Judicial guarantees may be defined as the set of principles or rules for the operation of justice intended to ensure the conditions necessary for penal process (*due process of law*). They include - by way of example not limitation - the principle of individual responsibility, the principle of legality, the principle of non-retroactivity, the principle of the presumption of innocence, the principle of *ne bis in idem*, the guarantee of an independent, impartial and properly constituted court and the guarantees for a fair trial (in the narrow sense).[28] It is clear that these minimum standards for judicial procedures (and in certain cases disciplinary procedures) are intrinsically linked to the application both of international human rights law and of IHL.

The participants began by considering possible divergences that might appear as to the content of the judicial guarantees, particularly between human rights law and IHL. Even though there is an undeniable convergence in this matter - hardly surprising in view of the fundamental nature of the judicial guarantees - the fact remains that the scope of these guarantees varies, depending on the qualification of the situation. Certain judicial guarantees enshrined in the Geneva Conventions and the Additional Protocols (relating more precisely to procedures involving prisoners of war or civilians) do not appear in the treaty instruments concerning the protection of human rights. One example of these guarantees specific to IHL stems from Article 105 of the third Geneva Convention, which stipulates that prisoners of war have the right to be assisted by a fellow prisoner during judicial proceedings. Nevertheless, the participants agreed on the fact that, despite the sometimes more detailed nature of IHL, the benchmark in this field should remain human rights law (possibly supplemented by other instruments[29]) which establishes judicial guarantees applying at all times.

However, it is not always easy to identify the judicial guarantees applying at all times because not all of them may be listed among the non-derogable human rights.[30] In particular, a literal reading of the relevant treaty instruments shows that the right to a fair trial may be the object of derogations in exceptional emergency situations. However, a majority of the participants acknowledged a recent development in this regard, the right to a fair trial having acquired a non-derogable nature through the interplay of norms deriving from other instruments

[28] The right to a fair trial is a generic term understood to cover, *inter alia*, the right of the accused to be informed as soon as possible, in detail and in a language that he understands, of the nature and the grounds of the charge brought against him; the right to have the time and facilities needed to prepare his defense and to communicate with a lawyer of his choice; to be judged without excessive delay; to be present at the trial and to defend himself or to have the assistance of a counsel of his choice; the right to examine prosecution witnesses or to have them examined and to obtain the appearance and examination of defense witnesses on the same conditions as the prosecution witnesses; the right to be assisted by an interpreter free of charge if he does not understand the language used in the hearing; the right not to be forced to incriminate himself or to plead guilty.

[29] Certain participants emphasized that an evaluation of judicial guarantees could not be confined to these two bodies of law, other instruments being equally applicable, even in the case of armed conflict. The Vienna Convention on Consular Relations was cited as one example of an instrument having an impact on judicial guarantees.

[30] In particular, the principle of *nullum crimen sine lege*, as well as the obligation not to impose a sentence heavier than that which would have applied at the time the offence was committed and to give the accused the benefit of any lighter sentence which may have been adopted since the time when the offence was committed.

and through the development of international customary law. Nonetheless, the experts remained divided on the precise content of this non-derogable right to a fair trial. Some opted for a *comprehensive approach*, whereby all of the provisions relating to fair trial would apply at the same time. Others, however, argued for a *selective approach*, whereby all or just some of the provisions would apply depending on the circumstances.

In any event, many participants concluded that, so far as judicial guarantees are concerned, there is no "black hole" in the system, i.e. whatever the qualification of the situation, individuals always enjoy the benefit of fundamental judicial guarantees, on which they must be able to rely.

In this context, the question was raised as to whether the fight against terrorism - based on the interests of national security - may be considered sufficient reason to limit the judicial guarantees normally applicable. The participants began by underlining their agreement on the fact that acts of terrorism could constitute a serious and exceptional factor of destabilisation capable of justifying the suspension of certain human rights. They also noted that the current environment contained a potential risk of fundamental ideals of justice being sacrificed on the altar of security. Many voices were then raised to express the view that the fight against "terrorism" must be conducted in accordance with the rule of law.

This discussion led certain participants to refer to the military commissions being formed at Guantanamo Bay. Some participants expressed their satisfaction at the establishment of such commissions and their hope that these would make it possible to clarify the legal status of the persons detained and the content of the applicable law. However, other participants criticised the fact that the judicial guarantees offered by these commissions corresponded to standards well below those provided for in the American Constitution or in the International Covenant of 1966 on Civil and Political Rights. They denounced the restrictions placed on legal assistance by a competent counsel as obstructing the right to mount an effective defence. They also condemned the extension of the military commissions to criminal conduct that did not necessarily fall within their jurisdiction and, above all, the absence of the conditions required for the military commissions to be deemed independent and impartial.

In conclusion, the majority of the participants agreed on the fact that the non-derogable judicial guarantees go beyond the traditional guarantees laid down in Article 4 of the 1966 Covenant on Civil and Political Rights (which represent an absolute minimum), as a result of the interplay between the main bodies of law applying in this domain. They expressed the view that the right to a fair trial was or should be deemed a non-derogable right. The participants also agreed on the fact that, despite these few important conclusions, many questions remained unanswered and that this was an area meriting fuller discussion.

3) Use of force

The participants distinguished two models traditionally governing the use of force by the agents of the State. The first model, relating to activities of law enforcement, is capable of being used in time of peace as well as in time of war, depending on the circumstances. Nevertheless, whatever the qualification of the situation, the applicability of this model presupposes a relatively secure hold by the authority over a given territory, which it controls effectively and on which it seeks to ensure that the rule of law is upheld. The second model, which applies exclusively to conduct of hostilities in armed conflicts (international or non-international), is based on the premise that, at this stage, it is too late to prevent the use of armed violence between the various parties to the conflict. Thus, the aim of this model is to restrict the use of violence by the belligerents- to the extent possible - by maintaining a balance between military necessities on the one hand and humanitarian imperatives on the other.

As the two models are based on distinct foundations, it is only logical that there should be marked differences between them as to the content of the norms governing the use of armed force.

- In the first model - relating to law enforcement - relatively high standards of protection are imposed by the prohibition that agents of the State may not "arbitrarily" deprive individuals of their right to life. This abstract formulation is generally interpreted as authorising the right to use lethal force only in the case of defence of oneself or a third party against an imminent threat of death or serious injury; or to prevent a particularly serious offence which could place human lives in grave danger; or, in certain circumstances, to proceed with an arrest. In any event, the guiding principles of this model do not authorise the agents of the State to have intentional recourse to the lethal use of force unless this is absolutely necessary to protect human life and this objective could not be achieved by less extreme measures. Moreover, law enforcement officials are obliged to identify themselves as such and to give prior warning before using force, save where compliance with these conditions would put their safety unduly at risk, or would present a danger of death or serious injury to other persons, or would be manifestly inappropriate or of no use in the given circumstances. Finally, there is the condition of proportionality, i.e. the use of force must be appropriate to the seriousness of the offence and must be a legitimate objective to achieve.[31]

- The second model - concerning the conduct of hostilities - involves different standards of protection. In this case, the members of the armed forces are authorised to attack individuals fighting for the enemy.[32] In this regard - and it will be noted that this point is currently the object of heated debate - a majority of the experts seemed to agree on the absence of norms prohibiting military personnel from opening fire on an enemy combatant whom it would be possible, in practice, to capture (save obviously in the case of soldiers who are surrendering or *hors de combat*).[33] Moreover, on grounds of military necessity, a combatant is under no obligation - save in exceptional circumstances - to give warning to the enemy armed forces before opening fire.

This dual model, briefly describing the differences of substance between the legal regime of human rights law and that of IHL, presents a useful distinction, particularly where the legal qualification of a situation is not in dispute. Its usefulness is not in any way diminished by conceding that the frontiers between the two models present a certain permeability and that this theoretical construct does not enable us to specify the exact moment when a real life situation falls into one or other of the models. There is nothing new in this difficulty, which is a familiar feature in cases of internal disturbances and tensions degenerating progressively into a non-international armed conflict or in situations of violence in an international context of occupation. However, some participants noted that new areas of uncertainty may have emerged with the capacity of non-state actors to project a high degree of violence beyond state frontiers. In such an eventuality, the authorities that are the victims of such operations inevitably face the question of which model should govern their response. In this regard, the participants agreed that the model relating to the conduct of hostilities applies in the event of the injured State deciding to use its armed forces to attack the territory of another State, the government of which hosts and protects the terrorist group and, the latter, by joining in the resistance, clearly takes part in the

[31] For a summary of the essential principles governing the use of force in the maintenance of order model, *cf.* the document entitled *"Basic principles on the Use of Force and Firearms by Law Enforcement Officials"* adopted by the 8th UN Congress on the Prevention of crime and the Treatment of Offenders, held in Havana (Cuba) from 27 August to 7 September 1990.

[32] In the context of an international armed conflict, this would of course be not only the members of the enemy armed forces but also civilians taking part directly in the hostilities for the duration of their participation. Within the framework of a non-international armed conflict, the notion of legitimate combatant not being transposable, the armed forces of a State can, in principle, use lethal force only against individuals taking part directly in the hostilities and for the duration of their participation.

[33] Nevertheless, some experts recalled that the legitimate aim of the belligerents is solely to "neutralise" the enemy armed forces and not necessarily to kill all of the men in their ranks. Moreover, the general principle of the prohibition against causing superfluous injury or unnecessary suffering would also set limits to this right to attack the enemy forces.

hostilities. However, what are the rules governing the use of force against the terrorist group in question if it refuses to emerge from its hiding places and so does not take part in the international armed conflict between the two States? Similarly, what are the rules applicable to the use of force if a State that cannot control a part of its territory on which a terrorist group has installed itself invites another State to conduct actions against the said group?

The aforementioned American operation that took place in Yemen serves to illustrate this problem.[34] According to the information at their disposal, the majority of the participants considered that the qualification of armed conflict was by no means appropriate in such a situation and that any person suspected of belonging to a terrorist network must be treated - in any event as far as the use of force is concerned - in the same way as any other criminal under ordinary law. This implies that it would be necessary to make every effort to apprehend them and that the use of lethal force would be justified only in the event of imminent danger to life, the burden of proof being on the party making use of lethal force.

Nevertheless, certain participants tried to overcome the apparently irreducible dichotomy between human rights law and IHL by considering the possibility of approaching the question from a different angle - for example by allowing the use of force against "enemy combatants" but only in certain circumstances and without necessarily allowing the counter-terrorist forces an uncontrolled right to shoot on sight anywhere and at any time. This line of reasoning would require understanding (contrary, as we have said, to the opinion of the majority of the experts) that such actions are conducted against organised groups falling outside the traditional framework of the maintenance of order and correspond to a form of armed conflict between a State and a transnational group. Such a premise would imply recognition of the applicability of IHL - at minimum Article 3 common to the Geneva Conventions - and very probably further norms deriving from customary humanitarian law. The result would be clear limits for this type of action, the main one being that such acts of violence could be directed only against the members of the terrorist group directly (or actively) taking part in the hostilities and only for the duration of their participation.[35]

However, looking beyond these obvious limits, does not the acceptance of such reasoning reveal possible lacunae in IHL? Furthermore, even if the answer is in the affirmative, a secondary question remains as to the capacity of the principles of international human rights law to fill such gaps - particularly with regard to the notion of the "arbitrary" deprivation of the right to life. Certain participants argued that the "fight against terrorism" presents undeniably specific features, not least the fact that the fight against terrorist actions - considering their clandestine and sporadic nature - sometimes involves the conduct of operations against individuals who are unarmed or no longer armed. The standards of human rights law would then come in to supplement IHL, particularly in prohibiting a direct attack on such individuals since there exists no absolute necessity to target them.[36] According to certain participants, this line of argument developed in the context of the "fight against terrorism" could then perfectly be transposed to other more familiar contexts, such as the fight against guerrilla movements.

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[34] For a factual and legal analysis of this incident, *cf.* DWORKIN, A., "The Yemen Strike: The War On Terrorism Goes Global", *in:* Crime of War Project, <http://www.crimesofwar.org/onnews/news-yemen.html> (November 14, 2002).

[35] It will be noted that, for some participants, this condition would imply, as a minimum, that the individuals be members of the operational wing of the movement targeted and that they be engaged in terrorist attacks on a continuous basis. This is not the place, however, to go more deeply into this highly complex problem. For its part, the ICRC has initiated a process of clarification of the content of this notion of direct participation in the hostilities. In particular, an informal meeting of experts - organized jointly with the Asser Institute - was held at the Hague on 2 June 2003. A summary of the debates and the conclusions of this first meeting is provided in Annex 1 of the report prepared by the ICRC and distributed at the 28th International Conference entitled "International Humanitarian Law and Challenges posed by Contemporary Armed Conflicts".

[36] Moreover, it was suggested that precisely because of the particular nature of this "war", the proper identification of the individual as a combatant or direct participant in the hostilities was far more difficult than in a conventional armed conflict. In this area of uncertainty, an attack on an individual who could have been captured would be tantamount to denying him his right to life and to a fair trial in order to determine his status.

The consequence is that the concept of the "arbitrary" deprivation of the right to life would continue to play a role in such circumstances, the conditions required to justify a lethal attack on an enemy then being far stricter than in a conventional armed conflict. In particular, the consequences would involve a more rigorous demonstration that the use of lethal force is commensurate with the seriousness of the offence and that it is absolutely essential, no other alternative action permitting the intended result to be achieved. It was suggested that the physical location of the individual might play a role in this regard, the content of the applicable norms varying depending on whether, on the one hand, the alleged terrorist is in an area without effective state control or, on the other, is in an area permitting his arrest, there being no reason for the use of force in this latter case. However, this point raised objections on the grounds that IHL is essentially conceived on the basis of the legal status of the individual or of the activities in which he is engaged and not at all on the basis of his physical location (save with regard to the precautions required).

IV. The mechanisms for the implementation of IHL, international human rights law and refugee law

This document is not intended to delve more deeply into the problem of the implementation of IHL and ways of improving respect for it, this question having already been the object of a special report presenting the results of five regional conferences organised by the ICRC within the framework of its "Reaffirmation and development of IHL" project.[37] However, in as much as many experts considered that the convergence between IHL, human rights law and refugee law has an impact on the implementation mechanisms and that, simultaneously, the connection of these mechanisms tends to blur still further the borders between these various legal regimes (especially between IHL and human rights law), it is appropriate to summarise the main lines of the debates held on this subject during the Round Table.

The first question raised was the possible use of the mechanisms of human rights law in order to ensure the effective protection of the victims of armed conflict. In this regard, mention was made of non-judicial mechanisms, particularly the system of reports to UN treaty bodies. Certain delegates emphasised that these reports served to bring pressure on the States by putting the spotlight on situations of violation not only of human rights but also of IHL. Without denying the impact of these reports, other experts echoed the usual criticisms made concerning this system. With regard to the judicial mechanisms, some participants noted the reluctance of the regional human rights courts to apply humanitarian law, even through the prism of obligations and using the vocabulary of human rights law.[38] On the basis of precedents, such as the decision rendered by the European Court of Human Rights in the *Bankovic* case, it seemed to many participants a delusion to rely on the regional systems of human rights law to improve the implementation of IHL, particularly as no such system exists in Asia.

The second question was whether it was opportune to draw inspiration from mechanisms existing in the field of human rights to establish similar ones in IHL. Some participants in particular repeated a suggestion often made in the past, namely introducing into IHL a reporting system comparable to that for human rights. It was even proposed that this mechanism should have a limited scope of application and should content itself with requiring the States to provide information relating to the preventive measures adopted in the domain of instruction and the

[37] This report, entitled "Improving Compliance with International Humanitarian Law – ICRC Expert Seminars", is contained in Annex 3 of the report prepared by the ICRC and distributed to the 28th International Conference under the title "International Humanitarian Law and the Challenges posed by Contemporary Armed Conflicts".

[38] Numerous references were made to the *Las Palmeras* case, which ended with a decision of the Inter-American Court refusing to examine norms falling outside the text of the Inter-American Convention, thus overturning an earlier decision of the Commission. In a similar vein, the European Court of Human Rights held, in its decision on the *Bankovic* case, that the European Convention was not intended to be applied thoughout the world, even to govern the behaviour of the contracting States. Certain experts pointed out that this latter decision failed to answer the question relating to the non-application of human rights law by reason of the fact that the situation was governed by IHL. Let it be noted simply that the Court did not base its decision on the incompatibility of these two regimes.

dissemination of IHL or to national implementation measures. However, apart from the criticisms already mentioned with regard to this control mechanism, some participants stressed that such a measure could well give rise to a large and costly bureaucracy and reduce efficiency. Another suggestion was to establish a High Commission for IHL. However, this proposal was also criticised on the grounds that, even if this were to be a large body with considerable investigative powers, it would remain subject to exactly the same political pressures that affect the mechanisms of human rights law. Finally, it was also proposed that a "commission of wise men" should be set up. Here too, however, it was noted that political considerations could well obstruct the implementation and operation of such a commission, starting with the crucial question of who would be appointing the "wise men".

Conclusion

On numerous occasions during the Round Table, the participants noted the importance of the problem of the interplay between the various legal regimes applicable in situations of violence, a question that poses serious challenges in relation to the protection of the victims of war. They also noted that a debate on this subject was timely: since the 11 September attacks in the United States, allegations were being heard that the law was unsuited to the fight against a supposedly new form of terrorism. However, after indicating that terrorism, as well as its root causes, must be dealt with through the rule of law, the participants unanimously held that there was no justification for a revision of IHL.[39] Thus, after analysing in detail the specificities - scope of application and normative content - relating to each of the legal regimes protecting the human person in situations of armed conflict, the participants agreed on the complementarity between these various systems which, if applied and coordinated in good faith, would be sufficient for the international legal system to ensure the protection of all persons affected by a situation of violence.

On the other hand, the participants emphasised that the on-going reflection on the adequacy of IHL to current problems should form part of a larger study of the underlying causes for the violation of this body of law. To quote an expert, the issue at the present time seems to be less a calling in question of the normative content of IHL than of the inalienable nature of the values which underlie the whole of IHL. Accordingly, efforts must focus on the reaffirmation of the universal character of the fundamental principles contained in the Geneva Conventions and the Additional Protocols, on the development of judicial and non-judicial techniques in order to convince both state and non-state actors to respect the law, and on the strengthening of the effectiveness of the implementation mechanisms.

[39] This remark does not in any way mean that IHL will not be able to benefit in the future from the clarification of a certain number of concepts, particularly in the domain of non-international armed conflicts. Thus, some experts repeatedly emphasized that the treaty instruments governing this type of conflict made no reference to the notion of the protected person and contained only rudimentary standards relating to the conduct of hostilities.

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

Agenda

Wednesday, 3 September 2003

15:00 – 19:00 **Registration**
International Conference Center
Grand Hôtel de Londres

Thursday, 4 September 2003

09:00 – 12:30
Opening session – Plenary

09:00 – 09:30 Welcome addresses

09:30 – 10:45 Keynote addresses:

Dr. Ruud Lubbers, U.N. High Commissioner for Refugees
Dr. Jakob Kellenberger, President, International Committee of the Red Cross

10:45 – 11:15
Coffee break

11:15 – 12:30 Discussion

12:30 – 14:00
Lunch

14:00 – 16:00
Session II – Plenary

"Relationship between IHL and Other Legal Regimes"

Chairperson: *Judge Abdul Koroma*, International Court of Justice, The Hague

14:00 – 15:00 Background Presentations

- **Historical evolution of IHL, international human rights law, refugee law and international criminal law**
  Prof. Michael Bothe, Johann Wolfgang Goethe University, Frankfurt

- **Mechanisms of implementation under IHL, international human rights law and refugee law**
  Dr. Yves Sandoz, Member of the International Committee of the Red Cross

15:00 – 16:00 Discussion

16:00 – 16:30
Coffee break

16:30 – 18:30

Session III (beginning) – Three working groups – same topic

"Legal Qualification of Situations of Violence and Related Challenges"

Chairpersons: *Prof. Laurence Boisson de Chazournes*, University of Geneva
Prof. Chaloka Beyani, London School of Economics
Dr. Elzbieta Mikos-Skuza, Polish Red Cross

16:30 – 17:00 Background Presentations

- **International armed conflict: legal qualification and IHL as *lex specialis***
  Prof. Fritz Kalshoven, University of Leiden
  Prof. Vitit Muntarbhorn, University of Bangkok
  Prof. Yoram Dinstein, Tel Aviv University

17:00 – 18:30 Discussion

19:00
Reception

Friday, 5 September 2003

09:00 – 12:30

Session III (end) – Three working groups – same topic

"Legal Qualification of Situations of Violence and Related Challenges" (cont.)

Chairpersons: same as above

09:00 – 09:30 Background Presentations

- **Non-international Armed Conflict: legal qualification and parties to the conflict**
  Prof. Dieter Fleck, Ministry of Defense, Germany
  Brigadier Titus K. Githiora, Chief of Legal Services, Department of Defense, Kenya
  Prof. Marco Sassoli, University of Quebec

- **Non-international armed conflict: the interplay of different legal regimes**
  Prof. Djamchid Momtaz, Teheran University
  Dr. Toni Pfanner, ICRC
  Prof. Habib Slim, University of Tunis, Deputy Secretary-General, Tunisian Red Crescent

09:30 – 10:30 Discussion

10:30 – 11:00
Coffee break

11:00 – 11:30 Background Presentations

- **Extraterritorial "self-help" operations: meaning and the applicable law**
  Dr. Yuval Shani, College of Management Academic Studies, Law School, Rishon Le Zion
  Dr. Michel Veuthey, Academic Director, Adjunct Professor, Fordham School of Law, New York
  Dr. Avril McDonald, TMC Asser Institute

11:30 – 12:30 Discussion

12:30 – 14:00
Lunch

14:00 – 15:30
Session IV – Plenary

"Protection of Persons in Situations of Violence: Specific Aspects"

Chairperson: Professor Sir Nigel Rodley, Human Rights Center – Department of Law, University of Essex

14:00 – 15:30 Background Presentations

- **Deprivation of liberty**
  Dr. Hans-Peter Gasser, Former Senior Legal Adviser, International Committee of the Red Cross

- **Judicial Guarantees**
  Mr. Stephane Bourgon, Defense Counsel before the International Criminal Tribunal for Former Yugoslavia, The Hague

- **Use of Force**
  Mr. Anthony Dworkin, Crimes of War Project

15:30 – 16:00
Coffee break

16:00 – 19:00
Session IV – Three working groups

"Protection of Persons in Situations of Violence: Specific Aspects"

Chairpersons: Professor Sir Nigel Rodley, Human Rights Center – Department of Law, University of Essex
Mr. Arthur Mattli, Head of Section, Human Right and Humanitarian Law Section, International Law Directorate, Swiss Federal Department of Foreign Affairs
Prof. Chris Maina, University of Dar Es Salaam

Discussion

- **Deprivation of liberty**
- **Judicial Guarantees**
- **Use of Force**

21:00
Official Dinner

Saturday, 6 September 2003

09:00 – 12:30
Session V – Plenary

Concluding session

Chairperson: *Dr. Francois Bugnion,* Director for International Law and Cooperation within the Movement, International Committee of the Red Cross

09:00 – 10:15 Reports

- **Session II,** Rapporteur:
  Ms. Monette Zard, International Council on Human Rights Policy, Geneva

- **Session III,** Rapporteurs:
  Working group 1: *Dr. Toni Pfanner,* ICRC
  Working group 2: *Dr. Yuval Shani*, College of Management Academic Studies, Law School, Rishon Le Zion
  Working group 3: *Dr. Knut Dörmann*, ICRC

- **Session IV,** Rapporteurs:
  Working group 1: *Ms. Helen Duffy*, Interights
  Working group 2: *Mr. Stephane Bourgon*, Defense Counsel before the ICTY
  Working group 3: *Dr. Anne-Marie La Rosa*, International Labor Organisation

10:15 – 10:45
Coffee break

10:45 – 12:00 Discussion

12:00 – 12:30 Concluding remarks

Prof. Jovan Patrnogic, President of the International Institute of Humanitarian Law