

EXPERT MEETING

THE USE OF FORCE IN ARMED CONFLICTS

**INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES
AND LAW ENFORCEMENT PARADIGMS**



ICRC



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FOREWORD

Traditionally, the use of force by belligerents was seen to be regulated almost exclusively by the conduct of hostilities. Force was used against enemy combatants who could be clearly distinguished from the civilian population. The use of force in order to maintain or restore public security, law and order was seen as a domestic task fulfilled by the police. Today, in many contemporary armed conflict situations, armed forces are increasingly expected to conduct not only combat operations against the adversary but also law enforcement operations in order to maintain or restore public security, law and order. Different reasons can be cited to explain this situation. Two of them deserve to be highlighted here.

First, contemporary armed conflicts are predominantly non-international armed conflicts. In these situations, belligerent States are using force against fighters who are often at the same time criminals under domestic law. Under an international humanitarian law (IHL) lens, fighters are legitimate targets and can be targeted according to the conduct of hostilities paradigm. However, the law enforcement paradigm could also be seen as relevant because, ultimately, force is used against fighters in order to maintain or restore public security, law and order. Furthermore, the fight against insurgency takes place sometimes far away from the battlefield, when fighters are not conducting hostilities, and where the law enforcement paradigm may be seen as appropriate in order to minimise casualties among the population of the belligerent State.

Second, in contemporary armed conflicts, military operations are increasingly conducted amongst the population. Adversaries intermingle with the civilian population. It may therefore be extremely difficult from a purely practical point of view to distinguish enemy combatants, fighters or civilians directly participating in hostilities from the civilian population. For example, situations of civilian unrest or violence – such as riots – may arise while combat operations against the adversary are taking place. Contemporary situations of armed conflicts are also highly volatile: a situation of civilian unrest in the context of an armed conflict can very quickly turn to an actual combat situation. It may then be difficult to identify the relevant paradigm to regulate the use of force.

International Law does not always provide clear and straightforward answers to these challenges. Human rights bodies tend to apply increasingly a law enforcement rationale to the use of force in non-international armed conflicts and in certain situations in contexts of occupation. However, human rights practice is often case-driven and it is sometimes difficult to extrapolate from it valid conclusions. This is even more so since the most interesting human rights practice regarding the use of force in armed conflicts comes from regional courts such as the European Court of Human Rights or the Inter-American Court of Human Rights. Eminent legal scholars provide different and sometimes conflicting approaches and interpretations. Some consider that the conduct of hostilities paradigm is the *lex specialis* regarding the use of force and thus displaces the law enforcement paradigm in an armed conflict situation. Others consider instead that in non-international armed conflict situations, the rules

and principles pertaining to the conduct of hostilities are not clear or precise enough and that, therefore, the law enforcement paradigm prevails in these situations. Still others consider that everything depends on actual circumstances. They allege, for instance, that the location of the situation (inside or outside the conflict zone) may be taken as an element to determine which paradigm to apply. Others invoke the degree of control over the area where force is used as well as the intensity of violence in this area as relevant circumstances.

This lack of clarity as to which paradigm applies to the use of force in different armed conflict situations is unsatisfactory given that belligerent States have to face these challenges on a regular basis. Some States have conducted a reflection in order to help their armed forces to determine when force should be used according to the conduct of hostilities and when instead the law enforcement paradigm applies. Others are reluctant to recognize the *de iure* relevance of law enforcement in armed conflict situations but nevertheless increasingly apply escalation of force procedures in situations such as checkpoints or each time their armed forces are attacked or on the verge of being attacked by unidentified individuals. Recent armed conflicts provide a multitude of examples where the answer to the question of which paradigm governs the use of force is not crystal-clear. The International Committee of the Red Cross (ICRC) is thus often confronted to these issues in its legal operational dialogue with belligerent States.

Solutions that are meaningful in theory and in practice have to be found in order to ensure an appropriate application of international law. Effective determination of the appropriate paradigm is not just a theoretical issue that interests international lawyers and military experts. On the contrary, it may have a crucial impact on the humanitarian consequences of an operation because it has a direct effect on the loss of life and injury to persons. This is so because the content of the two paradigms pertaining to the use of force is different. The conduct of hostilities does not prohibit the killing of legitimate targets, provided that, among others, the IHL principles of proportionality and precautions are fulfilled. Instead, under law enforcement, lethal force may be used only as last resort in order to protect life, when other available means remain ineffective or without any promise of achieving the intended result. The conduct of hostilities tolerates, moreover, more incidental loss of life than the law enforcement paradigm. In terms of planning also, the conduct of hostilities and law enforcement paradigms are very different. For example, the conduct of hostilities paradigm does not suppose the use, if possible, of less-than-lethal weapons in contradistinction to the law enforcement paradigm. Unlike IHL, the law enforcement paradigm entails also an obligation to conduct an investigation at least each time there is an allegation of violation of the right to life.

The operational and legal environment just described has led the ICRC to conclude that there is a need to clarify the types of cases in which the use of force falls within the conduct of hostilities or, by contrast, within that of law enforcement. For this reason, and as part and parcel of the activities of the ICRC in order to reaffirm and clarify IHL and its interplay with other bodies of international law, the ICRC organised an expert meeting in January 2012 whose objective was to examine the issue by discussing five case studies that were developed to illustrate some of the concrete legal and practical issues that arise in the field. The case studies portray situations taking place in the context of non-international armed conflicts but the lessons drawn from these cases can to a large extent

be applied in international armed conflicts as well. The meeting also tackled the issue by adopting a broad perspective. Issues arising not only at the moment of the execution of an operation (i.e. the actual use of force) but also before and after the use of force – notably questions of planning and investigation were addressed.

This report has for objective to provide an account of the fascinating debates that took place during the meeting. It does not purport to provide the ICRC's legal positions on these issues.

The ICRC hopes that this report will contribute meaningfully to the task of clarifying some of the most significant issues pertaining to the interplay between the conduct of hostilities and law enforcement paradigms and will help to shape the debate on legal and policy issues related to the use of force in armed conflict situations.

Dr Knut Dörmann
Head of the Legal Division, ICRC

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The present report is an official publication of the International Committee of the Red Cross (ICRC).

It is the outcome of an expert meeting which took place in January 2012 on the issue of the use of force in armed conflicts: interplay between the conduct of hostilities and law enforcement paradigms.

The conceptualization, drafting and publication of the report would not have been possible without the commitment and contributions of many individuals.

Our personal gratitude goes, first of all, to the experts who participated in their personal capacity and whose commitment and expertise shed light on the most difficult legal and practical aspects pertaining to the interplay between the conduct of hostilities and law enforcement paradigms, and thus contributed to the clarification of the issue.

We would also like to express our thankfulness to Dr Gloria Gaggioli, Legal Adviser in the ICRC's Legal Division, who was in charge of the organization of the meeting and who prepared and edited this report.

Finally, we would like to sincerely thank all our colleagues at the ICRC who contributed to the text of the report through their comments, provided valuable support in the organization and follow-up of the expert meeting or helped with the publication of the report.

Dr Knut Dörmann
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INTRODUCTION

In a situation of armed conflict, the use of lethal or potentially lethal force (hereafter ‘use of force’) by armed forces and law-enforcement officials is governed by two different paradigms: the conduct of hostilities paradigm, derived from international humanitarian law (IHL) and the law enforcement paradigm, mainly derived from international human rights law (hereafter human rights law).¹

In many contemporary armed conflict situations – particularly in occupied territories² and in non-international armed conflicts – armed forces are increasingly expected to conduct not only combat operations against the adversary but also law enforcement operations in order to maintain or restore public security, law and order. The coexistence of the two paradigms is also possible in non-international armed conflicts where there is a foreign intervention with the consent of the host State. For example, an intervening third State may conduct law enforcement operations with the consent of the territorial (or host) State in order to help the latter to maintain or restore law and order; in parallel, an intervening third State may conduct hostilities against enemy fighters³ and civilians directly participating in hostilities.

It is not entirely clear in international law which situations in the context of an armed conflict are governed by the conduct of hostilities paradigm and which are covered by the law enforcement paradigm. In practice, also, it is sometimes difficult to draw the line between situations governed by the conduct of hostilities and the law enforcement paradigms. For example, in a non-international armed conflict, when a State is using force against fighters, it may be considered as simultaneously conducting hostilities and maintaining law and order (since fighters are also frequently criminals under domestic law). Similarly, situations of civilian unrest (such as riots) may arise while combat operations against the adversary are taking place. Sometimes the two situations of violence may even intermingle, for instance when fighters are hiding among rioting civilians or demonstrators. In such cases, it may become difficult to distinguish fighters from rioting civilians and to identify the relevant applicable paradigm.

Effective determination of the appropriate applicable paradigm may have a crucial impact on the humanitarian consequences of an operation, since the content of these two paradigms is different. For example, the conduct of hostilities paradigm allows for the killing of legitimate targets, whereas the law enforcement paradigm prescribes that one must “capture rather than kill” suspected persons, unless they pose an imminent threat to

¹ This report deals with the manner in which force can be used during an armed conflict. It does not deal with the legality of the use of force between States which pertains to the *jus ad bellum* and which is governed by the 1945 United Nations’ Charter.

² See: ICRC, Expert Meeting Report, *Occupation and Other Forms of Administration of Foreign Territory, Third Meeting of Experts: The Use of Force in Occupied Territory*, prepared by T. Ferraro, Geneva, Switzerland, April 2012 (hereafter: ICRC Report on *The Use of Force in Occupied Territory*).

³ For the purpose of this report, the term ‘fighters’ refers to members of organized non-State armed groups which are party to a non-international armed conflict; and should thus be understood as “individuals whose continuous function is to take a direct part in hostilities.” See: ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, prepared by N. Melzer, Geneva, Switzerland, May 2009, p.27 (hereafter: ICRC DPH Guidance).

life. In addition, the conduct of hostilities paradigm tolerates more incidental loss of life than the law enforcement paradigm. These differences show that the determination of the paradigm to be applied has a direct impact on how lethal force can be used against individuals. Consequently, there is a need to identify the types of cases in which the use of force falls within the conduct of hostilities paradigm or, by contrast, within that of law enforcement, in particular when these two paradigms apply in the same context.

In order to shed further light on these issues, the ICRC convened an expert meeting in Geneva on January 26-27, 2012. This meeting brought together 22 prominent practitioners and academics with expertise in use of force issues, participating in their personal capacity and coming from 16 different countries. The meeting was held in English and was governed by the Chatham House Rule.⁴

The expert meeting endeavoured to find the dividing line between the conduct of hostilities and law enforcement paradigms in armed conflict situations, with a particular focus on non-international armed conflicts where the issue of interplay between the conduct of hostilities and law enforcement paradigms is prominent. In situations other than armed conflict, such as internal disturbances and tensions, this discussion does not arise since the conduct of hostilities paradigm applies only to armed conflicts. Moreover, although the interplay between the two paradigms is also relevant for the targeting of objects, the expert meeting focused exclusively on the targeting of individuals.⁵ Further, the issue was analysed from a State perspective, since human rights law (and thus human rights law enforcement requirements) *de iure* binds only States.⁶ The expert meeting did not specifically address the question of the use of force by non-State armed groups. It should be noted also that the objective of this outcome report – and of the expert meeting that preceded it – was to focus only on the use of force as such. Therefore, issues related to internment and detention in armed conflict situations were not addressed by the expert meeting.

⁴ When a meeting is held under Chatham House Rule, this means “participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.” Available at: <http://www.chathamhouse.org/about-us/chathamhouserule> (Last accessed on 30 September 2013).

⁵ The interplay between the conduct of hostilities and law enforcement paradigms is very different depending on whether the use of force is against objects or individuals. Under human rights law, questions related to the use of force against individuals are governed by the right to life, while issues related to the use of force against objects are dealt with under other rights such as the right to property or the right to respect for private and family life, home etc.

⁶ ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, Switzerland, October 2011, pp. 14-15 (hereafter: ICRC Report on *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*) : “There are, [...], important differences of a general nature related to the interplay between international humanitarian law (IHL) and human rights law that should be mentioned. The first is that human rights law *de iure* binds only states, as evidenced by the fact that human rights treaties and other sources of human rights standards do not create legal obligations for non-state armed groups. [...] It should, however, be noted that the exception to what has just been said are cases in which a group, usually by virtue of stable control of territory, has the ability to act like a state authority and where its human rights *responsibilities* may therefore be recognized *de facto*.”

Experts were provided with a background paper⁷ prepared by the ICRC presenting the issue at stake and introducing five practical case studies, which experts were invited to discuss at the meeting. These were:

Case study 1: The use of force against potential targets (isolated sleeping fighter example)

Case study 2: Riots (where civilians and fighters are intermingled)

Case study 3: Fight against criminality

Case study 4: Escape attempts and rioting detainees

Case study 5: Checkpoints

In each case, the experts had to determine whether the use of force in such a situation falls within the conduct of hostilities paradigm or, by contrast, within that of law enforcement. Experts also discussed legal issues relevant before and after the actual use of force – notably questions of planning and investigation.

The objective of this report is to present the issue at stake, the background information provided to the experts and case studies that were debated during the meeting, as well as to provide a summary of the analysis and positions of the experts on the different issues discussed.

This outcome report is divided into three parts. It addresses successively:

- I) The legal basis and distinguishing features of the conduct of hostilities and law enforcement paradigms.
- II) The case studies analysis pertaining to the actual use of force.
- III) The legal issues relevant before and after the actual use of force - notably questions of planning and investigation.

Finally, a short conclusion endeavours to present some observations based on the discussions at the expert meeting.

The meeting agenda and the list of participants are available in **Appendixes 1 and 2** respectively. **Appendix 3** reproduces a written statement submitted by one expert who could not attend the meeting.⁸ **Appendixes 4-6** include summaries of presentations that were made by three experts in the introductory session of the meeting, in order to set the scene and to contextualise the issue at stake.⁹ Key aspects of these presentations and ensuing discussions are also provided in the report where appropriate.

⁷ Information provided in the background paper has been incorporated in this report.

⁸ This statement was written by Françoise Hampson and deals with the case law of the European Court of Human Rights on the use of force.

⁹ The first presentation was made by Juan Carlos Gómez Ramírez who addressed the issue of the use of force in the context of the armed conflict in Colombia. It included, in particular, some reflections on the Colombian Operational Law Manual which endeavoured to address the difficult issue of the interplay between the conduct of hostilities and law enforcement paradigms. The second presentation was made by Richard Gross and dealt with the use of force in the different phases of the conflict in Afghanistan. Finally, Olga Chernishova presented an overview of the European Court of Human Rights' case law dealing with the use of force.

I. LEGAL BASIS AND DISTINGUISHING FEATURES OF THE TWO PARADIGMS

In order to introduce the topic and to set the scene for the following analysis of case studies, this part presents, first, the international legal regimes governing the use of force in armed conflicts. Second, it describes the conduct of hostilities and law enforcement paradigms. Third, it addresses the main differences between these two paradigms. These three sections represent a summary of the background information provided to experts as a basis of discussion. A fourth section presents some key comments that were made by experts on the legal basis and distinguishing features of the two paradigms.

A. The international legal regimes governing the use of force in armed conflicts

In international law, the legal regimes governing the use of force against persons are found in IHL and in human rights law.

In IHL, the rules and principles regarding the use of force can primarily be found in the 1907 Hague Regulations,¹⁰ the Additional Protocols to the Geneva Conventions¹¹ and customary IHL.¹² In international human rights law, the legal regime governing the use of force against individuals is mainly derived from the right to life, which is protected in every general human rights treaty¹³ and under customary law.¹⁴

¹⁰ The 1907 Hague Regulations, articles 22-28, article 43.

¹¹ Additional Protocol I (API), articles 48 *et seq.*; Additional Protocol II (APII), articles 13 *et seq.*

¹² J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, Cambridge, 2005, rules 1-24, pp. 3-76 (hereafter: *ICRC Study on Customary International Humanitarian Law*). Many other specific IHL rules can have an impact on the type of force to be used (e.g. rules concerning weapons) or on the persons specifically protected (e.g. medical and religious personnel). See: International Court of Justice (ICJ), *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, paras. 78–79; ICTY, *Prosecutor v. D. Tadić*, Appeals Chamber, Decision of 2 October 1995, case IT-94-1-AR72, paras. 100-127; ICTY, *Prosecutor v. M. Martić*, Trial Chamber, Decision of 8 March 1996, case IT-95-11-R61, para. 18; ICTY, *Prosecutor v. D. Kordić and M. Čerkez*, Trial Chamber, Decision of 2 March 1999, case IT-95-14/2, para. 31; ICTY, *Prosecutor v. Kupreškić*, Trial Chamber, Judgment of 14 January 2000, case IT-95-16, paras. 524-525; IACCommHR, *J. C. Abella v. Argentina* (“la Tablada”), 18 November 1997, para. 177.

¹³ See: International Covenant on Civil and Political Rights (ICCPR), article 6; European Convention on Human Rights (ECHR), article 2; American Convention on Human Rights (ACHR), article 4; African Charter on Human and Peoples’ Rights (ACHPR), article 4.

¹⁴ Article 6 of the ICCPR qualifies the right to life as “inherent”, which serves to indicate its customary nature. On the customary, or even *jus cogens* nature of the right to life, see among many others: M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N. P. Engel, Kehl/Strasbourg/Arlington, 2005, p. 122; T. Desch, “The Concept and Dimensions of the Right to Life (as Defined in International Standards and in International and Comparative Jurisprudence)”, *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht*, Vol. 36, No. 1/2, 1985, p. 79; B. G. Ramcharan, “The Right to Life”, *Netherlands International Law Review*, Vol. 30, No. 3, 1983, p. 299; Y. Dinstein, “The Right to Life, Physical Integrity, and Liberty”, in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, pp. 114-115. See also: Human Rights Committee (hereafter: HRC), General Comment No. 24: *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, 11 April 1994, UN Doc. CCPR/C/21/Rev.1/Add.6, para 8.

In terms of their scope of application, IHL is limited to situations of armed conflicts, while human rights law applies in peacetime and also in situations of armed conflict.¹⁵

In order to be covered by IHL, the use of force must take place in an armed conflict situation and must have a nexus with the armed conflict. Moreover, as stated by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* decision, IHL applies “in the whole territory of the warring States or, in the case of internal armed conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”¹⁶ Finally, IHL rules bind equally States and non-State armed groups.

As for international human rights law, it is true that some rights can be derogated from “in time of public emergency which threatens the life of the nation.”¹⁷ This is not the case, however, for the prohibition of arbitrary deprivation of life, which is non-derogable and from which the limits for the use of force against individuals in human rights law are derived.¹⁸ In addition, it should be underlined that the extraterritorial scope of application of human rights law¹⁹ has been accepted by human rights bodies and the International Court of Justice.²⁰ However, it is important to note that not all States accept the extraterritorial application of human rights law.²¹ Moreover, the exact scope of the extraterritorial reach of human rights law remains a matter of ongoing legal debate.

¹⁵ There is, however, a minority view according to which human rights law does not apply to armed conflicts. See for instance the position of some States at the occasion of the Advisory Opinion on Nuclear Weapons of the ICJ. See: ICJ, Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, *supra*, note 12, para. 24: “It was suggested that the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict.” See also the position of Israel in: ICJ, Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paras. 102-110.

¹⁶ ICTY, *Prosecutor v. D. Tadić*, *supra*, note 12, para. 70.

¹⁷ ICCPR, article 4. See also ECHR, article 15; ACHR, article 27. However, the ACHPR does not include such a provision. The African Commission on Human and Peoples’ Rights held that therefore no derogation was possible. See: African Commission on Human and Peoples’ Rights (ACommHPR), *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, 11 October 1995, para. 21.

¹⁸ ICCPR, article 4, para. 2; ACHR, article 27, para. 2. The only exception being the ECHR in which the right to life is considered as non-derogable “except in respect of deaths resulting from lawful acts of war” (ECHR, article 15, para. 2). So far, this provision has had no real impact in practice since no European State has ever derogated from the right to life and the European Court of Human Rights (ECtHR) has never resorted to this exception *proprio motu*.

¹⁹ The debate on the extraterritorial scope of application of human rights treaties is related to the interpretation of provisions such as article 2, para. 1, of the ICCPR or article 1 of the ECHR.

²⁰ See among many others: ICJ, Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra*, note 15, paras. 107-113; HRC, General Comment No. 31/80: *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10; ECtHR, *Al Skeini and others v. United Kingdom*, 7 July 2011, paras. 130-150. On the case law of the European Court of Human Rights regarding jurisdiction, see: Appendix 3: Written statement of Françoise Hampson; Appendix 6: Summary of the presentation by Olga Chernishova.

²¹ See, for the position of the United States of America: U.S. Department of State, *Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*, Annex 1, 21 October 2005. Available at: <http://www.state.gov/g/drl/rls/55504.htm> (Last accessed on 30 September 2013); *United States Responses to Selected Recommendations of the Human Rights Committee*, 10 October 2007, pp. 1-2. Available at: <http://2001-2009.state.gov/documents/organization/100845.pdf> (Last accessed on 30 September 2013). For the position of Israel, see: HRC, *Sixty-third session. Summary Record of the 1675th meeting*:

Although the scope of application of IHL and human rights law is not the same, there is some overlap. This is particularly the case in situations of occupation and of non-international armed conflicts where the majority opinion considers human rights law as being applicable because of the existence of a sufficient control over the territory. There is, however, more debate regarding situations of extraterritorial non-international armed conflicts, on account of the contentious extraterritorial scope of human rights law outside occupation or detention.²²

B. The conduct of hostilities and law enforcement paradigms

The paradigms of the conduct of hostilities and law enforcement find their international legal basis in the legal regimes of IHL and human rights law.

The IHL basic rules governing the conduct of hostilities were crafted to reflect the reality of armed conflict. They are based on the assumption that the use of force is inherent to waging war because the ultimate aim of military operations is to prevail over the enemy's armed forces. First among those basic IHL rules is the principle of distinction. According to this principle, parties to an armed conflict must at all times distinguish between civilians and civilian objects on the one hand, and combatants and military objectives on the other hand and direct their attacks only against the latter.²³ Parties to an armed conflict are thus permitted, or at least are not legally barred from, attacking each other's military

Consideration of the Initial Report of Israel, 21 July 1998, UN Doc. CCPR/C/SR.1675, paras 21 and 27; UN Committee of Economic Social and Cultural Rights (CESCR), *Addendum to the Second Periodic Reports Submitted by States Parties, Israel*, 16 October 2001, UN Doc. E/1990/6/Add.32, para. 5; HRC, *Addendum to the Second Periodic Report, Israel*, 4 December 2001, UN Doc. CCPR/C/ISR/2001/2, para. 8. For legal writings negating the extraterritorial application of human rights law, see, e.g. M. Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", *American Journal of International Law*, Vol. 99, 2005, pp. 119-141. It shall be noted also that, although Canada accepts the extraterritorial application of human rights treaties, it only does so on the basis of the criterion of "control over territory", which the Canadian case law seems to equate with situations of occupation. Extraterritoriality on the basis of state agent authority (or control of the person) as found in some human rights case law (see, e.g. HRC, *Burgos v. Uruguay*, 29 July 1981, UN Doc. CCPR/C/13/D/52/1979, para. 12.3; HRC, *Lilian Celiberti de Casariego v. Uruguay*, 29 July 1981, UN Doc. CCPR/C/13/D/56/1979, para. 10.3; ECtHR, *Öcalan v. Turkey*, 12 March 2003, para. 93) has been expressly rejected by the Canadian Government but also by Canadian courts. See Federal Court, Ottawa, Canada, *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, 25 January and 12 March 2008. Available at: <http://reports.fja-cmf.gc.ca/eng/2008/2008fc336.pdf> (Last accessed on 30 September 2013). This decision was upheld by the Federal Court of Appeal and leave to the Supreme Court of Canada was denied.

²² On the extraterritorial scope of human rights law in the case of an occupation, see, e.g.: ICJ, Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra*, note 15, paras. 107-113; HRC, *Concluding Observations: Israel*, 18 August 1998, UN Doc. CCPR/C/79/Add.93, para. 10; HRC, *Concluding Observations: Israel*, 21 August 2003, UN Doc. CCPR/CO/78/ISR, para. 11; ECtHR, *Loizidou v. Turkey*, 23 March 1995, para. 62; ECtHR, *Cyprus v. Turkey*, 10 May 2001, para. 30; ECtHR, *Al Skeini and others v. United Kingdom*, 7 July 2011, paras. 130-150. On control over the person, see, e.g. ECtHR, *Öcalan v. Turkey*, 12 March 2003, para. 93; ECtHR, *Issa v. Turkey*, 16 November 2004, paras. 69-71; ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, 30 June 2009, para. 88; ECtHR, *Al-Jedda v. United Kingdom*, 7 July 2011, paras. 74-86.

²³ API, article 48. See also ICRC *Study on Customary International Humanitarian Law*, *supra*, note 12, rules 1-10.

objectives, including enemy personnel. By contrast, acts of violence directed against civilians or civilian objects are unlawful. Indeed, one of the main purposes of IHL is to spare them from the effects of hostilities. In elaborating the principle of distinction, IHL also prohibits *inter alia* indiscriminate and disproportionate attacks²⁴ and obliges the parties to the conflict to observe a series of precautionary rules in attack, aimed at avoiding or minimizing incidental harm to civilians and civilian objects.²⁵ This set of rules (i.e. distinction, proportionality and precautions in attack) can be described as the main part of the conduct of hostilities paradigm. They regulate the means and methods of warfare.

Human rights law is based on different assumptions. It was initially conceived to protect individuals from abuse by their State. Its rules on the use of force in law enforcement essentially provide guidance on how force can be used by State agents when it is absolutely necessary in self-defence; to prevent crime, to effect or assist in the lawful arrest of offenders or suspected offenders; to prevent the escape of offenders or suspected offenders and in quelling a riot.²⁶ In brief, human rights law regulates the resort to force by State authorities in order to maintain or restore public security, law and order. The essence of the principles governing the use of force under law enforcement in human rights is that lethal force may be used only as last resort in order to protect life, when other available means remain ineffective or without any promise of achieving the intended result.²⁷ Human rights jurisprudence and non-binding standards, such as the UN *Code of Conduct for Law Enforcement Officials*²⁸ and the UN *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*²⁹ have also clarified that a “strict” or “absolute” necessity standard is attached to any use of force, meaning that force may not exceed what is strictly or absolutely necessary to protect life. Specifically, this implies that where possible, an arrest must be effected by using non-lethal means. The set of foregoing

²⁴ API, article 51. See also ICRC *Study on Customary International Humanitarian Law*, *supra*, note 12, rules 11-14.

²⁵ API, article 57. See also ICRC *Study on Customary International Humanitarian Law*, *supra*, note 12, rules 15-24.

²⁶ UN *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eight UN Congress on the Prevention of Crime and the Treatment of Offenders and welcomed by UNGA Res. 45/166, 18 December 1990, Principle 9 (hereafter: UN *Basic Principles on the Use of Force*): “Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving great threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape ...”; UN *Code of Conduct for Law Enforcement Officials*, adopted by UNGA Res. 34/169, 17 December 1979, commentary to article 3 (hereafter: UN *Code of Conduct*): “... law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders ...” ECHR, article 2, para. 2: “Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: a) in defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection.” Although the other human rights instruments do not set out what is considered to be the legitimate purpose of the use of force, their practice comply with the legitimate aims explicitly provided by the UN *Basic Principles on the Use of Force*, the UN *Code of Conduct* and the ECHR. See: F. Hampson, “Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts,” *Revue de Droit Militaire et de Droit de la Guerre*, Vol. 31, No. 1, 1992, p.131.

²⁷ UN *Basic Principles on the Use of Force*, *supra*, note 26, Principle 4 (on use of force and firearms) and Principle 9 (on use of firearms specifically).

²⁸ UN *Code of Conduct*, *supra*, note 26.

²⁹ UN *Basic Principles on the Use of Force*, *supra*, note 26.

rules and principles describe what will be called, for the purpose of this report, the law enforcement paradigm.

C. Main differences between the conduct of hostilities and law enforcement paradigms³⁰

The principles governing the conduct of hostilities and law enforcement paradigms operate differently. The main differences can be summarised as follows:

- 1) The principle of *necessity* is conceived in a different way under the two paradigms. Under the conduct of hostilities paradigm, the military necessity to use force against legitimate targets is presumed. In other words, the presumption is that combatants/fighters can be attacked with lawful means while civilians are protected against direct attack, unless and for such time as they take a direct part in hostilities. In contrast, under the law enforcement paradigm, the principle of “absolute necessity” implies that the use of force must be the last resort and can be undertaken only in order to pursue a legitimate aim, such as self-defence, effecting a lawful arrest, preventing the escape of a person lawfully detained, or quelling a riot. In brief, force must be absolutely necessary in order to maintain public security, law and order.

- 2) The *principle of proportionality*, the observance of which is crucial to both conduct of hostilities and law enforcement operations, is conceived differently under IHL and human rights law. IHL prohibits an attack against a legitimate target if this attack “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”³¹ In other words, the IHL principle of proportionality protects only surrounding civilians and civilian objects from damage which would be excessive in relation to the concrete and direct military advantage anticipated of an attack. The legitimate target of an attack (combatant, fighter or civilian directly participating in hostilities) is not covered by the principle of proportionality under IHL.

By contrast, when a State agent is using force against an individual under human rights law, the proportionality principle requires a balancing between the risks posed by the individual versus the potential harm to this individual as well as to bystanders. Thus, the life of the individual posing an imminent threat himself is to be taken into account, in contradistinction to IHL. If the individual is not posing an imminent threat of death or serious injury, the use of lethal (or potentially lethal) force would not be considered as proportionate (even if the necessity requirement were to be fulfilled). In addition, whenever the lawful use of force and firearms is unavoidable, the human rights proportionality test leads to a need to use the smallest amount of force necessary (including possibly through the use of less-than-lethal weapons) and to apply an escalation of force procedure unless this

³⁰ This section is largely based on the ICRC Report on *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, *supra*, note 6, pp. 18-19.

³¹ API, article 51, para. 5 b).

appears impossible.³² Finally, in human rights law, the use of force must avoid as far as possible deaths or injuries of bystanders,³³ while the IHL principle of proportionality prohibits only *excessive* incidental civilian losses.

- 3) In the same vein, under the conduct of hostilities paradigm, the *principle of precaution* requires belligerents to take constant care to spare the civilian population, civilians and civilian objects.³⁴ On the contrary, under the law enforcement paradigm, all precautions must be taken to avoid, as far as possible, the use of force as such, and not merely incidental civilian death or injury or damage to civilian objects.³⁵ State agents shall thus endeavour, to the greatest extent possible, to minimize injury and respect and preserve human life.³⁶

Given the parallel applicability in armed conflicts of these two international law paradigms regulating the use of force, and their differences in content, the crucial question that remains is: in which cases does the use of force fall within the conduct of hostilities paradigm or, by contrast, within that of law enforcement?

D. Experts' comments and discussion

There was general agreement among experts that the legal regimes governing the use of force in armed conflicts are found in both IHL and human rights law. There was also

³² See also N. Lubell, "Challenges in Applying Human Rights Law to Armed Conflict", *International Review of the Red Cross*, Vol. 87, No. 860, December 2005, pp. 745-746: "'Proportionality' is considered a core principle in both IHL and human rights law. In both of them it denotes a balancing relationship: X in relation to Y. In substance, however, it is not always the same and can indeed cause confusion. For example, under human rights law and the rules of law enforcement, when a State agent is using force against an individual, the proportionality principle measures that force in an assessment that includes the effect on the individual himself, leading to a need to use the smallest amount of force necessary and restricting the use of lethal force. Under IHL, on the other hand, if the individual is for instance a combatant who can be lawfully targeted, then the proportionality principle focuses on the effect upon surrounding people and objects, rather than upon the targeted individual, against whom it might be lawful to use lethal force as a first recourse."

³³ It shall be noted that even under human rights law, deaths or injuries of bystanders do not necessarily lead to a violation of the right to life as long as the use of force was absolutely necessary and strictly proportionate. See, e.g. ECtHR, *Andronicou and Constantinou v. Cyprus*, 9 October 1997, para. 194; ECtHR, *Kerimova and Others v. Russia*, 3 May 2011, para. 246.

³⁴ See *supra*, note 25.

³⁵ The "principle of precaution" in human rights law does not appear explicitly in the treaty provisions pertaining to the right to life. It has been mainly developed through human rights case law. The ECtHR was the first to develop the concept, borrowing in part from IHL. See ECtHR, *McCann and Others v. United Kingdom*, 27 September 1995, paras. 150 and 194; ECtHR, *Ergi v. Turkey*, 28 July 1998, para. 79. On the influence of IHL on human rights law for the introduction of the principle of precaution in human rights law, see: Aisling Reidy, "The approach of the European Commission and Court of Human Rights to international humanitarian law", *International Review of the Red Cross*, Vol. 38, No. 324, 1998, p. 526. The Inter-American Court of Human Rights has followed the jurisprudence of the ECtHR. See IACtHR, *Neira Alegria et al. v. Peru*, 19 January 1995, para. 62; IACtHR, *Montero-Aranguren et al. v. Venezuela*, 5 July 2006, para. 82; IACtHR, *Zambrano Velez et al. v. Ecuador*, 4 July 2007, para. 89. Some Human Rights bodies refer more generally to the obligation to "prevent" violations of the right to life: HRC, General Comment No. 6, *The Right to Life (article 6)*, 30 April 1982, UN Doc. HRI/GEN/1/Rev.1, para. 3; HRC, *Burrell v. Jamaica*, 18 July 1996, UN Doc. CCPR/C/53/D/546/1993, para. 9.5; ACommHPR, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, *supra*, note 17, para. 22.

³⁶ UN *Basic Principles on the Use of Force*, Principle 5 a) b), *supra*, note 26.

agreement with the basic assumption that both the conduct of hostilities and law enforcement paradigms can be relevant in an armed conflict situation. Experts also acknowledged the differences between these two paradigms as described above. There were nevertheless a number of comments and discussions on each of the foregoing sections that are worth summarising here.

As regards the legal regimes governing the use of force, there was some discussion regarding the applicability of human rights law in armed conflict situations as well as regarding the extraterritorial applicability of human rights law. A few experts were of the view that human rights law pertains to the relationship between a State and its people and that it is not applicable in armed conflict situations as a matter of law. The extraterritorial applicability of human rights law was also questioned by these experts, who emphasized that Article 2, paragraph 1, of the International Covenant on Civil and Political Rights specifies that each State Party “undertakes to respect and to ensure to all individuals within the territory *and* subject to the jurisdiction (emphasis added)” the rights recognized in the Covenant. It was also suggested that imposing human rights obligations on States in armed conflict situations might increase the asymmetry in non-international armed conflicts between States and organized non-State armed groups, since the latter are in principle not bound by human rights law. As a consequence, there would not only be an asymmetry in the means and methods of warfare used but also as regards the range of rules belligerents must respect. This would provide an advantage to organized non-State armed groups which are bound by IHL only, while States would be bound by both IHL and human rights law.

The great majority of experts were however of the view that human rights law is generally applicable in armed conflict situations. It was pointed out that the issue of human rights applicability in armed conflict situations and the issue of the extraterritorial applicability of human rights law should not be mixed up. In non-international armed conflicts taking place in the territory of one State, the issue of extraterritorial applicability of human rights law does not arise. Moreover, in the context of armed conflicts taking place in two or more States, the majority of experts held that the extraterritorial applicability of human rights law cannot be questioned in situations where there is effective control over the territory (e.g. occupation).

It is also worth noting that the few experts questioning the applicability of human rights law in armed conflict situations considered, nevertheless, that human rights law would not be totally irrelevant in armed conflicts. In their view, human rights law is relevant as a matter of policy because the end result of armed conflicts should be a situation of peace where human rights are respected. However, many experts rejected the idea that human rights law would apply only as a matter of policy in armed conflict situations.

As regards the broad descriptions above of the conduct of hostilities and law enforcement paradigms, most experts found them generally appropriate, although there was discussion on the nature of the two paradigms. Experts agreed that the conduct of hostilities and law enforcement paradigms do not constitute new legal regimes or legal frameworks, but that they rather constitute a description of different sets of norms belonging to IHL and human rights law and applicable to the use of force in armed conflict situations. In this context, some experts were of the view that – although the meeting focused on the use of force

only – the interplay between the conduct of hostilities and law enforcement paradigms might extend beyond the actual use of force and have implications in the context of capture/arrest operations or even detention. In their view, this broader picture should be kept in mind when analysing the interplay between these two paradigms in the context of the use of force.

As regards the content of the two paradigms, several experts noted that it would be an oversimplification to state that the law enforcement paradigm is only derived from international human rights law. They pointed out that IHL also contains other specific rules for the use of force outside conduct of hostilities operations, such as the obligation of the Occupying Power to maintain public order and safety.³⁷ One expert also emphasized that the law of naval warfare contains many rules and principles pertaining to the use of force in situations akin to law enforcement, notably for enforcing blockades or regulating civilian shipping.³⁸

In addition, it was mentioned that the law enforcement paradigm derives also from the notion of social contract, whereby States have to maintain law and order on their territories. Accordingly, law enforcement norms are found in most domestic legal orders. As such, the basic law enforcement principles arguably can be considered as general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.³⁹

When discussing the conduct of hostilities and law enforcement paradigms, the notion of self-defence was also referred to. A few experts mentioned that according to their domestic law, the military cannot conduct law enforcement operations and that, as a consequence, in armed conflict situations, armed forces can use force only in the

³⁷ For example, article 43 of the Hague Regulation provides that “the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” Thus, under occupation law, the occupying power has an obligation to maintain law and order and has the power to use force to do so. In this regard, see ICRC Report on *The Use of Force in Occupied Territory*, *supra*, note 2, p. 119. See also K. Watkin, “Use of Force during Occupation: Law Enforcement and Conduct of Hostilities,” *International Review of the Red Cross*, Vol. 94, No. 885, Spring 2012, pp. 295-296.

³⁸ A blockade is a method of warfare. However, para. 98 of the 1994 *San Remo Manual*, which reflects customary law, specifies that “merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. Merchant vessels which, after prior warning, clearly resist capture may be attacked.” See also: *The Public Commission to Examine the Maritime Incident of 31 May 2010*, January 2010, Part one, para. 179 (hereafter: the Turkel Commission Report): “[T]he tactics applied in the law enforcement context to stop a vessel serve as a relevant comparison to the attempt to capture a vessel while enforcing a blockade during an armed conflict with respect to the issue of the appropriate escalation of force. The obligation under international humanitarian law to attempt to capture a neutral vessel before attacking it when enforcing a blockade is based on the principle of using force only when necessary. This principle is also applicable in a law enforcement context, where the necessity for using force must be demonstrated by establishing that less forceful means were attempted and failed, or that such means would have been impossible or futile under the circumstances.” Available at: <http://www.turkel-committee.com/index-eng.html> (Last accessed on 30 September 2013). Regarding vessels and aircraft exempt from attack and the conditions in which force may be used, see the provisions of the San Remo Manual dealing with loss of exemption, such as: paras. 50, 51, 52, 57 etc.

³⁹ In this regard, see K. Watkin, “Use of Force during Occupation: Law Enforcement and Conduct of Hostilities,” *supra*, note 37, p.304.

framework of the conduct of hostilities paradigm or in self-defence. In the view of these experts, self-defence was not subsumed in the law-enforcement paradigm, but was a distinct concept derived from domestic law. Some experts suggested that their view of self-defence reflects what they apply as a matter of policy in armed conflicts, but is entirely consistent with domestic rules for the use of force (derived from human rights law and/or law enforcement standards).⁴⁰ Like the law enforcement paradigm, self-defence would generally imply an escalation of force procedure. Other experts criticized this approach as being dangerous, since the concept of self-defence varies so much among States.⁴¹ It was suggested that clarification of the notion of “self-defence” might be useful but would go beyond the realm of this expert meeting.

Regarding the distinguishing features of the conduct of hostilities and law enforcement paradigms, a discussion arose regarding the question of how much the law enforcement paradigm differs from the conduct of hostilities paradigm in the assessment of the risk or danger justifying the use of force. It was noted that, under the law enforcement paradigm, there needs to be a concrete and imminent risk to life or limb posed by one or more individuals for the use of force to be considered necessary and proportional. In contrast, under the conduct of hostilities paradigm, the notion of risk would have to be understood more broadly. Military objectives could be targeted independently of the existence of an imminent threat to life or limb and even though the attack might cause incidental civilian damage. In other words, under IHL the legality of an attack does not depend on a determination of the existence of an imminent risk to life but rather on the qualification of a person/object as a military objective – which could in turn constitute a danger for military operations only remotely.

Finally, some experts suggested that one of the distinguishing features between the conduct of hostilities and the law enforcement paradigms concerns the actor using force: in the former paradigm, the actor using force is the military and in the latter paradigm it is the police. However, most experts rejected the relevance of the actor-criterion to distinguish between the conduct of hostilities and law enforcement paradigms. They highlighted that even though under domestic law a State may decide that armed forces cannot conduct law enforcement operations, under international law the actor is not decisive. Depending on the context and circumstances, policemen might in practice directly participate in hostilities. In the same vein, armed forces might in practice conduct law enforcement operations.

⁴⁰ For domestic law cases setting the standards for the use of force from which countries may derive their self-defence rules in armed conflict situations: see, e.g. US Supreme Court, *Tennessee v. Garner*, 27 March 1985; UK House of Lords, *R. v. Clegg*, 1995.

⁴¹ States use different definitions of self-defence. For instance, in some countries (e.g. the United States of America) the use of force in self-defence to defend property is authorised, while in others (e.g. Canada, United Kingdom) it is not authorised, unless the loss of, or damage to, that property will result in an imminent threat to life. See B. Cathcart, “Application of Force and Rules of Engagement in Self-Defence Operations”, in T. D. Gill and D. Fleck (eds), *The Handbook of the International Law of Military Operations*, Oxford University Press, Oxford/New York, 2010, p. 210. In multinational operations, these differences have led to the introduction of a number of “national caveats” (i.e. restrictions or amplifying instructions) by member States to the Rules of Engagement in order to ensure compliance with their domestic laws and policies. Cathcart, *ibid.*, p. 203.

II. THE USE OF FORCE IN ARMED CONFLICTS: CASE STUDIES ANALYSIS

This second part of the report deals with the use of force in five different situations:

- 1) when force is used against legitimate targets (the isolated sleeping fighter example);
- 2) when civilians are involved in riots, in close proximity to or intermingled with fighters;
- 3) when civilians belong to criminal groups which are not party to the armed conflict but which have close links to organised armed groups;
- 4) when detainees or internees attempt an escape or are involved in a riot in detention;
- 5) when civilians do not respect military orders.

These five situations were addressed through a discussion of case studies. These case studies are stated at the beginning of each section. They are followed by a summary of the background information provided to experts and a summary of the experts' comments and discussion.

A. Use of force against legitimate targets during armed conflicts

Case study 1: Use of force against legitimate targets

In the context of a non-international armed conflict between a government and an organized non-State armed group, a fighter⁴² belonging to that group is sleeping at home with his family in a part of the territory controlled by the government. The government army locates the fighter and decides to launch an operation against him.

1. Is this operation governed by the conduct of hostilities or law enforcement paradigm? What are the consequences for the way in which the operation is conducted?

2. Does the determination of the paradigm to be applied depend on whether the fighter is in the conflict zone⁴³? In other words, should the law enforcement paradigm be applied if the fighter is in the northern part of the State, for example, and hostilities are taking place only in the south?

3. Does the existence of control over the area and the level of violence in the area play a role? In other words, should the law enforcement paradigm be applied even against a legitimate target if the control over the territory is high and the level of violence is low?

1. Background information:

From an IHL perspective, the use of force against individuals constituting legitimate targets of attack is governed by the conduct of hostilities paradigm. In this context, legitimate targets are: 1) members of the armed forces of a party to the conflict or participants in

⁴² *Supra*, note 3.

⁴³ The notion of "conflict zone" is used in this report to refer to the area where active hostilities are taking place.

mass levies in international armed conflicts;⁴⁴ 2) members of State armed forces or fighters in a non-international armed conflict; and 3) civilians directly participating in hostilities in either international or non-international armed conflicts. Combatants and fighters can, in principle, be attacked at any time unless *hors de combat*. Civilians cannot be targeted unless and for such time as they take a direct part in hostilities.

However, in the context of non-international armed conflicts or occupation, some human rights bodies have applied the law enforcement paradigm even when dealing with the use of force against persons who would be considered legitimate targets under IHL. It should be noted that the Inter-American Commission on Human Rights constitutes an important exception in this regard. Although it has dealt rarely with cases where force has been used against legitimate targets, when it has done so, it has generally considered IHL as the *lex specialis* or has at least relied on IHL.⁴⁵

Three examples where human rights bodies have applied the law enforcement paradigm regarding the use of force against legitimate targets can be cited:

- 1) In the context of the non-international armed conflict in Colombia, the UN Human Rights Committee considered, in the *Guerrero* case, that the use of force against unarmed alleged “guerrilleros” by policemen who lay in wait for them at their house in the “Contador” district of Bogota, was disproportionate and violated the right to life. In particular, the Human Rights Committee criticized the fact that no warning had been given, that guerrilleros were not given the opportunity to surrender, and that the use of force did not pursue a legitimate aim (self-defence, lawful arrest, preventing the escape of a person lawfully detained). In short, the Human Rights Committee applied the law enforcement paradigm to the use of force against persons suspected of belonging to an organized armed group.⁴⁶
- 2) In the context of the territories occupied by Israel, the Human Rights Committee in its 2003 Concluding Observations considered that “before

⁴⁴ Medical and religious personnel of the armed forces are protected against direct attacks unless they commit “hostile” or “harmful” acts outside their privileged function. See First Geneva Convention (GCI), articles 24-25, Second Geneva Convention (GCII), article 36; APII, article 9, para. 1; ICRC *Study on Customary International Humanitarian Law*, *supra*, note 12, rules 25 and 27. See also ICRC *DPH Guidance*, *supra*, note 3, footnote 8.

⁴⁵ For instance, in the *Tablada* case, where Argentina’s army used force against persons attacking a military barrack, the Commission simply said that according to IHL, such persons were legitimate targets since they directly participated in hostilities. See IACommHR, *Abella v. Argentina* (“la Tablada”), 18 November 1997. In addition, in its 1999 report concerning the human rights situation in Colombia, the Commission considered that members of organized non-State armed groups under responsible command whose principal daily activity is to directly participate in hostilities are to be considered as subject to direct attack under IHL to the same extent as members of regular armed forces. Instead, civilians could only be targeted if directly participating in hostilities. See IACommHR, *Third Report on the Human Rights Situation in Colombia*, Chapter IV, 26 February 1999, OEA/Ser.L/V/II.102, para. 61. The IACommHR tends however to adopt a restrictive definition of the direct participation in hostilities as “acts of violence that constitute a real and immediate threat to the adversary” (IACommHR, *Ellacuria et al. v. Salvador*, 22 December 1990, para. 166). See also: IACommHR, *Report on Terrorism and Human Rights*, 22 October 2002, OEA/Ser.L/V/II.116.

⁴⁶ HRC, *Camargo and Suarez de Guerrero v. Colombia*, 31 March 1982, UN Doc. CCPR/C/15/D/45/1979.

resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.”⁴⁷ Regarding the same context, the Israeli Supreme Court adopted a different approach, which could be called the “mixed-model” approach.⁴⁸ Although it applied a conduct of hostilities reasoning when dealing with the targeting of civilians directly participating in hostilities, it ultimately held – in conformity with the law enforcement paradigm – that “if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed.”⁴⁹

- 3) In the context of the violence between the Turkish government and the Kurdistan Workers’ Party (PKK) in the late 1990s, the European Court of Human Rights systematically applied the law enforcement paradigm when dealing with cases where force was used against members of the PKK,⁵⁰ including when the PKK members themselves had resorted to armed force.⁵¹ It should be noted that Turkey does not recognize the existence of an armed conflict on its territory. This may have had an impact on the European Court of Human Rights’ reasoning, although the Court referred explicitly to the existence of “violent

⁴⁷ HRC, *Concluding Observations: Israel*, 21 August 2003, UN Doc. CCPR/CO/78/ISR, para. 15. See also: HRC, *Concluding Observations: Israel*, 29 July 2010, UN Doc. CCPR/C/ISR/CO/3, para. 10: “The Committee notes the State party’s affirmation that utmost consideration is given to the principles of necessity and proportionality during its conduct of military operations and in response to terrorist threats and attacks. Nevertheless, the Committee reiterates its concern, previously expressed in paragraph 15 of its concluding observations (CCPR/CO/78/ISR), that, since 2003, the State party’s armed forces have targeted and extrajudicially executed 184 individuals in the Gaza Strip, resulting in the collateral unintended death of 155 additional individuals, this despite the State party’s Supreme Court decision of 2006, according to which a stringent proportionality test must be applied and other safeguards respected when targeting individuals for their participation in terrorist activity (art. 6).” In another context, see also *Report of the Special Rapporteur on the Extrajudicial, Summary and Arbitrary Executions, Philip Alston: Mission to the United States of America*, 28 May 2009, UN Doc. A/HRC/11/2/Add.5, paras. 71-73 (hereafter: *Report on the Extrajudicial, Summary and Arbitrary Executions*).

⁴⁸ The “mixed-model” approach consists in borrowing from both IHL and human rights law to address the unique situation confronting an occupying power in occupied territory. See ICRC Report on *The Use of Force in Occupied Territory*, *supra*, note 2, p. 115. On the Israeli Supreme Court judgment: See also N. Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, pp. 32 *et seq.*

⁴⁹ See High Court of Justice of Israel, *The Public Committee against Torture in Israel v. The Government of Israel*, 11 December 2005, HCJ 769/02, para. 40.

⁵⁰ For example, in the *Gül* case (ECtHR, *Gül v. Turkey*, 14 December 2000, para.82), the Court held that the use of force by Turkish officials against a member of the Kurdistan Workers’ Party (hereafter: PKK) who was at home was “grossly disproportionate” since he did not attack them. See also, among many others, ECtHR, *Oğur v. Turkey*, 20 May 1999. On these cases, see: G. Gaggioli and R. Kolb, “A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights”, *Israel yearbook on human rights*, Vol. 37, 2007, pp. 115-163.

⁵¹ See for example ECtHR, *Hamiyet Kaplan and others v. Turkey*, 13 September 2005. In this case, armed members of the PKK were killed by Turkish security forces in the context of a raid degenerating into an armed confrontation. The Court found a violation of the right to life because the security forces did not have non-lethal weapons and were not trained in non-lethal methods of arrest. In addition, the Turkish legal and administrative framework did not provide sufficiently clear recommendations regarding the use of lethal force and the Turkish authorities did not conduct an effective investigation into the incident. In this case, the violation of the right to life was not situated at the level of the execution of the operation but at the level of its preparation and at the level of the obligation to investigate. See also ECtHR, *Mansuroglu v. Turkey*, 26 February 2008.

armed clashes” (in French: “violents conflits armés”) in some related Turkish cases.⁵²

This approach adopted by some human rights bodies – which differs from IHL reasoning – has led legal scholars to arrive at divergent views about which paradigm should apply when dealing with legitimate targets in non-international armed conflicts and situations of occupation.⁵³ This is problematic because, as explained earlier, the results of applying one paradigm might be different to the results of applying the other.

For example, in a situation such as the one described in case study 1 above (isolated sleeping fighter example), would the conduct of hostilities paradigm apply or should the law enforcement paradigm be applied instead? If the conduct of hostilities paradigm is deemed appropriate, the fighter could be targeted provided, in particular, that the principles of proportionality and precaution in attack are respected. On the other hand, if the law enforcement paradigm is applied, the government would need – if possible – to endeavour to arrest the fighter and to exhaust all reasonable less-than-lethal and non-violent means before resorting to lethal force.

Although, in the view of the ICRC among others, the IHL principles of military necessity and humanity may lead to the conclusion that the fighter must not be targeted on sight under certain circumstances,⁵⁴ the applicability of the conduct of hostilities

⁵² See, e.g. ECtHR, *Ergi v. Turkey*, 28 July 1998, para. 85; ECtHR, *Kaya v. Turkey*, 19 February 1998, para. 91; ECtHR, *Güleç v. Turkey*, 27 July 1998, para. 81; ECtHR, *Ahmet Özkan and others v. Turkey*, 6 April 2004, para. 319.

⁵³ See, e.g. for conflicting approaches : W. Abresch, “A Human Rights Law of Internal Armed Conflicts: The European Court of Human Rights in Chechnya,” *European Journal of International Law*, Vol. 16, No. 4, September 2005, pp. 746-748; L. Doswald-Beck, “The Right to Life in Armed Conflicts : Does International Humanitarian Law Provide All the Answers ?,” *International Review of the Red Cross*, Vol. 88, No. 864, December 2006, pp. 881-904; D. Fleck, “Law Enforcement and the Conduct of Hostilities: Two Supplementing or Mutually Excluding Legal Paradigms?,” in A. Fischer-Lescano *et al.*, *Frieden in Freiheit. Peace in Liberty. Paix En Liberté. Festschrift Für Michael Bothe Zum 70 Geburtstag*, Nomos/DIKE, Baden-Baden/Zürich, 2008, pp. 391-407; N. Melzer, “Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities,” in T. D. Gill and D. Fleck, *supra*, note 41, pp. 43-44; K. Watkin, “Stability Operations: a Guiding Framework for ‘Small Wars’ and other Conflicts of the 21st Century?,” *Israel Yearbook on Human Rights*, Vol. 39, 2009, pp. 239-259.

⁵⁴ ICRC *DPH Guidance*, *supra*, note 3, pp. 78 *et seq.* Regarding the circumstances under which this would be the case, the ICRC *DPH Guidance* specifies (pp. 80-81): “What kind and degree of force can be regarded as necessary in an attack against a particular military target involves a complex assessment based on a wide variety of operational and contextual circumstances. (...) The practical importance of the restraining function [of the principles of military necessity and humanity] will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.” The Guidance also notes (see p. 78, footnote 212) that this question was highly controversial during the expert meetings devoted to the notion of direct participation in hostilities, but that “[t]hroughout the discussions, it was [not] claimed that there was an obligation to assume increased risks in order to protect the life of an adversary not entitled to protection against direct attack.” In other words, the question whether a capture or the use of other non-lethal means against a legitimate target is required by the principles of military necessity

paradigm would still lead to results different from those achieved through the application of the law enforcement paradigm. Under the law enforcement paradigm, the presumption is that State agents must arrest persons and not kill them on sight (i.e. “capture rather than kill”). It is only if the arrest is at risk, and if the person poses an imminent threat to life, that the use of lethal force is authorised as a last resort. Under the conduct of hostilities paradigm, the presumption is the reverse. In the ICRC’s view, a legitimate target may be killed at any time, unless it is clear that he/she may be captured or otherwise rendered *hors de combat* without additional risk to the operating forces. This is so because “it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.”⁵⁵ This fundamental difference indicates that the determination of the applicable paradigm is crucial.

The overarching question asked to the experts was thus whether they considered the conduct of hostilities paradigm as prevailing each time force is used against a legitimate target and, if so, why; or whether there are situations where the law-enforcement paradigm could apply and if so, what would be the factors to be taken into account in determining the applicable paradigm.

More specifically, experts were asked whether the following factors should be taken into account to determine the applicable paradigm:

- 1) The location of the potential target, i.e. whether he or she is inside or outside the conflict zone

The geographical scope of application of IHL, and more specifically of the conduct of hostilities paradigm, is not crystal-clear. In the *Tadić* decision, the ICTY underlined that:

“Although the Geneva Conventions are silent as to the geographical scope of international ‘armed conflicts,’ the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. *Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited* (emphasis added). Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. (...) The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations.”⁵⁶

On the basis of the italicized sentence of this quotation, it could be contended that the geographical scope of application of the conduct of hostilities paradigm is limited to the “conflict zone.” This notion of “conflict zone” is neither defined nor used in IHL treaties. It is however frequently used, in practice, to describe an area where active hostilities are taking place. It could thus be argued that, in a situation of non-international armed

and humanity would also depend on the existence of additional risks to the operating forces or the surrounding civilian population (see also ICRC *DPH Guidance*, pp. 81 and 82).

⁵⁵ *Ibid.*, p. 82. For the criticisms on Chapter IX of the ICRC *DPH Guidance*, see *infra*, note 66.

⁵⁶ See ICTY, *Prosecutor v. D. Tadić*, *supra*, note 12, paras. 68-69.

conflict, the conduct of hostilities paradigm would prevail inside the conflict zone. Outside the conflict zone, the law enforcement paradigm would prevail, or not be displaced by, the conduct of hostilities paradigm, even against legitimate targets.

It should be noted, however, that in the *Tadić* decision, the ICTY was not trying to deal conclusively with the geographical scope of application of the conduct of hostilities paradigm. Rather, it was trying to demonstrate that IHL rules protecting persons in the power of the enemy are applicable on the whole territory of the belligerent parties even if hostilities are not taking place on that part of the territory. Moreover, the sentence italicized in the quotation dealt with international rather than non-international armed conflicts.

2) The intensity of violence and degree of control

It has sometimes been stated that the degree of control and violence may constitute useful factors in order to determine the applicable paradigm governing the use of force.⁵⁷

⁵⁷ ICRC Report on *The Use of Force in Occupied Territory*, *supra*, note 2, p. 129: “Two other experts proposed a different method for determining the model applicable in situations of overlap. They said that the degree of control the occupying power had over the circumstances surrounding a military operation, as well as its control over the place where that operation would take place, could be useful criteria for determining whether the rules pertaining to law enforcement or those governing the conduct of hostilities would apply as a matter of *lex specialis*. Control over the circumstances of the operation and over the areas in question would trigger application of the law enforcement model. Therefore, when the occupying forces conducting a specific operation are not excessively concerned about having to deal with other members of the organized armed group, meaning that additional military means would not be required to make the operation a success, the law enforcement model would become applicable. On the other hand, when the occupying forces expect to be militarily challenged by fighters from organized armed groups, then the operation should be carried out within the framework of the ‘conduct-of-hostilities’ model. This double layer of control (control over the operation within the broader concept of effective control over the occupied territory) was well received by the other experts, except one who challenged the practicality of the proposal. Thus, level of control within the broader concept of effective control over the occupied territory was accepted as an important criterion in situations of overlap and regarded as a workable option for determining the model applicable.” See also The University Centre for International Humanitarian Law, Report of an Expert Meeting, *The Right to life in armed conflicts and situations of occupation*, Geneva, Switzerland, 1-2 September 2005, p. 19. Available at: http://www.geneva-academy.ch/docs/expert-meetings/2005/3rapport_droit_vie.pdf (Last accessed on 30 September 2013): “One expert described the state of the law as one in which both IHL and human rights law apply in parallel in situations of occupation, non-international armed conflict and with respect to targeted killings. Given the parallel applicability of IHL and human rights law in these contexts, according to this expert, human rights law and the law-enforcement model constitute the default legal regime. Where this model becomes unworkable in these situations, given the level of organised violence and lack of control exercised by the State in the relevant territory, the IHL rules on conduct of hostilities govern.” HRC, *Outcome of the Expert Consultation on the Issue of Protecting the Human Rights in Armed Conflicts: reports of the United Nations High Commissioner for Human Rights*, Eleventh session, 4 June 2009, UN Doc. A/HRC/11/31, para. 14: “[..] there had to be some type of test against which each situation would need to be assessed in order for the most adequate legal framework to be determined. There was a suggestion that such a test could be framed in the context of effective control: the more effective the control over persons or territory, the more applicable human rights law would be. In this respect, it was argued that the human rights law paradigm posited effective control over a population, while the international humanitarian law paradigm posited a breakdown of power as a result of armed conflict. As a way to inform the *lex specialis* maxim in the context of armed conflict, it was suggested that, the more stable the situation, the more the human rights paradigm would be applicable; the less stability and effective control, the more the international humanitarian law paradigm would be applicable to supplement human rights law. This approach nevertheless may raise complex legal questions.” This

The underlying idea is that the conduct of hostilities paradigm would prevail against legitimate targets but only in situations of actual “hostilities.” This notion would then suppose a high intensity of violence and lack of control over the area and over the circumstances. In other words, the conduct of hostilities paradigm would prevail over the law enforcement paradigm when force is used against legitimate targets and when the degree of violence is high while the control exercised over the area and over the circumstances is low. On the other hand, the more control over the area and circumstances, the more the possibility of applying the law enforcement paradigm – and thus the rationale to capture rather than kill – would exist. In the same vein, the lower the intensity of violence in the area, the more the law enforcement paradigm would appear adequate and be preferred to the conduct of hostilities paradigm.

The factors of intensity of violence and degree of control have to be distinguished from the conflict zone factor mentioned earlier. While the latter refers to the geographical scope of the conduct of hostilities paradigm, the former relates to the material definition of hostilities. In practice, these different types of factors might lead to different results. In some situations, for instance, even in a conflict zone, the degree of control over an area and circumstances might be high and the intensity of violence low at a certain point in time. Therefore, if the degree of control/intensity of violence factors were to be adopted in such a situation, they would lead to applying the law enforcement paradigm (even though the situation takes place in the conflict zone). Conversely, if the conflict zone factor were to be accepted, it would lead to the prevalence of the conduct of hostilities paradigm in the same situation.

2. Experts’ comments and discussion:

Experts were divided regarding their legal analysis of case study 1.

By a small margin, the majority of experts considered that, for case study 1, the use of force against a person who is a legitimate target is governed by the conduct of hostilities paradigm under IHL. Concretely, this meant that, from a legal point of view, an isolated sleeping fighter could be lawfully attacked provided that the IHL principles of proportionality and precautions are fulfilled.

The main legal argument for this view was that IHL constitutes the *lex specialis* because it is specifically designed to address the reality of armed conflicts and thus prevails over the general legal regime of human rights law. The *lex specialis* character of IHL rules regarding the conduct of hostilities has been clearly recognized by the International Court of Justice and by the Inter-American Commission of Human Rights.⁵⁸

More precisely, some experts held that the “overwhelming fact” for determining that IHL is the *lex specialis* in the context of the use of force in armed conflict situations is the status or function of the person against whom force is being used. This is because treaty

statement was made in the context of a discussion on the general relationship between human rights law and IHL.

⁵⁸ ICJ, Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, *supra*, note 12, para. 25, Concerning the case law of the Inter-American Commission of Human Rights, see *supra*, note 45.

and customary IHL allow the targeting of members of armed forces and fighters as well as civilians directly participating in hostilities in armed conflict situations and provide for detailed and specific rules in this regard. State practice was held to be consonant with such an analysis.

In the same vein, one argument was that logically, it should be possible legally to target members of armed forces and fighters anytime, regardless of whether or not they pose an imminent threat in the circumstances ruling at the time and not to take into account the law enforcement paradigm. Otherwise, members of armed forces and fighters would actually be treated like civilians. The IHL distinction between, on the one hand, members of armed forces and fighters and, on the other hand, civilians, who cannot be targeted unless and for such time as they directly participate in hostilities, would vanish.⁵⁹ Another argument was that it would be unfair to consider that an isolated sleeping fighter in a non-international armed conflict should be captured in a situation like case study 1, while in their view a regular combatant in an international armed conflict is always targetable.

A minority of experts held a contrary position and considered instead that the law enforcement paradigm should prevail in case study 1. One argument was that the starting point should be that both the conduct of hostilities paradigm under IHL and the law enforcement paradigm under human rights law are applicable in principle. In order to determine which paradigm is to be applied, the *lex specialis* maxim should be taken into account. This maxim, however, does not always give precedence to IHL rules. The *lex specialis* has to be determined in each particular case.

According to this view, the appropriate legal paradigm had to be determined taking into account the applicable rules and the particular facts of the case. In order to determine the *lex specialis*, one should identify the rules having the “greatest common contact surface area” with those facts. In the case study under discussion, the fact that the person is a fighter is an element in favour of the conduct of hostilities paradigm; all other factors, however, speak in favour of the law enforcement paradigm. The fighter is not conducting hostilities (he is sleeping at home with his family) and is isolated, thus rendering a capture feasible. Moreover, the other factual elements mentioned in questions 2 and 3 (conflict zone, control, intensity of violence) would constitute additional factors to take into account in order to determine the applicable *lex specialis*. For example, if the fighter is in an area controlled by the Government where the intensity of violence is very low (or non-existent), these are additional factual elements in favour of the law enforcement paradigm. In other words, the status/function of the potential target is not necessarily the only or the decisive criterion for the selection of the paradigm to be applied.

The situation would be different if the fighter was sleeping instead in an encampment of insurgents or if he or she was directly participating in hostilities. In these cases, the factual elements would be in favour of the conduct of hostilities paradigm. Similarly, the situation would be different if the fighter were instead a combatant in the context of an international armed conflict. In that case, the argument that status is the key criterion is sound, since IHL for international armed conflicts defines clearly and specifically who is a

⁵⁹ All experts agreed that, in the same situation as case study 1, if the person sleeping at home with his family is not a fighter but rather a civilian having (in the past) directly participated in hostilities, he could not be targeted on sight under IHL but should be captured instead.

combatant and, as such, presumably always targetable. Non-international armed conflicts were held to be fundamentally different from international armed conflicts in that respect. There is no combatant status under IHL for non-international armed conflicts and IHL does not define who is a fighter in the context of non-international armed conflicts. Taking into account this fundamental difference, how could the “status” be considered as the only criterion to distinguish between the conduct of hostilities and law enforcement paradigms in the context of non-international armed conflicts? In practice, moreover, fighters usually do not wear a uniform and it is therefore more difficult to ascertain that a person is actually a fighter. For these various legal and practical reasons, and because human rights law clearly applies to the use of force by a State against persons located on its own territory, the *lex specialis* could not always be the conduct of hostilities paradigm.

A slightly different view, though agreeing that there were fundamental differences between international and non-international armed conflicts, was that in non-international armed conflicts, the law enforcement paradigm constitutes the “default legal regime.” In other words, as one expert put it, “the law enforcement paradigm would be the norm while the conduct of hostilities paradigm would be the exception.” This would not mean however that the law enforcement paradigm should be applied in the same way as in peacetime. According to this expert and others, the law enforcement paradigm under human rights law is flexible and can be adapted to take into account the particular situation of armed conflict. The situational analysis in case study 1, taking into account notably the control exercised by the State over the area and provided that there is a low level of violence, would indicate that the law enforcement paradigm continues to apply and is not displaced by the conduct of hostilities paradigm.

The *lex specialis* maxim was criticised by other experts as not bringing much to the debate since its understanding varies very much from one expert to the other. It was pointed out that the International Court of Justice itself progressively abandoned the *lex specialis* maxim in the context of the analysis of the interplay between IHL and human rights law. For example, the ICJ did not refer to it in the *Congo v. Uganda* case.⁶⁰ In any case, even if the relevance of the *lex specialis* maxim were to be accepted, these experts questioned whether IHL constitutes the *lex specialis* regarding targeting issues in non-international armed conflicts. The question of who can be targeted and when under IHL for non-international armed conflict continues to be debated, despite the efforts of the ICRC to clarify the matter through its Interpretive Guidance on Direct Participation in Hostilities under IHL.⁶¹ In these experts’ views, given the lack of precision of IHL in that respect, its rules cannot be deemed to be the *lex specialis*.

One other view was that since the conduct of hostilities and law enforcement paradigms could both potentially apply, one should apply the paradigm which can cause the minimum loss of life or which, in other words, is the most favourable to the individual. The

⁶⁰ ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, para. 216. In this case, the Court specified that in its previous advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, it had concluded that “both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration” without however again describing IHL as the *lex specialis*.

⁶¹ For the reference to the ICRC *DPH Guidance*, see *supra*, note 3.

law enforcement paradigm being the most protective, it should prevail over the more permissive conduct of hostilities paradigm.

Some experts based their analysis on human rights case law⁶² dealing with similar situations. In their view, most human rights experts would come to the conclusion that the fighter in case study 1 should be arrested under a law enforcement paradigm. Targeting and killing such a fighter would be considered as an arbitrary deprivation of life of the fighter (and of the other potential collateral victims of the use of force) since an arrest would appear feasible given the control exercised by the Government over the territory and area. Conversely, other experts who favoured the conduct of hostilities paradigm mentioned that “judge made law” should not be taken into account. They criticized, in particular, the fact that some non-governmental organisations and legal scholars tend to extrapolate criteria from the case law of human rights bodies and in particular from the case law of the European Court of Human Rights dealing with situations of non-international armed conflicts. It was argued that this case law was not directly relevant since the European Court usually ignores the existence of a situation of non-international armed conflict (because, among other reasons, of the relevant States’ reluctance to admit the existence of an armed conflict on their territory). The European Court therefore refrains from referring to the applicable rules of IHL and thus gives no indication whatsoever regarding their interplay with human rights law.⁶³

Although there were different views as regards case study 1, for the vast majority of experts, whether favouring the conduct of hostilities paradigm or the law enforcement paradigm, the factor of the conflict zone should not be seen as a relevant additional criterion from a purely legal point of view. Introducing such an additional criterion for determining the applicable paradigm was regarded as dangerous and not workable. The conflict zone criterion was seen as being too subjective, too open to debate and misinterpretation or disagreement. It raised a number of issues such as: Who decides what is the immediate theatre of operations? Would that imply that an encampment of fighters outside the conflict zone could not be targeted? Would that not constitute an incitement for fighters to operate from outside the conflict zone? If a fighter is targeted in a zone where there are no hostilities, does that zone become a conflict zone? What if a civilian is directly participating in hostilities in an area where there are no confrontations at all? Would this area be considered as a conflict zone?

Experts made fewer comments on the control and intensity of violence factors. Overall, however, these factors were criticized as being too context-dependent. It was stressed in particular that the factor of control is often difficult to assess. For example, in case study 1, the State’s armed forces may have control over the house in which the fighter is sleeping, but this would not mean necessarily that the State’s armed forces exercise control over the village where the house is. A capture operation could then fail because of the intervention of other fighters located in the village.

⁶² For an overview of the case law of the European Court of Human Rights regarding the use of force, see: Appendix 3: Written statement by Françoise Hampson; Appendix 6: Summary of the presentation by Olga Chernishova.

⁶³ See also in this regard the written statement by Françoise Hampson in Appendix 3.

One expert argued that factors like conflict zone, control and intensity of violence add new complexity to the analysis. These factors were described as more suited for judicial discretion by human rights tribunals, applied after the fact, than to military decision-making in “real time.” It was stressed that targeting rules must be clear and simple in order to be realistic and fair for combatants who need to make split-second decisions.

Finally, although the legal analysis provided by experts varied widely, the difference in practical consequences appeared to be somewhat reduced when taking into account not only legal but also policy arguments. Most experts arguing for the application of the conduct of hostilities paradigm to case study 1 stressed that, in practice, in such a situation, a reasonable military commander would probably order a capture operation under IHL rather than the targeting of the fighter. This would be the result of policy considerations and not legal considerations.⁶⁴ Because of the potential intelligence value of capturing a fighter and because in many contemporary armed conflicts it becomes essential to “win hearts and minds,” States’ armed forces may prefer to conduct a capture operation under IHL if there is little or no risk to the mission or to the operating forces.

According to some experts, even if the conduct of hostilities paradigm were to prevail in a situation like case study 1, the underlying principles of military necessity and humanity would constitute legal constraints that must be taken into account. These principles would be equally applicable to regular combatants in international armed conflicts, to fighters in non-international armed conflicts and civilians directly participating in hostilities.⁶⁵ Other experts disagreed with this approach, considering that the principles of military necessity and humanity – although underlying principles of IHL – are not additional legal rules to be taken into account in the conduct of hostilities.⁶⁶

⁶⁴ The introductory presentation made by Richard Gross on the use of force in Afghanistan counterinsurgency exemplified well the fact that belligerent States may decide for policy reasons to restrict the use of force beyond international law requirements. See Appendix 5: Summary of the presentation by Richard Gross on the use of force in the different phases of the conflict in Afghanistan.

⁶⁵ See ICRC *DPH Guidance*, *supra*, note 3, p. 82. As emphasized in the ICRC Guidance on direct participation in hostilities under IHL, “[i]n situations of armed conflict, even the use of force against persons not entitled to protection against direct attack remains subject to legal constraints. In addition to the restraints imposed by IHL on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”

⁶⁶ In this regard, see the criticisms in respect of Chapter IX of the ICRC *DPH Guidance*. See, e.g. W. Hays Parks, “Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect,” *New York University Journal of International Law and Politics*, Vol. 42, No. 3, Spring 2010, pp. 769-830. For a response to these and other criticisms, see N. Melzer, “Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities,” *New York University Journal of International Law and Politics*, Vol. 42, No. 3, Spring 2010, pp. 831-916.

B. Riots in armed conflict situations

Case study 2: Riots in armed conflict situations

In the context of a non-international armed conflict, a demonstration to protest against the governments' repression of the insurgency takes place. More than a hundred people gather on the main street of the capital, where government troops are based. Initially, the protest is peaceful. After some attempts by the government army to disperse the crowd (e.g. with a loudspeaker), the crowd becomes more aggressive and starts to throw rocks at the soldiers. At the same time, fighters take advantage of the riot and attack the soldiers with rifles. Some contend that fighters instrumentalized the population and incited it to demonstrate in order to hide in the crowd and to conduct an attack.

- 1. Should the law enforcement paradigm govern the use of force against rioting civilians and the conduct of hostilities paradigm govern the use of force against fighters ("parallel approach")?*
- 2. Should the whole situation be considered as governed by the conduct of hostilities paradigm? What would this conclusion imply in practice?*
- 3. Does the determination of the paradigm to be applied depend on whether the riot is taking place inside or outside the conflict zone?*
- 4. Should the whole situation be considered as governed by the law enforcement paradigm, unless the government army loses control over the area and the violence reaches a high level and when would this level be reached? What would the conclusion that the law enforcement paradigm governs the whole situation imply in practice?*

1. Background information:

Riots are generally not considered as amounting to direct participation in hostilities, regardless of how violent they might be and of the reasons for which the civilian population reacts violently.⁶⁷ This conclusion remains the same even if civilian unrest may contribute to the general war effort of the adversary. As explained in the ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities* under IHL:

"During armed conflict, political demonstrations, riots, and other forms of civil unrest are often marked by high levels of violence and are sometimes responded to with military force. In fact, civil unrest may well result in death, injury and destruction and, ultimately, may even benefit the general war effort of a party to the conflict by undermining the territorial authority and control of another party through political pressure, economic insecurity, destruction and disorder. It is therefore important to distinguish direct participation in hostilities – which is specifically designed to support a party to an armed conflict against another – from violent forms of civil unrest, the primary purpose of which is to express dissatisfaction with the territorial or detaining

⁶⁷ There are, however, exceptions. Riots may also degenerate into real combat situations where rioting civilians decide to take up arms and to fight against the authorities.

authorities.”⁶⁸

In other words, riots which are not specifically designed to cause directly the required threshold of harm in support of a party to the conflict and to the detriment of another, fall outside the conduct of hostilities paradigm and are to be dealt with under the law enforcement paradigm.

Human rights case law is fully consistent with this conclusion. For instance, the European Court of Human Rights had to deal with riots in contexts it described as armed conflicts and it clearly applied the law enforcement paradigm.⁶⁹

However, fighters may take advantage of riots in order to hide in the crowd and attack the enemy. For the State authorities, it may then be difficult, or even impossible, to distinguish between fighters and rioters.

2. Experts’ comments and discussion:

The vast majority of experts agreed that in situations such as case study 2, the classical legal analysis is that the two paradigms of the conduct of hostilities and law enforcement apply in parallel. The conduct of hostilities paradigm is applicable to the use of force against fighters while the law enforcement paradigm remains applicable as regards the use of force against rioting civilians. For the purpose of this report, this option will be called the “parallel approach” (question 1 of case study 2).

While experts mostly concurred about the need to differentiate between the rules governing the use of force against fighters and civilians, the legal sources and arguments varied somewhat. One view was that the law enforcement paradigm constituted the *lex specialis* for regulating the use of force against violent civilians whose acts do not amount to direct participation in hostilities. Another view was that since such acts of violence had no *nexus* with the hostilities, they were not covered by IHL as a *lex specialis* and continued to be covered by the law enforcement paradigm.

The parallel approach implies that fighters who are in the crowd can be targeted on sight if the IHL prohibitions of indiscriminate attacks and of attacks in violation of the principles of proportionality and precaution are respected. Incidental damage among the civilians is thus not prohibited, provided it is not excessive in relation to the concrete and direct military advantage anticipated.

In contradistinction to fighters, rioting civilians cannot be considered as directly participating in hostilities and therefore must not be targeted by virtue of the conduct of

⁶⁸ ICRC DPH Guidance, *supra*, note 3, p. 63.

⁶⁹ See, e.g. ECtHR, *Güleç v. Turkey*, 27 July 1998 (referring to the armed conflict at the time in para. 81). See also ECtHR, *Simsek et al. v. Turkey*, 26 July 2005 (dealing with the same context). It should be noted however that – although in the first case the Court expressly referred to the existence of an armed conflict – it did not analyse the applicability of IHL in such a situation or discuss the interplay between IHL and human rights law. For a criticism of the relevance of the European Court of Human Rights’ case law on issues related to the interplay between IHL and human rights law, see: Appendix 3: Written statement of Françoise Hampson.

hostilities paradigm.⁷⁰ Under IHL, civilians who are not directly participating in hostilities must be “respected.” Moreover, IHL explicitly provides that “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”⁷¹ On the other hand, it is equally and explicitly provided that “[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations.”⁷² If rioting civilians commit acts of violence, force may be used under a law enforcement paradigm. In that case, an escalation of force procedure must be followed.

Applying only the conduct of hostilities paradigm to the situation (as suggested in question 2 of the case study) was an option which was selected by none of the attending experts. It was mentioned nevertheless that, in any case, even applying only the conduct of hostilities paradigm, one would reach a conclusion similar to the solution provided by the parallel approach, since only legitimate targets can be attacked under IHL. Rioters who are not directly participating in hostilities are protected against direct attack. If they commit acts of violence, an escalation of force procedure (i.e. warning, show force, less than lethal force, lethal force as a last resort) would have to be applied as part of the IHL principle of precaution.⁷³

Although the legal analysis provided by experts was pointing to the same direction (i.e. the “parallel approach”) regarding case study 2, the discussion revolved a lot around the practical challenges posed by this type of situation. Some experts noted that, while the parallel approach was legally attractive, its implementation in practice posed real obstacles. How could soldiers distinguish between fighters (who might not distinguish themselves), civilians directly participating in hostilities and rioters who are not directly participating in hostilities? How could soldiers be expected to apply two different paradigms at the same time and place? Moreover, in most situations of armed conflicts, belligerents may not have snipers able to target surgically fighters among the crowd and thus targeting them may cause excessive incidental civilian losses in violation of IHL.

Also, situations of civilian unrest in the context of an armed conflict can be highly volatile and can turn into actual armed clashes amounting to hostilities. Thus, a situation such as case study 2 could become mainly governed by the conduct of hostilities paradigm if fighters or civilians directly participating in hostilities actually outnumber peaceful and

⁷⁰ One expert expressed the view however that, in some wholly exceptional cases, rioting civilians can be considered as directly participating in hostilities if they are performing acts of violence which are specifically designed to harm directly the State having to face the riot in support of its enemy. This would be the case, for example, if a riot is led by the enemy in order to destroy the military equipment of the State’s armed forces or in order to divert attention of the armed forces and conduct a military operation in a nearby village. In this exceptional situation, the rioters are actually civilians directly participating in hostilities and become targetable under a conduct of hostilities paradigm.

⁷¹ API, article 50, para. 3. See also: ICTY, *Prosecutor v. D. Kordić and M. Čerkez*, Appeals Chamber, Judgement of 17 December 2004, case IT-95-14/2-A, para. 50; ICTY, *Prosecutor v. T. Blaskić*, Appeals Chamber, Judgment of 29 July 2004, case IT-95-14, para. 113.

⁷² API, article 51, para. 7.

⁷³ On the issue of whether the escalation of force procedure can be derived from IHL rules and principles, see the discussions below under case study 5.

rioting civilians (whose acts do not amount to direct participation in hostilities). In other words, a situation can change in nature and the predominant paradigm may not always be the same.

Some experts suggested, in this respect, that a single approach to the situation as a whole might be preferable – at least as a practical matter. For instance, it was suggested that the law enforcement paradigm apply to the whole situation as long as the State facing the riot continues to exercise sufficient control over the area and circumstances and the level of violence is low (as suggested in question 4 of the case study). However, for most experts, the factors of the degree of control and intensity of violence mentioned in question 4 of case study 2 were not seen as decisive. The conflict zone factor included in question 3 of case study 2 was suggested by no one.⁷⁴ Another proposed solution was to apply the law enforcement paradigm in situations where it is materially impossible to distinguish clearly between legitimate targets under IHL and violent civilians. Still another proposal was that - to the extent that a purely law enforcement approach may not easily be accepted by States' armed forces - further reflection should be undertaken in order to work out the appropriate procedures independently of the legal framework or paradigm. It was suggested that in such grey zones, the baseline should be in practice that an escalation of force procedure has to be applied to the situation as a whole.

The role of self-defence was discussed for these grey zone scenarios. Some experts highlighted that, in practice, national rules of engagement (RoE)⁷⁵ regarding riot situations are usually based on self-defence. Concretely, this means that the situation will be addressed as a whole with an escalation of force procedure. In other words, armed forces would be instructed to use law enforcement-like techniques but, as a matter of law, it was contended that these techniques are not based on the law enforcement paradigm but rather on the autonomous concept of self-defence. RoE would thus not give different instructions depending on the status/function of the persons in the crowd, but rather based on the level of threat in the concrete circumstances. Thus, even if a fighter not using lethal force could be identified and targeted, armed forces would be instructed not to do so because of the risk to cause excessive incidental civilian losses. Instead, if the fighter is using force, he might be targeted under self-defence rules, by a sniper for example. The concept of self-defence as embodied in RoE was not understood as domestic self-defence or human rights-based self-defence, but rather as an autonomous military concept, which is more permissive.⁷⁶ The extent of this notion of military self-defence varies however from one State to another (in the same way as the concept of domestic self-defence⁷⁷).

⁷⁴ For the rejection of these factors as legal criteria, see the developments above, under case study 1.

⁷⁵ It was noted that Rules of Engagement (RoE) integrate domestic and international law requirements but also operational/tactical and policy considerations. On the concept of self-defence in RoE, see for instance: International Institute of Humanitarian Law, *Rule of Engagement Handbook*, San Remo, November 2009, pp. 3-4. Available at: <http://www.iihl.org/Default.aspx?pageid=page12090> (Last accessed 30 September 2013); Chairman of the Joint Chiefs of Staff Instruction, *Standing Rules of Engagement for US Forces*, 15 January 2000, CJCSI 3121.01A, Enclosure A; *US Operational Law Handbook*, International and Operational Law Department, The Judge Advocate General's Legal Centre and School, U.S. Army, Charlottesville, Virginia, 2012, Appendix A, pp. 3-6, 76 *et seq.* and 84 *et seq.*

⁷⁶ On the different concepts of self-defence, one expert pointed to an article: H. F. R. Boddens-Hosang, "Force Protection, Unit Self-Defence, and Extended Self-Defence," in T. D. Gill and D. Fleck (eds), *supra*, note 41, p. 415.

⁷⁷ *Supra*, pp. 11-12.

This creates potential difficulties for multinational forces dealing with riots. Some experts stressed, moreover, that the self-defence rules embodied in the RoE used by their respective countries were applied as a matter of policy, although they were substantially similar to, or completely derived from, their domestic law.

Other experts did not support the application of self-defence rules in this context and noted that self-defence is a concept which should be understood as more restrictive than law enforcement. In their view, the police and armed forces can do more than use force in self-defence, they can also resort to force to effect a lawful arrest or to quell a riot, for example, as indicated in Article 2, paragraph 2, of the European Convention on Human Rights.

In practical terms – and while based on different legal arguments – the vast majority of experts agreed that situations in which fighters and civilians are closely intermingled would have to be addressed mainly through an escalation of force procedure. Moreover, fighters who are firing or civilians directly participating in hostilities could be targeted either under a conduct of hostilities or law enforcement paradigm. A number of experts highlighted that even applying a purely law enforcement paradigm, lethal force could be resorted to against fighters if they represent an imminent threat to life or limb and if all the precautions relevant under the law enforcement paradigm have been taken. These arguments tended to show that – in a particular situation like case study 2 – the difference in results when applying the conduct of hostilities or law enforcement paradigms were less important than expected.

However, some experts were of the view that it remains important to determine which paradigm applies. First, in theory, a fighter among the crowd who is not firing could be targeted under a parallel approach even if he or she did not pose an imminent threat (if the IHL principles of proportionality and precautions are fulfilled) while self-defence rules or a law enforcement paradigm would not allow such an attack. Second, the acceptance of incidental loss of civilian life might be reduced when applying a purely law enforcement paradigm as compared to the parallel approach—for example when legitimate targets under IHL are attacked under a conduct of hostilities paradigm. Third, under a law enforcement paradigm, there are additional obligations, such as the obligation to protect the population from life-threatening acts of violence. Under self-defence rules, there is no such an obligation.⁷⁸ Therefore, in a riot situation, following the logic of self-defence, armed forces could decide just to withdraw and leave the area even though rioters may pose a threat to life or limb of civilians.⁷⁹ Under a law enforcement paradigm, such an approach might be considered as not satisfying the obligation to protect the population. Finally, the determination of the applicable paradigm might also lead to further differences in terms of planning, arms availability and the obligation to investigate.⁸⁰ Regarding arms availability, for instance, it was pointed out by a number of experts that while riot control agents (such as teargas) or

⁷⁸ Rules of engagement might include, additionally, an “authority” to protect civilians but there is no obligation to do so.

⁷⁹ One expert noted that, this kind of strategy might, in fact, be very efficient and help de-escalate the situation when the riot is related to dissatisfaction with the military.

⁸⁰ On these issues, see below, part III.

expanding bullets can be used lawfully under a law enforcement paradigm, they are prohibited in the context of the conduct of hostilities.⁸¹

C. Fight against criminality

Case study 3: Fight against criminality

In the context of a non-international armed conflict, an organized non-State armed group entertains close links with a criminal group (not constituting a party to the armed conflict) whose activities consist of illicit trade (hereafter “the criminal group”). The criminal group finances the war effort of the organized armed group and/or facilitates its access to weapons. The organized non-State armed group provides, in turn, armed protection to the members of the criminal group as well as the possibility to operate more-or-less freely in those parts of the territory under its control. Sometimes, armed members of the criminal group operate in the area where armed clashes between the fighters and government armed forces take place. Sometimes armed forces have therefore to face simultaneously armed violence from the fighters belonging to the organized non-State armed group and from members of the criminal group.

1. Provided that the violent acts committed by the members of the criminal group do not amount to direct participation in hostilities, should the law enforcement paradigm govern the use of force against members of the criminal group while the conduct of hostilities paradigm governs the use of force against fighters? (“parallel approach”) Does the answer depend on the geographic proximity between fighters and members of the criminal group?

2. Should the whole situation be considered as governed by the conduct of hostilities paradigm? What would this conclusion imply in practice?

3. Does the determination of the paradigm to be applied depend on whether the situation is taking place inside or outside the conflict zone?

4. Should the whole situation be considered as governed by the law enforcement paradigm, unless the armed forces lose control over the area and the violence reaches a high level and when would this level be reached? What would the conclusion that the law enforcement paradigm governs the whole situation imply in practice?

1. Background information:

In a number of armed conflicts, parties to the conflict have close connections with organized crime and criminal groups. As exemplified in the case study above, criminal groups may finance the war effort through illicit trade or facilitate access to weapons, while armed groups may, in turn, provide armed protection to the members of the

⁸¹ On the prohibition to use riot control agents as a method of warfare, see *infra* note 118. On the prohibition of expanding bullets in armed conflict situations, see the 1899 Hague Declaration concerning Expanding Bullets. The use of expanding bullets is also a war crime in the Statute of the International Criminal Court (article 8 (2)(b)(ix)). See also ICRC *Study on Customary International Humanitarian Law*, *supra*, note 12, rule 77.

criminal groups as well as the possibility to operate more-or-less freely in those parts of the territory under their control.

If, by hypothesis, the criminal group is not a party to the armed conflict, because it is not sufficiently organized or because it does not engage in violence of a sufficient intensity,⁸² the law enforcement paradigm is particularly relevant. The situation might be different if the members of the criminal group directly participate in hostilities or if some members of the criminal group are at the same time members of the organized non-State armed group.

Difficult legal and practical questions may arise when Parties to an armed conflict fight each other while at the same time armed members of criminal groups operate in the same area as the fighters (as described in Case study 3). In such a situation, what should the legal analysis be and how should the State's armed forces react?

2. Experts' comments and discussion:

As in case study 2, it was broadly agreed that a parallel approach would be necessary. The conduct of hostilities paradigm would be applicable to the use of force against fighters while the law enforcement paradigm would apply to the use of force against violent members of the criminal group (whose acts do not amount to direct participation in hostilities under the circumstances).

The reasons that had led some experts to question the practicality of the parallel approach in case study 2 did not arise when discussing case study 3 because, even though violent members of the criminal group and fighters were described as operating in close proximity in the same geographical area, they were clearly separated, and not intermingled as in case study 2.⁸³ In that sense, case study 3 was considered as more straightforward than case study 2 and the parallel approach was not really contested in this context.

However, those who disagreed with the applicability of the law enforcement paradigm in armed conflicts by armed forces had difficulty with the parallel approach.⁸⁴ Some experts considered that violent members of the criminal group whose acts did not amount to direct participation in hostilities could be engaged under self-defence rules exclusively. Thus, fighters would be engaged under the conduct of hostilities paradigm while violent members of the criminal group could be killed only if absolutely necessary in self-defence.

As in case study 2, experts highlighted the practical difficulty in distinguishing between armed members of the criminal group and fighters, if the latter do not distinguish themselves. Fighters and members of the criminal group may perform activities that look similar. For example, extortion by criminal groups or collection of "taxes" by non-State armed groups may look the same to an external observer. Even the motives of members

⁸² On the ICRC classification of situations of violence resulting from organized crime, see ICRC Report on *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, *supra*, note 6, pp. 11-13.

⁸³ If fighters and criminals had been intermingled, the same issues as the one described in case study 2 would have arisen here as well.

⁸⁴ See *supra*, p. 10.

of the criminal group and fighters could be similar. Some fighters may be engaged in an armed conflict not only for ideological or political motives but also (or mainly) for personal profit. On the other hand, members of the criminal group may have certain sympathies with the cause of the armed group. Thus, it is not always easy to distinguish between fighters and members of the criminal group. In case of doubt IHL provides that a person shall be considered a civilian.⁸⁵

No experts considered that the situation described in case study 3 should be governed solely by the conduct of hostilities paradigm (as suggested in question 2 of case study 3).

The factors of conflict zone, control over the area or intensity of violence (suggested in questions 3 and 4) were not regarded as being influential in determining the applicable paradigm. Instead, the assessment of whether the persons were legitimate targets under IHL was considered as decisive in determining the applicable paradigm.

Although it was not central to the analysis of case study 3, some experts discussed the questions of 1) when criminal groups may become parties to an armed conflict and, 2) when members of the criminal group can be considered as directly participating in hostilities. It was highlighted that, if one accepts the hypothesis that the criminal group finances and provides weapons to the non-State armed group, it becomes questionable whether they are really a distinct organisation or a branch of the non-State armed group. Moreover, assuming that the criminal group is a distinct organisation, clearly separable from the organised armed group, and, assuming also that directly between the criminal group and the State's armed forces there are acts of violence of a sufficient intensity to be qualified as non-international armed conflict under IHL, then the criminal group should be regarded as a party to the armed conflict. If that were the case, the experts underlined that the question of whether the members of the criminal group in the area have a continuous combat function would come into play for the determination of the applicable paradigm.⁸⁶

Regarding the issue of direct participation in hostilities, most experts agreed that persons conducting criminal activities that might finance the war effort cannot be considered as directly participating in hostilities. Otherwise, this would constitute a very dangerous slippery slope because virtually everyone could be seen as supporting somehow the war effort by contributing to the economic wealth of the State or party engaged in an armed conflict. By way of example, a number of experts mentioned that initially in Afghanistan, some military commanders of NATO's International Security Assistance Force (ISAF) were in favour of considering drug-lords as civilians directly participating in hostilities, because they played a large role in financing the Taliban. Moreover, some ISAF military commanders considered drug labs as military objectives pursuant to the theory that they were part of the Taliban's "war-sustaining capability." However, many ISAF-contributing countries were against such an interpretation and counter-narcotics operations directed

⁸⁵ For further discussions on the issue of doubt, see the discussions in case study 5.

⁸⁶ For the ICRC definition of the notion of continuous combat function, see: ICRC *DPH Guidance*, *supra*, note 3, p. 33. Some experts do not accept the "continuous combat function" concept, as applied to membership in organized armed groups. See, e.g., K. Watkin, "Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance," *New York University Journal of International Law and Politics*, Vol. 42, No. 3, Spring 2010, pp. 655-657 and 683-686.

against drug lords and drug labs were reconceptualized as law enforcement operations.⁸⁷ Today, counter-narcotics operations are thus addressed in Afghanistan under a law enforcement paradigm, notably by the Afghan anti-drug police, and drug lords are not described as civilians directly participating in hostilities.⁸⁸

As regards case study 3, some experts expressed some unease however in saying that the members of the criminal group were not directly participating in hostilities. Case study 3 describes a situation where members of the criminal group are not only financing the organized non-State armed group and facilitating its access to weapons, but are also using armed violence alongside the fighters against the State's armed forces. Admittedly, depending on the circumstances, the use of force by members of a criminal group alongside fighters could be an indication of the existence of a belligerent nexus.⁸⁹ It was submitted that, in any case, if members of the criminal group were using force alongside fighters, lethal force could be resorted to against them, whether under the conduct of hostilities paradigm (if one considers that they are directly participating in hostilities) or under the law enforcement paradigm provided that it is absolutely necessary. The end-result, that is, resort to lethal force, would thus be the same.

Finally, the question arose regarding what should be the paradigm applicable to the use of force in a situation short of armed conflict where a Government faces powerful criminal groups, such as drug cartels, resorting to armed violence. If the situation does not reach the threshold of armed conflict, it is clear that the conduct of hostilities paradigm would not apply. Only the law enforcement paradigm would be applicable. However, one expert submitted that the law enforcement paradigm would not be adequate to address this situation because of its restrictive limitations on the use of force. It was argued that a "third way" should be explored where, *de lege ferenda*, the conduct of hostilities paradigm would be considered applicable even though the criminal group would not be characterised as a party to an armed conflict.

Many experts reacted to this argument and expressed their disagreement with the suggestion made, which they considered dangerous. These experts stressed that the existing law and the two paradigms are adequate to address a variety of situations of armed violence and that there is no need to develop different rules on the use of force or to think of mixing the two paradigms in any third way. It was also highlighted that, in reality, the law enforcement paradigm is flexible enough to be able to address any kind of situation of armed violence outside armed conflicts. In an armed conflict, alongside the

⁸⁷ One expert was of the view that, although civilians could not be considered as directly participating in hostilities just because they contributed to the war effort, objects which are "war-sustaining capabilities" may be considered as military objectives. Nevertheless, this expert suggested that it would be counterproductive to describe drug labs in Afghanistan as military objectives because of the death toll and other negative political repercussion this would entail. Along the same line, another expert highlighted that under IHL, there is a difference between the targeting of objects and the targeting of persons. For instance, a weapons' factory may be a military objective. However, civilians working in this weapons' factory are civilians and if they are killed while the weapons' factory is targeted, they are part of incidental civilian losses. Thus, the criteria used to determine whether an object is a military objective cannot be transposed to determine whether a civilian is directly participating in hostilities. For obvious reasons, the rules for the targeting of individuals are more restrictive than those pertaining to the targeting of objects.

⁸⁸ See, in that regard, Appendix 5: Summary of the presentation by Richard Gross on the use of force in the different phases of the conflict in Afghanistan.

⁸⁹ For the ICRC definition of belligerent nexus, see: ICRC *DPH Guidance*, *supra*, note 3, p. 58.

conduct of hostilities paradigm, the law enforcement paradigm – where applicable, such as in a situation of civilian unrest – can also take into account the situation of ongoing hostility in the assessment of the human rights proportionality principle, for example, or in the assessment of the precautions to be taken (for instance the warning requirement).

D. Escape attempt and riots in detention

Case study 4: Escape attempt and riots in detention

In the context of a non-international armed conflict, the governmental armed forces detain fighters. Some of the detainees, dissatisfied with the conditions of detention, start a riot and throw all kinds of objects against the guards. A small group of detainees takes advantage of the situation and tries to escape. Simultaneously armed fighters come from outside and start attacking the prison guards in order to release the detainees.

- 1. Should the law enforcement paradigm govern the use of force against rioting detainees or detainees trying to escape while the conduct of hostilities paradigm governs the use of force against fighters coming from outside (“parallel approach”)?*
- 2. Should the whole situation be considered as governed by the conduct of hostilities paradigm? What would this conclusion imply in practice?*
- 3. Does the determination of the paradigm to be applied depend on whether the situation is taking place inside or outside the conflict zone?*
- 4. Should the whole situation be considered as governed by the law enforcement paradigm unless the armed forces lose control over the detention centre and the violence reaches a high level and when would this level be reached? What would the conclusion that the law enforcement paradigm governs the whole situation imply in practice?*
- 5. Does the fact that a detention centre is, by definition, under a particularly high degree of control and scrutiny change the analysis (when compared with situations like those described in the previous case studies)?*

1. Background information:

Article 42 of the Third Geneva Convention specifically regulates the use of force against prisoners of war trying to escape. Under this provision:

“The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.”

Therefore, the use of weapons against prisoners of war trying to escape is considered as the last resort and warnings have to be made, just as required by the law enforcement paradigm. Although there is no similar provision concerning civilian internees or persons deprived of their liberty for reasons related to a non-international armed conflict, it can be deduced from this provision that the law enforcement paradigm applies to escape

attempts. This conclusion should logically also be valid for rioting detainees.⁹⁰ Persons deprived of liberty are *hors de combat* and under the direct control of the detaining authorities. The prevention of escape and quelling of riots is not part of hostilities.⁹¹

Human rights case law also supports this position. For example, in the case *Neira Alegria v. Peru*, the Inter-American Court of Human Rights had to deal with the deaths of many detainees after a riot in a prison. This case took place in the context of the non-international armed conflict between the Peruvian government and the non-State armed group Sendero Luminoso and most of the detainees were members of this group. The Court considered that the demolition of the prison by the forces of the Peruvian Navy was disproportionate. The Court applied human rights law (the American Convention on Human Rights) and did not refer to IHL, even though there was at the time a non-international armed conflict, and the prisoners were members of a non-State armed group.⁹² It is worth recalling that, although the Inter-American Court of Human Rights made clear in its case law that it is not competent to apply IHL, it nevertheless admitted that humanitarian law provisions can be used as an interpretative tool.⁹³

⁹⁰ See J. S. Pictet, *Commentary to the Third Geneva Convention*, ICRC, Geneva, 1960, p. 246: “Whether in the case of attempted escape or any other demonstration (e.g. mutiny or revolt), the use of weapons shall constitute an extreme measure, which shall always be preceded by warning appropriate to the circumstances.”

⁹¹ ICRC *DPH Guidance*, *supra*, note 3, p. 62: The *ICRC DPH Guidance* precisely recognized that “once military personnel have been captured (and, thus, are *hors de combat*), the suppression of riots and prevention of escapes or the lawful execution of death sentences is not designed to directly cause military harm to the opposing party to the conflict and, therefore, lacks belligerent nexus.” See also in the *ICRC DPH Guidance*, *supra*, note 3: “The prevailing view during the expert meetings was that guarding captured military personnel was a clear case of direct participation in hostilities. Nevertheless, to the extent practically possible, the guarding of captured military personnel as a means of preventing their liberation by the enemy should be distinguished from the exercise of administrative, judicial and disciplinary authority over them while in the power of a party to the conflict, including in case of riots or escapes, which are not part of a hostile military operation. This nuanced distinction was not discussed during the expert meetings.”

⁹² IACtHR, *Neira Alegria v. Peru*, 19 January 1995, para. 74: “Article 4(1) of the Convention states that ‘[n]o one shall be arbitrarily deprived of his life.’ [...] In the present case, the analysis that must be made has to do with the right of the State to use force, even if this implies depriving people of their lives to maintain law and order, an issue that currently is not under discussion. There is an abundance of reflections in philosophy and history as to how the death of individuals in these circumstances generates no responsibility whatsoever against the State or its officials. Although it appears from arguments previously expressed in this judgment that those detained in the Blue Pavilion of the San Juan Bautista Prison were highly dangerous and, in fact armed, it is the opinion of this Court, those do not constitute sufficient reasons to justify the amount of force used in this and other prisons where riots had occurred. The incident was understood as a political confrontation between the Government and the real or alleged terrorists of Sendero Luminoso [...], a confrontation which probably led to the demolition of the Pavilion and all of its consequences; among them the death of inmates who would have eventually surrendered, the clear negligence in the search for survivors and, later, in the recovery of the bodies.”

⁹³ See, e.g. IACtHR, *Bámaca-Velásquez v. Guatemala*, 25 November 2000, para. 208: “Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3.”

The situation is more complex, however, when escape attempts and/or riots in detention centres are accompanied by an enemy attack in order to liberate the detainees/internees (as illustrated in Case study 4). In such a situation, what should the legal analysis be and how should the prison guards react?

2. Experts' comments and discussion:

In the analysis of case study 4, there was a broad consensus among experts that an escalation of force procedure has to be used when dealing with rioting or escaping detainees, be they prisoners of war, fighters or other civilian internees. The practice of States was said to be very clear in this regard. However, the legal source of this escalation of force procedure in a situation of non-international armed conflict was controversial.

Some experts considered that the applicable paradigm for rioting or escaping detainees in the context of a non-international armed conflict was law enforcement as derived from human rights law. In IHL for non-international armed conflicts, there is no provision similar to Article 42 of the Third Geneva Convention. In any case, even Article 42 of the Third Geneva Convention was nothing more than an implicit reference (*renvoi*) to the law enforcement paradigm, which constitutes the *lex specialis* regarding the use of force against rioting or escaping detainees. According to this view, detained fighters no longer had a continuous combat function. Detention had to be considered as an interruption whereby fighters again became civilians, unless they made a successful escape, rejoined the organized armed group and became fighters again. Another view was that law enforcement was the relevant paradigm to deal with rioting or escaping fighters during a non-international armed conflict, but only until the fighter had made a successful escape. After that, he/she could be the object of attacks under the conduct of hostilities paradigm. There would be no need for the fighter actively to rejoin the organized armed group to be considered a fighter again after successful escape. The detention was not, as such, an interruption of the continuous combat function because the fighter did not voluntarily distance himself or herself from the organized non-State armed group.

A number of experts held a contrary view and considered instead that there was no need to refer to the human rights law enforcement paradigm because IHL already provided the answer. According to this view, the rule contained in Article 42 of the Third Geneva Convention for international armed conflicts could be expanded to apply by analogy to escaping or rioting detainees/internees in non-international armed conflicts as well. The source of the escalation of force procedure would thus be IHL and not the human rights law enforcement paradigm. One argument in support of this view was that an escaping fighter should still be considered a fighter and be treated differently to a civilian who is escaping and never participated in hostilities.

However, most experts who considered that IHL already provided the answer to a situation such as case study 4 admitted that, in certain circumstances, law enforcement rules derived from human rights law or domestic law might be applicable and become the inspiration or source of the escalation of force procedure. Various circumstances were pointed out by different experts.

1) A few experts considered that it depends on who is running the detention facility (military or law enforcement officials) and on the type of deprivation of liberty (internment under IHL or pending prosecution under domestic law). If the fighters were under the control of the military as IHL internees, the IHL specific rule analogous to Article 42 of the third Geneva Convention would apply. Instead, if the captured fighters were transferred to the police or other law enforcement officials and prosecuted under domestic law, then the law enforcement paradigm would apply.

2) Another argument was that – in the context of a non-international armed conflict taking place on the territory of the belligerent State for instance – there might be an obligation under domestic law for the armed forces to transfer them to law enforcement authorities. When these detainees are under the control of law enforcement authorities, again, the law enforcement paradigm would be applicable if they rioted or attempted to escape.

3) Another view was that, in a “classical” non-international armed conflict opposing a Government to an insurgent group operating on its soil, the law enforcement paradigm applies, while in a non-international armed conflict with an extraterritorial element, analogies should be drawn from Article 42 of the Third Geneva Convention.⁹⁴

4) A last argument was that IHL-specific rules drawn by analogy from Article 42 of the Third Geneva Convention would apply, unless captured fighters are detained in a mixed detention centre where common criminals are also detained.

A sub-issue discussed in the context of case study 4 was the question of when an escape is to be regarded as successful under IHL. According to one view an escape is successful when the detainee has joined again the armed group to which he/she belonged. Article 91 of the Third Geneva Convention on “successful escape” would provide some support for this view.⁹⁵ Thus, for instance, an escaping prisoner of war hiding in the woods may not be targeted under the conduct of hostilities paradigm. A slightly different view was that an attempt may be considered successful for the purpose of targeting when the prisoner of war or fighter is on the verge of rejoining the enemy’s armed forces. A number of experts held a contrary view. According to them, if an escaping prisoner of war or fighter has made his way outside the camp, his escape is already successful and he can be targeted under the conduct of hostilities paradigm. It was submitted that the Pictet Commentary on Article 42 of the Third Geneva Convention goes in this direction since it accepts the possibility of detaining authorities resorting to “death-lines” “which prisoners of war were absolutely forbidden to cross, under penalty of being fired on by guards and sentries.”⁹⁶

⁹⁴ A non-international armed conflict with an extraterritorial element is a conflict opposing a State to a non-State armed group operating outside that State’s territory. See: ICRC Report on *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, *supra*, note 6, pp. 9-10.

⁹⁵ Third Geneva Convention (GCIII), Article 91 reads as follows: “The escape of a prisoner of war shall be deemed to have succeeded when: (1) he has joined the armed forces of the Power on which he depends, or those of an allied Power; (2) he has left the territory under the control of the Detaining Power, or of an ally of the said Power; (3) he has joined a ship flying the flag of the Power on which he depends, or of an allied Power, in the territorial waters of the Detaining Power, the said ship not being under the control of the last named Power. Prisoners of war (hereafter: POW) who have made good their escape in the sense of this Article and who are recaptured, shall not be liable to any punishment in respect of their previous escape.”

⁹⁶ J. S. Pictet, *Commentary to the Third Geneva Convention*, *supra*, note 90, pp. 246-247.

This sentence could be interpreted as authorising the resort to the conduct of hostilities paradigm as soon as an escaping prisoner of war crosses the death-line.⁹⁷ It was also argued that Article 91 of the Third Geneva Convention was not relevant in this context since it does not deal with targeting issues but with the question of the punishment in respect of the previous escape of recaptured prisoners of war.

The additional question that arose was whether IHL and the law enforcement paradigm really provided different solutions in this particular context. In other words, the question was whether the result is the same in practice, independently of the legal analysis.

In that respect, experts generally agreed that, from a practical standpoint, the escalation of force procedure required by the law enforcement paradigm and the one required by IHL (notably under Article 42 of the Third Geneva Convention) is the same. It was mentioned moreover that, in some countries, soldiers who run detention facilities are trained on the same riot control escalation of force procedures as law enforcement officials. It was also highlighted that even under human rights law, lethal force can be used to prevent an escape as long as it is absolutely necessary in order to protect life. This legitimate aim is explicitly mentioned in Article 2, para. 2 b), of the European Convention on Human Rights.

A small number of experts disagreed with that conclusion, which they considered oversimplistic. In their view the law enforcement paradigm was in any case more restrictive. Under a law enforcement paradigm, an escalation of force procedure has to be used even when a detainee has succeeded in making his/her way out of the detention centre, while, under IHL, combatants and fighters could be targeted on sight in this same situation.⁹⁸ One view was that under a law enforcement paradigm, lethal force cannot be used against an escaping detainee unless he or she is posing an imminent threat to life or limb.

Finally, regarding the armed fighters coming simultaneously from the outside and starting attacking the prison guards in order to release the detainees, there was a consensus among experts that they were to be treated under a conduct of hostilities paradigm. This external attack did not seem to have a direct influence on the previous analysis regarding the use of force against escaping or rioting fighters. Experts considered that the only potential impact was that it may be easier for escaping fighters to succeed in their escape and rejoin the non-State armed group. As soon as they had rejoined the group, they would become targetable under a conduct of hostilities paradigm. The parallel approach (as

⁹⁷ Another interpretation of the ICRC Commentary is however possible. It could also be argued that the Commentary indicates that resort to lethal force is possible only after the detainee has crossed the death-line. This use of lethal force must be done through an escalation of force procedure as provided in the Third Geneva Convention, Article 42. As long as the detainee is in the camp, lethal force cannot be resorted to (except in self-defence). In fact, just after the sentence quoted in the text, the Commentary goes on to say: “[E]ven when there is justification for opening fire [i.e. when the POW has crossed the death-line], the Convention follows international custom and the national legislation of most countries and gives prisoners of war at least one last chance to abandon the attempt and escape the penalty. Fire may not be opened automatically, even when all the required material conditions have been met; the use of weapons must always be preceded by warnings “appropriate to the circumstances,” which may either be verbal, by means of an instrument (whistle, bell, etc.) or by a warning shot. The essential thing is that the warnings must be clearly perceived and understood by those to whom they are addressed”: J. S. Pictet, *Commentary to the Third Geneva Convention*, *supra*, note 90, p. 247.

⁹⁸ See *supra*, the discussion of what a “successful escape” means under IHL.

suggested in question 1 of the case study) would remain valid in that case as well. Even experts who disagreed with the applicability of the human rights law enforcement paradigm for rioting or escaping fighters accepted that a “parallel-like” approach should be adopted. In other words, an escalation of force procedure has to be used against rioting/escaping fighters, while the attacking fighters coming from outside can be targeted under a conduct of hostilities paradigm.

No expert contended that the situation described in case study 4 should be considered as governed by the conduct of hostilities paradigm exclusively (as suggested in question 2 of the case study). The questions of whether the situation was taking place inside or outside the conflict zone, or the degree of control and intensity of violence (as suggested in questions 3 and 4 of the case study) were not seen as decisive. A few experts referred, however, to the factors of control and intensity. Notably, it was highlighted that if the rioting detainees were not just expressing dissatisfaction with the conditions of detention, but were in fact aiming at taking control over the prison and the level of violence became high, then the analysis might change and the whole situation might switch into the conduct of hostilities paradigm. It was also noted by one expert that it was surprising that the majority view in case study 4 was that, in certain circumstances, the law enforcement paradigm would apply to the use of force against rioting or escaping fighters. In the analysis of the previous case studies, the majority of experts discarded the relevance of the law enforcement paradigm for the use of force against fighters. One could wonder whether the particularly high degree of control and scrutiny over a detention centre (as suggested by question 5 in the case study) might explain this change of approach. The fact that rioting or escaping detainees are by definition *hors de combat* by virtue of their continued detention may also explain this difference of approach.

E. Lack of respect for military orders: checkpoint – protection of an area – protection of military property

Case study 5: Lack of respect for military orders: the example of checkpoints

In the context of a non-international armed conflict, a suspicious car arrives at a checkpoint manned by the belligerent States' armed forces. Although the checkpoint is clearly indicated, the car arrives at high speed and does not stop when ordered to do so.

- 1. In this situation, would the use of force by the soldiers operating the checkpoint be governed by the conduct of hostilities or the law enforcement paradigms?*
- 2. Does the answer depend on the status, function or conduct of the person suspected to be a threat?*
- 3. How should the situation be addressed in case of doubt as to the status, function or conduct of the person suspected to be a threat?*
- 4. Does the determination of the paradigm to be applied depend on whether the situation is taking place inside or outside the conflict zone?*
- 5. Does the analysis depend on the degree of control exercised when operating a checkpoint and on the level of violence in the area?*
- 6. Does the applicable paradigm (conduct of hostilities or law enforcement) lead to different results with respect to the use of force?*

1. Background information:

In armed conflict situations, armed forces are not only called on to engage the enemy directly but may be expected to perform a range of other tasks, such as manning checkpoints, limiting access to prohibited areas or protecting military property. When performing these functions, armed forces may be faced with difficult situations such as, for example, when an unidentified person arriving at a checkpoint in a vehicle travelling at high speed refuses to stop (as illustrated in case study 5). As this person does not respond to military orders, the authorities may think that he or she is a fighter or a civilian taking part in hostilities. Similarly, difficult situations can arise if an unidentified individual tries to enter a prohibited military area. The main issue in these cases is that there will frequently be a factual doubt as to the status, functions or the conduct of the person concerned.

In such situations, State practice shows a tendency to apply procedures/rules of engagement, which are typical of the law enforcement paradigm (although they are not necessarily conceived by States as a *de jure* application of the law enforcement paradigm). Many countries, for example, provide for recourse to “escalation of force” techniques,

where the underlying idea is that the use of force should be the last resort and that other non-lethal means should be exhausted first, if possible.⁹⁹

Human rights case law is very scarce regarding use of force in these situations, but the rare cases that are directly relevant point to an application of the law enforcement paradigm.¹⁰⁰

Another approach could be to consider that the conduct of hostilities paradigm still applies, because if armed forces operating a checkpoint in a zone of military operations use force, it is ultimately because they believe that the individual is a legitimate target. In case of doubt, however, the person has to be considered a civilian¹⁰¹ and the obligation to take all feasible precautions to verify that the person attacked is not a civilian¹⁰² would prescribe an escalation of force procedure.¹⁰³

Regardless of which approach is taken, it is clear that, ultimately, if a member of the armed forces or a police officer reasonably believes that a person constitutes an imminent threat to life, he or she can use lethal force. The use of force could therefore be based on: 1) the conduct of hostilities paradigm (because the person posing a threat is believed to be a legitimate target); 2) the law enforcement paradigm or 3) the right to self-defence. Experts were invited to discuss whether the different paradigms would lead to different results in the way force is used.

2. Experts' comments and discussion:

In the context of case study 5, the answer to question 1 was seen as depending on the situation, and in particular on whether there would be knowledge or doubt as to the status, function or conduct of the person suspected to be a threat.

A number of experts mentioned that, if there was knowledge that the person arriving at high speed in the car is a legitimate target under IHL (i.e. a fighter or a civilian directly participating in hostilities), this person could be targeted under a conduct of hostilities paradigm. Conversely, if there was knowledge that the person arriving at high speed in the car is a civilian (not directly participating in hostilities), the law enforcement paradigm would apply. No one questioned this position. The determination of the applicable paradigm seemed therefore to depend mainly on the status, function or conduct of the person suspected to be a threat (as suggested in question 2 of case study 5).

⁹⁹ For many concrete examples of the “escalation of force” methodology, see: *Escalation of Force: Lessons, Observations and Training Scenarios from Operation Iraqi Freedom 05-07*, Marine Corps, 5 April 2007.

¹⁰⁰ See, e.g. ECtHR, *Kakoulli v. Turkey*, 22 November 2005 (shooting of a Greek Cypriot allegedly carrying a weapon by Turkish soldiers in the buffer zone inside the territory of northern Cyprus).

¹⁰¹ API, article 50, para. 1. Further, the ICRC *DPH Guidance* (ICRC *DPH Guidance*, *supra*, note 3, recommendation VIII, p.74), includes as a recommendation that “all feasible precautions must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities. In case of doubt, the person must be presumed to be protected against direct attack.”

¹⁰² API, article 57, para. 2 a) i). This rule is considered as customary for international armed conflicts as well as for non-international armed conflicts. See ICRC *Study on Customary International Humanitarian Law*, *supra*, note 12, rule 16.

¹⁰³ See, for example, *supra*, note 99.

Regarding the issue of doubt (question 3 of case study 5), there was a broad consensus among experts that an escalation of force procedure has to be used when dealing with the use of force against an unidentified person seemingly posing a threat at a checkpoint. The practice of States was said to be very clear in this regard.¹⁰⁴ However, as in the discussion of case study 4, the legal source of this escalation of force procedure was controversial.

Many experts were of the view that the escalation of force procedure derived from IHL rules on the conduct of hostilities. The IHL rules mainly invoked were, first, the rule that in case of doubt, a person is presumed to be civilian and, second, the principle of precautions in attack and in particular the rule according to which “everything feasible” should be done to verify that the objectives to be attacked are not civilians. In other words, the escalation of force was seen as a feasible way to determine whether or not the person is a legitimate target.

A few experts were of the view that the escalation of force procedure could also be derived from the principle of military necessity. It was argued that, in this situation, the principle of military necessity was not invoked as a way to restrain the use of force against legitimate targets but rather as a way to allow it in case of doubt as to the status, function or conduct of the person. Another view was that the principle of military necessity could not be read as demanding an escalation of force procedure. The IHL principle of proportionality was also invoked but without further exploring how the escalation of force procedure could be derived from it. It was also highlighted that an escalation of force procedure could perhaps be read into the obligation of minimising incidental civilian losses, as derived from the principle of precautions.

A number of experts held a contrary position and considered instead that the escalation of force procedure derives from the law enforcement paradigm. The IHL rule of doubt was also invoked by these experts but in a different way. In their view, as long as there is a doubt, the person has to be considered a civilian (not directly participating in hostilities) and therefore cannot be targeted under the conduct of hostilities paradigm. Thus, force could only be used under a law enforcement paradigm. The latter could be derived – depending on the situation – either from human rights law or from general principles of law. It was argued that, under IHL, there are simply no rules allowing the use of force against civilians (unless they directly participate in hostilities) and that no escalation of force procedure could be read into IHL rules and principles pertaining to the conduct of hostilities. In particular, the IHL principle of precautions in attack was not seen as relevant in case of doubt, since it intervenes only when preparing or directing an attack against the adversary. In a situation such as case study 5, the problem is precisely that there is no clarity as to whether the person arriving at high speed is an adversary or not.

Another view was that the escalation of force procedure pertains neither to the conduct of hostilities nor to the law enforcement paradigms, but rather to the notion of self-defence or force protection in self-defence (also called “unit self-defence”), as encompassed in many States’ rules of engagement.

¹⁰⁴ See also in this regard: Appendix 5: Summary of the presentation by Richard Gross on the use of force in the different phases of the conflict in Afghanistan.

A few experts raised the question of the function or purpose of the checkpoint. Certain experts were of the view that operating checkpoints is a typical law enforcement function implying inspection and control activities, which indicates that the law enforcement paradigm is the relevant paradigm to be applied. Others highlighted instead that a checkpoint can well be part of a military operation, for example to impede the passage of the adversary, and is therefore covered by IHL (unless the checkpoint is just there as a police operation not related to the armed conflict). Most experts, however, did not seem to attach a particular importance to the function or purpose of the checkpoint in order to determine the applicable paradigm.

Although the factors of conflict zone, control over the area and intensity of violence (as suggested in questions 4 and 5 of the case study) were not seen as decisive by most participants, some experts made reference to them in different ways. One expert felt that, in the particular context of case study 5, the question whether the situation was taking place inside or outside the conflict zone might be relevant in order to determine the applicable paradigm. A few experts mentioned as potentially relevant in the analysis of the threat – and therefore in the determination of the applicable paradigm – other factual elements that can be included into the “intensity of violence” factor, such as the number of incidents in the previous days or the frequency of suicide-attacks. On a similar note, it was highlighted that the manner in which the escalation of force procedure is applied in case of doubt may vary depending on the context. For instance, in a context where there are many incidents, the decision to resort to the use of lethal force may be reached more quickly because the likelihood of an attack is higher.

Finally, experts discussed whether the applicable paradigm (conduct of hostilities or law enforcement) leads to different results with respect to the use of force in case of doubt in the context of case study 5.¹⁰⁵ The experts reading an escalation of force procedure into IHL rules in case of doubt were of the view that the result in terms of the actual use of force would be the same as it would be if a law enforcement paradigm were to apply. In contrast, experts denying the possibility that an escalation of force procedure could be read into IHL rules pertaining to the conduct of hostilities, were of the view that the result would remain very different depending on the paradigm. In their view, under a conduct of hostilities paradigm, force could simply not be used in case of doubt. Instead, under the law enforcement paradigm, force could be used – depending on the circumstances – to enforce the checkpoint even if the person is a civilian not directly participating in hostilities.

¹⁰⁵ If there is knowledge that the person is a legitimate target under IHL, the result would clearly be different. See *mutatis mutandis* the discussion of case study 1.

III. ISSUES BEFORE AND AFTER THE USE OF FORCE

This third part of the report addresses issues that are relevant before and after the actual use of force, notably as regards preventive obligations and investigation. In each section, the background information and guiding questions given to experts are presented first, and then a summary of the experts' comments and discussion is provided.

A. Preventive obligations

1. Background information:

The interplay between the conduct of hostilities and law enforcement paradigms poses challenges not only at the moment of the execution of an operation when force is actually being used, but also before force is used. Many difficult practical issues arise when planning an operation, when elaborating a legal and administrative framework for the use of force in armed conflicts and when training and equipping armed forces.

The law enforcement paradigm imposes a number of obligations on States in order to prevent and minimize the use of force, including the following: 1) an obligation to provide an adequate legal and administrative framework limiting the use of force to the maximum extent possible;¹⁰⁶ 2) an obligation to train law enforcement officials in non-lethal methods of arrest and techniques;¹⁰⁷ and 3) an obligation to plan the operation so as to avoid recourse to lethal force as much as possible and, under certain circumstances, to provide self-defensive equipment and less-than-lethal weapons in order to allow a differentiated use of force.¹⁰⁸

Under IHL, there are also obligations to be taken before force is used but these are different. Among them, the following can be cited by way of example: 1) The principle of precautions in attack requires those who plan or decide upon an attack to verify that the targets are legitimate and to avoid, and in any event to minimize, incidental civilian casualties and damages;¹⁰⁹ 2) the prohibition of means and methods of warfare that are indiscriminate or that cause superfluous injury or suffering, as well as IHL treaty and customary rules prohibiting or restricting the use of certain specific weapons on the basis

¹⁰⁶ UN *Basic Principles*, *supra*, note 26, Principles 1 and 11. All articles guaranteeing the right to life provide that it must be protected by law. See ICCPR, article 6, para. 1; ECHR, article 2, para. 1; ACHR, article 4, para. 1; ACHPR, article 4 combined with article 1. See also: HRC, General Comment No. 6, *The Right to Life (article 6)*, 30 April 1982, UN Doc. HRI/GEN/1/Rev.1, para. 3; ECtHR, *Makaratzis v. Greece*, 20 December 2004, paras. 56-72; HRC, *Pedro Pablo Camargo v. Colombia ("Guerrero case")*, 31 March 1982, UN Doc. CCPR/C/15/D/45/1979, para. 13.3; ICAtHR, *Montero-Aranguren et al v. Venezuela*, 5 July 2006, para. 75; IACtHR, *Zambrano Vélez et al. v. Ecuador*, 4 July 2007, para. 86.

¹⁰⁷ UN *Basic Principles*, *supra*, note 26, Principles 18-21. For the case law, see, e.g. ECtHR, *Hamiyet Kaplan and others v. Turkey*, 13 September 2005; HRC, *Rickly Burrell v. Jamaica*, 18 July 1996, UN Doc. CCPR/C/53/D/546/1993, para. 9.5; IACtHR, *Montero-Aranguren et al v. Venezuela*, 5 July 2006, paras. 77-78; IACtHR, *Zambrano Vélez et al. c. Ecuador*, 4 July 2007, para. 87.

¹⁰⁸ UN *Basic Principles*, *supra*, note 26, Principles 2-3. For the case law, see for example: ECtHR, *Güleç v. Turkey*, 27 July 1998; ECtHR, *Hamiyet Kaplan and others v. Turkey*, 13 September 2005.

¹⁰⁹ See API, article 57, para. 2 a). See also ICRC *Study on Customary International Humanitarian Law*, *supra*, note 12, Rules 15-18.

of the above principles.¹¹⁰ There are also preventive obligations such as: 1) the duty of commanders to take measures to prevent breaches of IHL by members of the armed forces under their command,¹¹¹ and 2) the obligation to disseminate IHL, which implies an obligation to provide adequate training and rules of engagement to armed forces so that they respect IHL.¹¹²

Since both armed forces or police forces may be involved in conduct of hostilities and law enforcement operations in armed conflict situations, a range of issues arise.

i) Elaborating a legal and administrative framework

Considering the importance of the legal framework and the concrete RoE and military orders to ensure compliance with human rights law and IHL, the practical question arises of how the criteria to differentiate between law enforcement and conduct of hostilities paradigms should be translated into the domestic legal framework generally and for each operation specifically. Therefore, experts were invited to address the following question:

- How should the legal and administrative frameworks be elaborated to take into account the fact that both conduct of hostilities and law enforcement operations may be conducted in armed conflict situations?

ii) Training armed forces and the police

Traditionally, armed forces are trained according to IHL in order to conduct hostilities. Police and security forces, on the other hand, are trained in using force according to the law enforcement paradigm. Given the fact that, in contemporary armed conflicts, armed forces and the police may be required to conduct hostilities as well as law enforcement operations, the traditional training for armed forces and the police may no longer be sufficient and/or appropriate.

Therefore, experts were invited to address the following questions:

- How should armed forces and the police be trained to take into account the fact that both conduct of hostilities and law enforcement operations may be conducted in armed conflict situations?
- Should armed forces include special units for conducting law enforcement activities?

¹¹⁰ On the prohibition of indiscriminate means and methods of warfare: API, article 51, para. 4 b) and c); ICRC *Study on Customary International Humanitarian Law*, *supra*, note 12, rule 71. On the prohibition of superfluous injury: See The 1868 Declaration of St. Petersburg, para. 5 of the preamble; the Hague Regulation, article 23 e); API, article 35, para. 2; ICRC *Study on Customary International Humanitarian Law*, *supra*, note 12, rule 70. See also : ICJ, Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, *supra*, note 12, paras. 78-79; ICTY, *Prosecutor v. D. Tadić*, *supra*, note 12, para. 119.

¹¹¹ See API, article 87, para. 1. See also ICRC *Study on Customary International Humanitarian Law*, *supra*, note 12, rule 153.

¹¹² GCI, article 47; GCII, article 48; GCIII, article 127; Fourth Geneva Convention (GCIV), article 144; API, article 83; and APII, article 19. See also ICRC *Study on Customary International Humanitarian Law*, *supra*, note 12, rules 142 and 143.

- What other practical recommendations can be made to address the reality of conduct of hostilities and law enforcement coexisting in armed conflict situations?

iii) Equipping armed forces

Under human rights law, there is an obligation to provide self-defensive equipment as well as less-than-lethal weapons (such as rubber bullets, water-cannons, riot-control agents) in order to allow an escalation of force procedure when force is used under the law enforcement paradigm. Such an obligation does not exist under IHL. IHL only prohibits means and methods of warfare that are indiscriminate or that cause superfluous or unnecessary suffering, and specific weapons on the basis of these rules.

Thus, experts were invited to share their experience and considerations with respect to the following questions:

- How should armed forces be equipped to take into account the fact that they may conduct law enforcement operations in armed conflict situations?
- How should armed forces address situations in which violent civilians (whose acts do not amount to direct participation in hostilities) unexpectedly become intermingled with fighters but armed forces are only equipped with combat weapons? Is it enough to consider that armed forces have to apply, to the extent possible, an escalation of force procedure with the means available at the time?

2. Experts' comments and discussion:

In general, experts agreed that preventive steps are essential to ensure respect for the applicable legal frameworks pertaining to the use of force.

1) Regarding the *legal and administrative framework*, several experts mentioned the importance of RoE. The San Remo “Rules of Engagement Handbook” was mentioned as a useful tool for States in shaping appropriate RoE.¹¹³

It was argued that RoE can work as a useful “policy bridge.” Even where IHL is the *lex specialis*, RoE can take into account and introduce human rights law concepts, although these are not required as a matter of law.¹¹⁴ Another view was instead that RoE are more than just policy. RoE “interact” with domestic law in two directions. First, RoE amount to military orders. Thus, their violation may constitute a criminal offence under domestic law even if not amounting to an IHL violation. Second, under domestic law, an act committed in pursuance of RoE may not be considered as criminal. The fact that RoE required an action (or omission) could be indeed a justification or excuse.

¹¹³ *Rules of Engagement Handbook, San Remo, supra*, note 75.

¹¹⁴ During the two-day expert meeting, several experts highlighted the importance of policy considerations when drafting RoE. For instance, in the second introductory presentation on Afghanistan, the expert highlighted that RoE restrained the use of force beyond what international law would require, taking into account policy considerations in the context of a counterinsurgency where the aim is to win hearts and minds. See Appendix 5: Summary of the presentation by Richard Gross on the use of force in the different phases of the conflict in Afghanistan.

Although experts agreed that RoE constitute a useful and necessary tool for regulating the use of force in armed conflict situations, they did not argue in favour of one or another way of shaping RoE in order to take into account the fact that both conduct of hostilities and law enforcement paradigms may be relevant in armed conflict situations. One expert noted that as a bottom line, even though the question of the interplay between the conduct of hostilities and law enforcement paradigms is complex, the legal framework should remain simple and straightforward. The clearer and easier the legal framework is, the simpler is it to translate it into practice by the armed forces.

The introductory presentation by Colonel Juan Carlos Gómez Ramírez on the Colombian Operational Manual and the ensuing discussions gave useful further indications as to how the legal and administrative frameworks could be framed to manage the interplay between the conduct of hostilities and law enforcement paradigms.¹¹⁵ This expert explained that in Colombia, the Ministry of Defence had developed an operational manual which addresses the issue of the use of force integrating both IHL and human rights law. This operational manual includes two sets of RoE: the “blue card” and the “red card.” The blue card is meant to deal with law enforcement operations, while the red card addresses combat operations, i.e. when force is used against military objectives.¹¹⁶ This solution was seen as useful because it is clear and easy to understand and to implement by soldiers. It is nevertheless sometimes criticized at the tactical level because armed forces are increasingly asked to conduct operations under a blue card paradigm; a task which they consider as belonging to the police and as not giving them sufficient room to fight against the enemy. It was noted, however, that this negative reaction may be explained by the fact that armed forces were traditionally trained in combat operations only and not in using force in a law enforcement mode. It was also noted that armed forces usually have no law enforcement equipment. One limitation of the “blue card”-“red card” system may also stem from its assumption that the paradigms would not apply in parallel. Therefore, it might not provide a suitable tool for dealing with situations that involve both paradigms, such as a riot which involves both civilians and legitimate targets, as discussed earlier in case study 2.

2) Regarding the *training* of armed forces, a number of experts highlighted the necessity, in today’s armed conflicts, to train armed forces – including peacekeeping personnel – not only in the conduct of hostilities but also in law enforcement techniques. It was mentioned that, in some countries, it is part of good practices to have trainers for armed forces that are in some cases police officers or members of the military police, who are very familiar with law enforcement techniques. It is thus advisable to have training which is not exclusively traditional military training. In order to be efficient, it was highlighted that training must be scenario-driven. Several experts mentioned that, even if armed forces

¹¹⁵ See Appendix 4: Summary of the presentation by Juan Carlos Gómez Ramírez on the Colombian Operational Manual.

¹¹⁶ Juan Carlos Gómez Ramírez explained that the decision to use the red card or the blue card belongs to the battalion commander. In some situations, the battalion commander can decide also to use the blue card in order to deal with the enemy if the latter is very much weakened. On the other hand, there are some places (in the middle of the jungle) where it is clear that the card to be used is the red card because there are exclusively fighters there and no civilians.

were not to be equipped with law enforcement apparatus, good training in escalation of force procedures and other law enforcement techniques would still be valuable.

It was also highlighted however that providing efficient training in law enforcement techniques is not so easy and not always possible to implement. If that option seems feasible for career soldiers, it is much less realistic for conscripts who already struggle to learn how to conduct traditional combat operations. In the same vein, the argument was made that soldiers cannot become policemen. According to this view, it is more advisable to conduct, when feasible, joint operations where military forces are there in support of the police.

A number of experts mentioned also the possibility of having special units, such as the *gendarmerie*, *carabinieri* or military law enforcement forces that are qualified and trained to do law-enforcement-like missions. This was considered to be a good practice, which had already proved its efficiency and usefulness in past conflicts.

It was also submitted that having specialised unit or riot control teams is not always sufficient. Indeed, there is a risk that the specialized team may not always be in the right place at the right time. The unit may be in one corner of the country where civilian unrest is expected and a violent unexpected demonstration may be taking place in the other side of the country, that the specialized unit could not possibly reach on time. It is therefore advisable to provide all soldiers with at least up to a very basic level of training in law enforcement techniques and with adequate equipment in order for them to be able to address unexpected situations of civilian unrest. Additionally, in contexts where civilian unrest is expected, the armed forces may want to have resort to specialised units, such as *carabinieri* or *gendarmerie*, which are highly trained in crowd-control and in de-escalation techniques.

3) As regards the *equipment* of armed forces, the majority of experts agreed that, to the extent that armed forces conduct law enforcement operations, they should be provided with law enforcement equipment, including so-called “non-lethal” or less-than-lethal weapons where appropriate. However, there was disagreement among experts as to whether there was a legal obligation in this regard.

For some experts, providing law enforcement equipment to armed forces was not compulsory and was just to be considered as part of good practices.

Most experts considered instead that it was part of belligerent States’ obligations. This obligation could, in some instances, be derived from IHL. For example, the duty to ensure law and order in the law of occupation would necessarily imply a duty to have appropriate means to do so. The obligation could also be derived from human rights law, where applicable. Indeed, under human rights law, there is an obligation to provide law enforcement equipment, including less-than-lethal weapons where appropriate, to State agents – be they policemen or armed forces – conducting law enforcement activities.

It was emphasized that this would not mean that armed forces must conduct law enforcement operations but rather that, if it is expected that they conduct these kinds of operations, they must be provided with adequate equipment to do so. According to

another view, the human rights obligation to provide armed forces with law enforcement equipment would be more far-reaching. It would not only apply when armed forces are actively planning a law enforcement operation, but also when they can foresee that they will have to cope with civilian unrest – irrespective of their willingness to do so. Thus, regarding the last question in the above background information section,¹¹⁷ it was submitted that, from a human rights point of view, the key question would not be whether the use of force in law enforcement was planned, but rather whether civilian unrest could have reasonably been expected—and expected not at the level of the soldiers facing civilian unrest but at the level of those planning the mission. If the answer was affirmative, then, under human rights law, a requirement existed to provide, first, appropriate training in escalation of force procedures and other law enforcement techniques and, second, to provide law enforcement equipment where appropriate.

Although providing law enforcement equipment to armed forces was generally seen as positive, several experts mentioned, however, that there are some issues to take into account. First, law enforcement equipment is expensive and may not be affordable for belligerent States. Second, law enforcement equipment is often heavy and cumbersome and cannot possibly be carried by foot patrols for example. Third, providing law enforcement equipment is useless if not accompanied by appropriate training. Fourth, regarding specifically so-called “non-lethal” or less-than-lethal weapons, the risks pertaining to these kinds of weapons should not be underestimated. So-called “non-lethal weapons” can indeed be lethal. Appropriate legal and administrative frameworks as well as training are thus essential for the effective and safe use of less-than-lethal weapons. The use of riot control agents in armed conflict situations should also be carefully assessed, bearing in mind the IHL prohibition on using them as a method of warfare.¹¹⁸

It was also mentioned that what is important when talking about law enforcement activities is not only the equipment of armed forces but also the general infrastructure. For example, the way in which a checkpoint is set up is crucial in order to minimize the potential use of lethal force.

4) Finally – and more generally – it was highlighted that, in order to improve military practice continuously, it is recommended to:

a) Seek good practices, in particular when drafting legal, policy and administrative frameworks and implement them. In seeking to apply good practices, one should not be excessively constrained by the categorizations of conduct of hostilities *versus* law

¹¹⁷ The question referred to is the following: “How should armed forces address situations in which violent civilians (whose acts do not amount to direct participation in hostilities) unexpectedly become intermingled with fighters but armed forces are only equipped with combat weapons? Is it enough to consider that armed forces have to apply, to the extent possible, an escalation of force procedure with the means available at the time?”

¹¹⁸ See the 1993 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, article I (5): “Each State Party undertakes not to use riot control agents as a method of warfare.” See also article II (9)(d). The majority view among States is that this rule is part of customary international humanitarian law. However, a consistent exception to the majority view is that of the United States of America, which maintains that the customary prohibition of chemical weapons does not apply to agents with temporary effects. See: ICRC *Study on Customary International Humanitarian Law*, *supra*, note 12, rule 75.

enforcement. For example, in order to know how to operate a checkpoint, advice should be sought from law enforcement officials who are very much used to this kind of activity. In another example, to know how to deal with riots in prison, whether it is a military detention facility or a civilian-run detention facility, advice should be sought from the Bureau of Prisons or the Department of Justice.

b) Take into account cultural considerations. For example, in designing a checkpoint, advice should be sought from the local population in order to understand local habits and what kind of signs/indications would induce the population to stop at a checkpoint.¹¹⁹

c) Put in place lessons learned processes. The legal and administrative framework as well as training should be continuously adapted on the basis of lessons learned in the field. A number of experts agreed that lessons learned processes should also inform the way in which future armed conflicts will be conducted to improve military practice and not to reproduce mistakes of the past.

B. The obligation to investigate

1. Background information:

IHL implicitly provides for an obligation to investigate war crimes.¹²⁰ This means that IHL requires an investigation in cases of certain allegations where force is used, for example, if it is claimed that: the civilian population or individual civilians have been wilfully made the object of attack; an indiscriminate attack has been wilfully launched affecting the civilian population or civilian objects, with the knowledge that such attack would cause excessive incidental loss of life, injury to civilians or damage to civilian objects; or a person has been wilfully made the object of attack with the knowledge that he/she is *hors de combat* or a protected person has been wilfully killed.¹²¹ The duty to suppress IHL violations also sometimes entails obligations of investigation.¹²² In addition to that, there are specific provisions regarding the obligation to investigate when prisoners of war and civilian internees are killed or injured in special circumstances.¹²³

In any case, it is clear that, under IHL, not every death triggers the obligation to investigate. This is so because, under IHL, legitimate targets – i.e. combatants, fighters and civilians directly participating in hostilities – can be killed lawfully and incidental loss of civilian life is not contrary to IHL as long as the principles of proportionality and precautions have been respected. Thus, IHL takes into account the fact that some deaths are inherent to the conduct of hostilities in armed conflicts. In addition, the instability and insecurity in armed conflict situations can pose serious obstacles to investigations into each death, such as difficulties in gathering evidence on site or hearing witnesses.

¹¹⁹ See, in that regard: Appendix 5: Summary of the presentation by Richard Gross on the use of force in the different phases of the conflict in Afghanistan.

¹²⁰ GCI, articles 49-50; GCII, articles 50-51 ; GCIII, articles 129-130 ; and GCIV, articles 146-147. See also API, articles 11 and 85-86.

¹²¹ See API, article 85, paras. 3-4. See also GCI, article 50; GCII, article 51; GCIII, article 130; GCIV, article 147. See also the 1998 Statute of the International Criminal Court, article 8, para. 2 b) and e).

¹²² GCI, article 49, para. 3 ; GCII, article 50, para. 3 ; GCIII, article 129, para. 3 ; and GCIV, article 146, para. 3.

¹²³ See GCIII, article 121, and GCIV, article 131.

Human rights law, which was initially conceived to govern peacetime situations where any use of force is exceptional, provides for a much more stringent obligation to investigate following the use of force that results in death or serious injury.¹²⁴ Human rights bodies usually consider that an effective investigation should be conducted each time a person has been killed and at least each time there is an allegation of a violation of the right to life.¹²⁵

In addition, human rights bodies, through their very rich practice in this area, have developed criteria for evaluating whether an investigation is effective. In particular, they have stressed that the body conducting the investigation should be independent and impartial; that the investigation should be conducted expeditiously and with due diligence; that the next-of-kin should be given an opportunity to participate in the investigation process; and that all possible steps should be taken in order to gather evidence, including hearing witness testimony, conducting ballistic examinations, medico-legal examinations etc.¹²⁶ While these criteria seem to be very demanding, it should be noted that human rights bodies tend to recognize that the nature and degree of the investigation may vary in different circumstances.¹²⁷

This obligation to conduct effective investigations into killings has not only been applied by human rights bodies in peacetime, but also in armed conflict situations when civilians have been killed (even incidentally)¹²⁸ and also when alleged members of organized armed groups have been killed.¹²⁹ Most of these cases dealt with non-international armed

¹²⁴ See UN *Basic Principles*, *supra*, note 26, Principle 22: “In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.” See also UN *Code of Conduct*, *supra*, note 26, commentary (c) to article 3. For the case law related to the obligation to investigate, see the following footnote.

¹²⁵ See, e.g. among many others: *Report of the Special Rapporteur on the Extrajudicial, Summary and Arbitrary Executions*, Philip Alston, 2006, UN Doc. E/CN.4/2006/53, paras. 35-36; ECtHR, *McCann and Others v. United Kingdom*, 27 September 1995, para.161; IACtHR, *Mapiripán Massacre v. Colombia*, 15 September 2005, paras. 216-241; ACommHPR, *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, *supra*, note 17, para.22.

¹²⁶ For steps to be taken in order to gather evidence, see: UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ST/CSDHA/12,1991, III. Model Protocol for a Legal Investigation of Extra-Legal Arbitrary and Summary Executions (*Minnesota Protocol*). This document has been drafted by a group of experts within the framework of the United Nations in order to complement the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65, 24 May 1989.

¹²⁷ *Report on the Extrajudicial, Summary and Arbitrary Executions*, *supra*, note 47, para. 36; ECtHR, *Isayeva v. Russia*, 24 February 2005, para. 210; ECtHR, *Yasa v. Turkey*, 2 September 1998, para. 104; IACtHR, *Mapiripán Massacre v. Colombia*, 15 September 2005, para. 238.

¹²⁸ Cases where civilians were intentionally killed and where a human rights violation existed because of lack of investigation are numerous. It will not be necessary to cite them since, in this respect, there is a convergence between human rights law and IHL. There is indeed an obligation to investigate war crimes in IHL also. For cases dealing with the obligation to investigate incidental loss of civilian life, see among many others: ECtHR, *Ergi v. Turkey*, 28 July 1998; ECtHR, *Isayeva v. Russia*, 24 February 2005; ECtHR, *Kerimova and Others v. Russia*, 3 May 2011, paras. 263-285.

¹²⁹ For cases where there was a doubt as to whether the victim was killed in a combat situation, see, among many others: ECtHR, *Kaya v. Turkey*, 19 February 1998; IACommHR, *Abella v. Argentina* (“la Tablada”), 18 November 1997. Cases where alleged insurgents/terrorists were killed while not using force, see, among many others, HRC, *Pedro Pablo Camargo v. Colombia* (“Guerrero”), 31 March 1982, UN Doc. CCPR/C/15/D/45/1979; ECtHR, *Gül v. Turkey*, 14 December 2000; IACommHR, *Artemio Camargo et al. v.*

conflict situations. However, the recent *Al-Skeini* case revolved around events in the context of an international armed conflict, and more precisely in the context of the occupation of Iraq by the United Kingdom. In this context, the European Court of Human Rights held that Article 2 of the European Convention on Human Rights, which guarantees the right to life, had been violated under its procedural limb because of the ineffectiveness of investigations into five killings (including the shooting of four persons who were mistakenly believed to be about to attack UK soldiers).¹³⁰

Other bodies have followed a similar approach. The Israeli Supreme Court also considered that an investigation should be conducted when civilians directly participating in hostilities are killed, but only when there is also incidental damage to civilians not directly participating in hostilities.¹³¹ The *UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions* also stressed that each allegation of a violation of the right to life should be investigated, even in international armed conflicts.¹³²

The questions which were therefore raised are the following:

- What is the scope of the obligation to investigate in armed conflict situations? In particular: is IHL the *lex specialis* regarding the obligation to investigate? Is IHL complemented by human rights law regarding the obligation to investigate? For example, must/should belligerent States conduct an investigation each time civilians are killed incidental to an attack?
- If an investigation has to be conducted in armed conflict situations, how is it to be operationalised in armed conflicts? Are the criteria developed by human rights bodies for an effective investigation (i.e. independence, impartiality, celerity, etc.) relevant in armed conflict situations? What can realistically be expected from belligerent States in terms of investigations in armed conflict situations?

2. Experts' comments and discussion:

Regarding the obligation to investigate in armed conflict situations, experts agreed that such an obligation exists both under human rights law and IHL, although the purpose and scope of (or trigger for) this obligation remains different under these two bodies of law.

One view was that the IHL obligation to investigate does not fulfil the same purpose as its human rights law counterpart. The latter was described as aiming at establishing State

Bolivia, 25 June 1981; IACtHR, *Arturo Ribon Avila v. Colombia*, 30 September 1997. For a criticism of the relevance of the European Court of Human Rights' case law on issues related to the interplay between IHL and human rights law, see: Appendix 3: Written statement of Françoise Hampson.

¹³⁰ ECtHR, *Al-Skeini and others v. United Kingdom*, 7 July 2011, paras. 161-177.

¹³¹ High Court of Justice of Israel, *The Public Committee against Torture in Israel v. The Government of Israel*, 11 December 2005, HCJ 769/02, para. 40. In a later case, the Court clarified that the obligation to investigate only applies in cases where there is also incidental damage to civilians not taking a direct part in hostilities. See High Court of Justice of Israel, *Yoav Hass v. The Military Advocate General*, 23 December 2008, para. 7.

¹³² *Report on the Extrajudicial, Summary and Arbitrary Executions*, *supra*, note 47, para. 36: "Armed conflict and occupation do not discharge the State's duty to investigate and prosecute human rights abuses." See also: *Report on the Extrajudicial, Summary and Arbitrary Executions*, *supra*, note 47.

responsibility while the former was seen as associated with war crimes and thus focusing on individual criminal responsibility. According to this view, this difference implied also a different standard of proof. Individual criminal responsibility needs to be proved beyond reasonable doubt, while the standard of proof used by human rights bodies to establish State responsibility is less stringent.

Experts discussed extensively the difference between human rights law and IHL as regards the triggering of the obligation to investigate. Indeed, as mentioned in the above background information section,¹³³ under IHL, the obligation to investigate is limited essentially to contexts of deaths of prisoners of war and civilian internees¹³⁴ and war crimes. Some experts highlighted that the obligation to suppress IHL violations was also relevant. It was argued that this requirement gives rise to an obligation to investigate, although this investigation may be administrative rather than criminal. It was moreover highlighted that the IHL obligation to investigate is also derived from the duty of commanders to prevent and, where necessary, to suppress and to report to competent authorities breaches of IHL, with a view to initiate disciplinary or penal action against violators.¹³⁵

Instead, as confirmed by a number of experts, human rights law requires States to investigate every potential human rights violation. The European Court of Human Rights goes as far as requiring from States an investigation for every violent death, provided that jurisdiction under Article 1 of the European Convention on Human Rights is established.¹³⁶ It was highlighted, however, that this is true unless a State derogates from the right to life under Article 15 of the European Convention for “deaths resulting from lawful acts of war.” Thus, under the European Convention, the killing of fighters and civilians alike has to be investigated in the context of armed conflicts (provided that jurisdiction is established and that no derogation to the right to life has been made).

This would clearly go far beyond IHL requirements under which killings of legitimate targets as well as incidental killings of civilians – provided they do not appear to violate the principle of proportionality – need not be investigated. Many experts thus concluded that

¹³³ *Supra*, pp. 49-51.

¹³⁴ One expert was of the view that the IHL obligation to investigate deaths of prisoners of war and civilian internees should be extended to every person deprived of liberty in an armed conflict. It should also be extended to persons killed in the power of the enemy even if not detained *stricto sensu*. Insofar as human rights law requires the investigation of all persons deprived of their liberty, it should be considered as *lex specialis*.

¹³⁵ See API, article 87: “1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol. 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol. 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.”

¹³⁶ On the obligation to investigate killings, see also: Appendix 6: Summary of the presentation by Olga Chernishova.

there is a real disparity or contradiction between IHL obligations and what is required by most human rights bodies, and in particular by the Inter-American and European Court of Human Rights. The abovementioned *Al-Skeini* case¹³⁷ was cited as being a case in point.

Experts then addressed the question of the interplay between IHL and human rights law regarding the obligation to investigate in armed conflict situations. The majority of experts were of the view that IHL has to prevail regarding the obligation to investigate in armed conflicts. The human rights obligation to investigate every killing was seen as unrealistic and not practicable in armed conflict situations. It was also argued that it would not make sense to oblige belligerents to investigate deaths that are perfectly lawful under IHL. Thus, when it comes to investigations in armed conflict situations (at least in the context of the use of lethal force), IHL is the *lex specialis* and the human rights obligation to investigate has to be read in light of IHL; otherwise one might come to the conclusion that what is lawful under IHL is a violation of human rights law.

In this context, one expert asked the group whether there was any objection to the following proposition: “Legally speaking a State does not breach a human rights law obligation to investigate if legitimate targets are killed in accordance with IHL or when there is incidental loss of civilian life which is not contrary to IHL as long as the principle of proportionality has been respected.” Some experts responded that, although in principle the statement seemed reasonable, in practice, the key issue is that it is difficult to know whether IHL has been violated, for instance whether the principle of proportionality was respected before conducting an investigation. As a consequence, the issue would again go back to what is the trigger for the obligation to investigate killings committed in the context of armed conflict situations. Apart from that practical issue, there was in general no formal rejection of the statement proposed, except for one expert who clearly disagreed, recalling that in the context of the European Convention on Human Rights, a State would have to investigate any violent loss of life – including in cases of killing of enemy combatants or of apparently lawful incidental civilian casualties under IHL – unless the State derogated to the right to life in accordance with Article 15 of the European Convention on Human Rights.

In the same vein, some experts considered that – at least in non-international armed conflicts – IHL is complemented or has to be read in light of subsequent human rights developments. These experts did not consider the case law of human rights bodies regarding the obligation to investigate in armed conflict situations as unrealistic. They highlighted that human rights bodies do take into account the context in order to assess the effectiveness of the investigation and so far have not reached conclusions that would directly contradict IHL. One expert pointed out that, for instance, in the *Al-Skeini* case, the European Court acknowledged the practical difficulties of conducting investigations in a context of military occupation;¹³⁸ it nevertheless held that the killing of civilians in such a

¹³⁷ *Supra*, p. 51.

¹³⁸ See ECtHR, *Al-Skeini and others v. United Kingdom*, 7 July 2011, para. 168: “The Court takes as its starting point the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading *inter alia* to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. As stated

context must be effectively investigated. This conclusion is not at odds with what is required by IHL.

It was also stressed that the human rights obligation to investigate is an obligation of means and not of results. An investigation may be considered as effective even if there was a human rights violation and it was impossible to identify and punish those responsible. Some experts warned that the human rights rationale of investigating violent deaths is understandable because it might not be possible to know if the person killed was a legitimate target before having investigated the death. Finally, it was pointed out that the obligation to investigate fulfils an important preventive function and that is why it should be understood as going beyond alleged war crime contexts. Investigations of some sort were seen as an essential prerequisite in order to conduct lessons learned to improve military practice and to help minimize, for instance, incidental loss of civilian lives. The prohibition of arbitrary deprivation of life – which is protected both by human rights law and IHL – would thus have to be read as having a procedural component and as demanding some form of investigation regarding deaths which give rise to a reasonable allegation of violation.

In light of these various arguments, a few experts highlighted that the answer to the question of which legal framework, human rights law or IHL, should prevail might depend on the context. For instance, one could consider that, in international armed conflicts, IHL would clearly be the *lex specialis*. Instead, in non-international armed conflicts, the answer might be more complex. It was also suggested that a possible thesis could be that there is a presumption of violation when civilians have been killed in non-international armed conflicts, and there should therefore be an investigation. Instead, if the person killed were a fighter, the presumption would be that there was no violation and therefore no need to investigate, unless some special circumstances raise doubts.

It was also highlighted that in non-international armed conflicts, it is more difficult to know who is a fighter and who is not because fighters may not wear distinctive signs. The rationale that applies in international armed conflicts, where deaths of uniformed soldiers in the context of the conduct of hostilities do not need to be investigated because these are clearly lawful (except if caused by unlawful weapons or if the combatants were *hors de combat*), could therefore not apply in the same way in non-international armed conflicts. As a result, an investigation would have to be conducted in order to find out whether the person was lawfully killed or not. However, this would also be true when the person killed was a civilian who was allegedly directly participating in hostilities in the context of an armed conflict, whether international or not. According to this view, this was the reason why the Israeli Supreme Court admitted, in the targeted killing case,¹³⁹ that there should be an investigation to make sure that the use of lethal force was lawful.

The idea that the prevailing legal framework regarding the obligation to investigate might also depend on whether lethal force was used in the context of the conduct of hostilities

above, the Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators.”

¹³⁹ For the reference of this case, see *supra*, note 49.

or, rather, in the context of a law enforcement operation was only hinted at and not further elaborated.¹⁴⁰

Lastly, experts discussed how the obligation to investigate should be operationalised in armed conflicts. In that context, many experts were of the view that the exact threshold to initiate a criminal investigation when lethal force was used is unclear under IHL, as well as under human rights law. There is no doubt, under both IHL and human rights law, that if there is a suspicion of a war crime, a criminal investigation must be conducted. However, not every civilian killed in an armed conflict raises *prima facie* a suspicion of criminal behaviour. On the other hand, even the killing of enemy fighters or combatants can be a war crime if they were *hors de combat* when killed. The key questions are then the following: when are there sufficient elements to believe that the use of force raises issues under criminal law? Does a credible allegation of war crime suffice? How many facts does the allegation have to put forth in order to be credible?

In terms of procedure, several experts explained how the legal system functions in their respective countries. One expert explained that, in his country, there is first an operational investigation, which is not meant to be a criminal investigation. This first investigation is a fact-finding process that allows collection of the information necessary for the decision-maker to determine whether a criminal investigation needs to be initiated. In this expert's view, the factors of degree of control over territory and intensity of violence, which were discussed when addressing the five case studies,¹⁴¹ could be taken into account to decide whether a criminal investigation should be conducted. In this context, these factors could be useful because they would not determine in advance the applicable paradigm but they could help to determine afterwards if a criminal investigation is needed.

Another expert explained that in his country, the standard for starting a criminal investigation is the existence of a credible allegation of a violation of IHL. If such a credible allegation exists, it needs to be reported and responsibility determined and/or corrective action taken if the violation does not amount to a war crime. In any case, the first step is always an administrative investigation that conducts a credibility review.

A third expert explained that, in his country, a distinction is made between, on one side, investigations that are made for penal or disciplinary purposes, and, on the other side, administrative enquiries with a fact-finding purpose. This expert pointed out that enquiries constitute a better tool to uncover systemic issues and to improve compliance with the law by subjecting the system to scrutiny. This is so because, in the context of penal investigations, if an allegation of crime cannot be proved beyond reasonable doubt, there is a right to silence. Such a right does not exist in the context of administrative enquiries; on the contrary, there is an obligation to uncover the truth.

Finally, experts identified also the issue of the content of the obligation to investigate. As noted earlier,¹⁴² human rights bodies have developed a series of criteria for considering an

¹⁴⁰ See, in this regard: The Public Commission to Examine the Maritime Incident of 31 May 2010, Second Report – the Turkel Commission, *Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*, February 2013, p. 106.

¹⁴¹ *Supra*, Part II.

¹⁴² *Supra*, p. 50.

investigation as effective. These are notably the criteria of independence, impartiality, promptness, involvement of the next-of-kin. Instead, IHL treaties do not provide clear-cut answers in this regard.

Some experts were reluctant to use the criteria developed by human rights bodies to assess the effectiveness of IHL investigations. They were of the view that these standards were too stringent and could not be applied in armed conflict situations.

For instance, it was noted that the Inter-American human rights bodies, particularly the Inter-American Commission on Human Rights, have frequently found that military tribunals lack the requisite independence and impartiality when investigating military personnel suspected of serious human rights violations, such as the killing of civilians in military operations. Thus, civilian courts should investigate such killings, even in armed conflict situations. While this case law has originally been developed in the context of the use of military courts by military dictatorships in Latin America and the ensuing prevalence of impunity, both the Inter-American Court and Commission have continued to refine and develop this jurisprudence in numerous recent cases involving the use of military courts in Colombia and in some other member states of the Organization of American States (OAS). However, this case law – if taken out of this very particular context – would be problematic since in most countries, when allegations of unlawful killings in the context of an armed conflict occur, the military will be investigating. This is actually a duty of the military, which derives from the duty of commanders to prevent and punish IHL violations.¹⁴³ It was pointed out that, in some Latin American countries, following the case law of the Inter-American human rights bodies, civilian jurisdictions are conducting investigations into every killing connected with a non-international armed conflict (including of enemy fighters). This was not seen as the solution because civilian judges are often unaware of IHL. Considerable efforts thus have to be invested to offer IHL training to civilian judges.

Most experts rejected the conception according to which military investigations are intrinsically not independent and impartial. It was argued that there are ways to ensure that the military investigative body is independent and impartial. It was highlighted that in some countries military investigations are done under civilian supervision, both of the Attorney General and the Supreme Court. A few experts stressed that, under the European Convention on Human Rights, there is no obligation that the investigation be conducted by civilian jurisdictions, provided that it is independent and impartial. In the *Al-Skeini* case, the European Court did not find a violation of the obligation to investigate because it was conducted by the military but because the investigating authority was not operationally independent of the military chain of command.¹⁴⁴ It was generally agreed that the criterion of independence is reasonable even in armed conflicts. The investigation must obviously be conducted by persons who are separated from those who allegedly committed a violation. However, there was a controversy as to whether the European

¹⁴³ *Supra*, note 135.

¹⁴⁴ See ECtHR, *Al-Skeini and others v. United Kingdom*, 7 July 2011, para. 169: “Nonetheless, the fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command.”

Court is going too far when it requires for instance that the victim's next-of-kin be involved in the procedure.¹⁴⁵

Finally, it was highlighted that – even without taking into account human rights law – under an exclusively IHL lens, it is clear that there is an obligation to provide effective penal sanctions, and this does presuppose independent and impartial investigations.

¹⁴⁵ *Ibid.*, para. 167: “For an investigation into alleged unlawful killing by State agents to be effective, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence (...). A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.”

CONCLUDING OBSERVATIONS

The interplay between the law enforcement and conduct of hostilities paradigms in situations of armed conflict poses numerous challenges.

The first challenge is determining whether the law enforcement paradigm can be relevant in situations of non-international armed conflicts and occupation¹⁴⁶ where force is used against legitimate targets. The meeting showed that this issue remains very controversial. This is particularly true for the use of force against legitimate targets in contexts such as the isolated sleeping fighter example discussed in case study 1. While some experts considered that IHL is the *lex specialis* and that, as a consequence, legitimate targets can always lawfully be killed on sight, others were of the view that in such specific circumstances (notably where the State controls the area, where the intensity of violence is low, where it is outside the conflict zone) the law enforcement paradigm is not displaced by the conduct of hostilities or, even, constitutes the *lex specialis*. In addition, views on whether, under the conduct of hostilities paradigm, the principles of military necessity and humanity would require one not to kill a legitimate target on sight but rather to put him/her *hors de combat* by other means, as suggested in Chapter IX of the ICRC's *Guidance on Direct Participation in Hostilities* remained equally divided. In practice however, most experts actually agreed that a reasonable military commander would not order an attack against an isolated fighter who is at home asleep, if a capture appears to be possible in the circumstances without additional risk to the armed forces. Given that for the time-being the law is not clear as regards which paradigm prevails in such cases and since valid arguments can be made on both sides, a pragmatic approach – looking at the feasibility and desirability of a capture operation in exceptional cases such as the one described in case study 1 – is advisable until international law crystallizes in one direction or the other.

The meeting showed moreover that, for many experts, the main (if not the only) legal criterion for determining whether a situation is covered by the conduct of hostilities or law enforcement paradigms is the status, function or conduct of the person against whom force may be used. Additional factual considerations, such as whether the situation is taking place outside the conflict zone or in an area under the control of the State's armed forces where the level of violence is low, were not seen as decisive legal criteria by most experts. However, some experts considered these factors as useful factual considerations in order to reach legal and/or policy decisions.

Another issue discussed during the meeting was the phenomenon of the concurrence of civilian unrest with actual hostilities. In that regard, the meeting showed – in the context of the discussions on case study 2 (riot) and 3 (fight against criminality) – that there was a genuine agreement among experts that the “parallel approach” was legally attractive notwithstanding the practical difficulties. This means that the conduct of hostilities paradigm can be used only against combatants, fighters and civilians directly participating in hostilities. Civilian unrest has to be dealt with under a law enforcement paradigm even

¹⁴⁶ ICRC Report on *The Use of Force in Occupied Territory*, *supra*, note 2.

in the context of an armed conflict. However, given the practical difficulties of this approach, in particular in the riot case – where it is difficult to distinguish between legitimate targets and violent civilians whose acts do not amount to direct participation in hostilities – a number of experts pleaded in favour of applying an escalation of force procedure to the situation as a whole, at least as a practical matter. In that context, it was pointed out that RoE – reflecting legal, policy and operational considerations – often address such situations with self-defence based rules, implying the application of an escalation of force procedure to the situation as a whole.

In many situations, such as case studies 4 (rioting/escaping fighters) and 5 (checkpoint), and in particular in case of doubt as to the status, function or conduct of person seemingly posing a threat, most experts agreed that an escalation of force procedure has to be used. Even if experts did not adopt the same legal reasoning, they reached the same result in practice and considered that an escalation of force procedure was required (although the details of this procedure were not discussed). In this regard, it was interesting to note that a number of experts read into IHL rules (in particular the rule on doubt as to the status, function or conduct of the target and the principle of precautions in attack) the obligation for belligerent parties to use an escalation of force procedure in some situations. In the checkpoint case, it was again highlighted that, in practice and for legal and policy reasons, a number of RoE address the issue through self-defence rules that are “threat-based” rather than “status-based”.

The meeting showed also that, in order for any clarification of the law in this area to be comprehensive and meaningful, the issue of the interplay between the conduct of hostilities and law enforcement paradigms needs to be tackled from a broad perspective, taking into account issues arising not only at the moment of the execution of an operation (actual use of force) but also before and after the use of force. Planning of operations was seen as key in order to ensure respect for the law. Training of armed forces in law enforcement (or law enforcement-like techniques) and the provision of adequate equipment allowing a graduated use of force were seen as important (or even compulsory) in contemporary armed conflicts. Experts agreed also that investigations must be conducted at least when there is a credible allegation of war crime and that investigations must be independent and impartial.

Finally, the meeting revealed that there is a disparity between the way the issue of the use of force in armed conflicts is perceived by IHL practitioners and the approach adopted by human rights experts and bodies. There is thus a need to bridge this gap and to enhance the dialogue between experts and practitioners from these two fields.

APPENDIXES

Appendix 1: Agenda

Appendix 2: List of participants

Appendix 3: Written statement by Françoise Hampson

Appendix 4: Summary of the presentation by Juan Carlos Gómez Ramírez

Appendix 5: Summary of the presentation by Richard Gross

Appendix 6: Summary of the presentation by Olga Chernishova

Appendix 1: Agenda

THE USE OF FORCE IN ARMED CONFLICTS <i>Interplay between the Conduct of Hostilities and Law Enforcement Paradigms</i>

Thursday 26 January 2012

8.30 – 10.15: Introductory session: setting the scene

8.30 – 8.45	Introductory speech	Philip Spoerri
8.45 – 9.15	Round of introductions of experts	See List of Participants
9.15 – 9.30	Presentation of the issue and methodology by the Chairman	Knut Dörmann
9.30 – 9.45	Reflections on the Colombian Operational Law Manual	Juan Carlos Gómez Ramírez
9.45 – 10.15	Questions and discussion	

10.15 – 10.30: Coffee break

10.30 – 10.45	The use of force in the different phases of the conflict in Afghanistan	Richard Gross
10.45 – 11.15	Questions and discussion	
11.15 – 11.30	The use of force and relevant case law of the European Court of Human Rights: an overview	Olga Chernishova
11.30 – 12.00	Questions and discussion	

12.00 – 13.00: Lunch

13.00 – 15.00: Discussion of the distinguishing features of the two paradigms

15.00 – 15.15: Coffee break

15.15 – 17.45: Use of force against legitimate targets during armed conflicts

Case study 1	Use of force against legitimate targets
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17.45 – 18.00: Wrap up by the Chairman

19.30: Dinner

Friday 27 January 2012

8.00 – 10.00: Use of force to address situations of riots, criminality, escape attempts and lack of respect for military orders during armed conflicts

Case study 2	Riots in armed conflict situations
Case study 3	Fight against criminality

10.00 – 10.15: Coffee break

10.15 – 12.15: Use of force to address situations of riots, criminality, escape attempts and lack of respect for military orders during armed conflicts (continued)

Case study 4	Escape attempt/riots in detention
Case study 5	Checkpoints

12.15 – 13.15: Lunch

13.15 – 14.00: Summing up the findings based on the case studies discussions

14.00 – 15.45: Issues before and after the use of force

The experts are invited to debate on issues regarding preventive obligations (before the execution of an operation) and the obligation to investigate after the use of force, bearing in mind the case studies.

15.45 – 16.00: Wrap-up by the Chairman

(From 16.00: departures to airports etc.)

Appendix 2: List of Participants

EXPERTS

	<i>fist name</i>	<i>family name</i>	<i>title - function</i>	<i>country of origin</i>
Mr	Kirby	ABBOTT	Colonel, Assistant Legal Advisor, SHAPE, NATO	Canada
Ms	Olga	CHERNISHOVA	Doctor, Head of Legal Division, Registry of the European Court of Human Rights	Russia
Mr	Robert	CHESNEY	Professor in Law, University of Texas School of Law	United States of America
Mr	Robert	GOLDMAN	Professor & Louis C. James Scholar, American University Washington College of Law	United States of America
Mr	Juan Carlos	GOMEZ RAMIREZ	Colonel, Colombian Air Force, Director of the Military Institute of Aeronautics	Colombia
Mr	Richard	GROSS	Colonel, Interim Legal Counsel to the Chairman of the Joint Chiefs of Staff, US Army	United States of America
Mr	Christof	HEYNS	Professor of Human Rights Law, University of Pretoria and UN Special Rapporteur on Extrajudicial, Summary of Arbitrary Executions	South Africa
Mr	Richard	JACKSON	Colonel, Special Assistant for Law of War Matters, US Army	United States of America
Mr	David	KRETZMER	Professor Emeritus, The Hebrew University of Jerusalem	Israel
Mr	Liron	LIBMAN	Colonel, Former Head of International Law Department, Military Advocate General's HQ, Israel Defence Forces	Israel
Ms	Yan	LING	Professor of international law, China University of Political Science and Law	China
Mr	Noam	LUBELL	Professor of International Law of Armed Conflict, University of Essex	The United Kingdom
Mr	Djamchid	MOMTAZ	Professor of Public International Law, Tehran University	Iran
Mr	Cameron	MOORE	Commander, Legal Officer for the Royal Australian Navy and Senior Lecturer, Faculty of The Professions, School of Law, University of New England	Australia
Mr	Milad	NASRALLAH	Major, Lebanese Internal Security Forces	Lebanon
Mr	Claudio	PIEDRA BUENA	Colonel, Director of the Argentinean Joint Peace Operations Training Center (CAECOPAZ)	Argentina

	<i>fist name</i>	<i>family name</i>	<i>title - function</i>	<i>country of origin</i>
Ms	Elizabeth	SALMÓN	Doctor, Academic Director of the “Instituto de Democracia y Derechos Humanos de la Pontificia Universidad Católica del Perú” (IDEHPUCP)	Peru
Mr	Marco	SASSÒLI	Professor of International Law, University of Geneva	Switzerland
Mr	André	VIANNA	Retired Colonel of the Military Police of São Paulo	Brazil
Sir	Michael	WOOD	Member of the UN International Law Commission	The United Kingdom
Mr	Marten	ZWANENBURG	Doctor, Senior legal adviser, Ministry of Defence, Netherlands	Netherlands

25.01.2012

ICRC

	<i>first name</i>	<i>family name</i>	<i>title - function</i>
Mr	Knut	DOERMANN	Doctor, Head of the Legal Division, Chairman
Ms	Cordula	DROEGE	Doctor, Legal adviser, Thematic Unit, Legal Division
Mr	Tristan	FERRARO	Doctor, Legal adviser, Thematic Unit, Legal Division
Ms	Gloria	GAGGIOLI	Doctor, Legal adviser, Thematic Unit, Legal Division
Mr	Jean-François	QUÉGUINER	Doctor, Head of the Thematic Unit, Legal Division
Ms	Kathleen	LAWAND	Head of the Arms Unit, Legal Division
Ms	Jelena	PEJIĆ	Senior Legal adviser, Thematic Unit, Legal Division
Mr	Yves	SANDOZ	Professor, Member of the Assembly
Mr	Philip	SPOERRI	Doctor, Director for International Law and Cooperation

25.01.2012

Appendix 3: Written statement by Françoise Hampson*

The case-law of the European Court of Human Rights and the Use of Force¹

1. Introduction – words of caution

I assume that the meeting will be examining when the use of force during what is or is arguably an armed conflict should be analysed in terms of IHL and when it should be analysed in terms of a law enforcement/human rights paradigm. This requires us to consider the substantive content of both IHL and human rights law. I suspect that the majority of killings during armed conflict which violate human rights law also violate IHL. That was certainly my experience of the cases from South-East Turkey and is also true of the Chechen cases. In other words, in practice, the problem is getting respect for the rules whatever rules are invoked. It is not that States are violating human rights law because they inappropriately apply IHL. That said, there are a range of situations in which it is genuinely unclear (or is argued to be unclear) which is the appropriate framework of analysis.

I assume that the key distinction between an IHL analysis and a human rights law analysis is that the former allows targeting² by reference to status. That means that a person can be targeted on account of their membership of a group, whether that is opposing armed forces or an organised armed group in which the individual exercises a continuous combat function.³ Generally speaking, a human rights paradigm only allows targeting based on the behaviour of the individual targeted.⁴

* The author was the applicant's legal representative in many of the cases involving killings in South-East Turkey, such as *Ergi*, *Akkum*, *Akan and Karakoc*, "unknown perpetrator" killings such as *Tanrikulu*, *Akkoc*, *Kaya*, *Kilic*, deaths in detention, such as *Salman* and *Tas* and disappearances and presumed death such as *Cakici*, *Ertak* and *Akdeniz*. In addition, she dealt with cases involving torture, unlawful detention, destruction of homes, destruction of property and the right to a remedy. She was one of the applicants' representatives in the case of *Bankovic*. She also represented the government of the Republic of Cyprus, intervening, in the case of *Varnava v. Turkey*.

¹ The following written statement has been prepared in advance of the expert meeting by Françoise Hampson, who could not attend the meeting and make an introductory presentation on the case-law of the European Court of Human Rights and the Use of Force. It shall be noted that this is not an academic piece but rather reflections the author wanted to share with the participants of the meeting.

² i.e. deliberately opening fire against, rather than simply ending up hitting, whether foreseeably or otherwise.

³ ICRC, *Interpretive guidance on the notion of Direct Participation in Hostilities under International Humanitarian Law*, prepared by N. Melzer, Geneva, Switzerland, May 2009 (hereafter: *ICRC DPH Guidance*). Some of those who object to the ICRC Interpretive Guidance on DPH do so on account of the requirement that the individual exercises a continuous combat function. The treaty law definition (until and for such time as the individual takes a direct part in hostilities) appeared to be based on behaviour. The Interpretive Guidance redefines the concept so as to include a status criterion, whilst also retaining the behaviour test for those who do not belong to an organised armed group or who only occasionally exercise a combat function. The Interpretive Guidance therefore has huge implications for the issue being examined by the meeting. See further, F. Hampson, "Direct participation in hostilities and the interoperability of the law of armed conflict and human rights law," *International Law Studies*, Vol. 87, US Naval War College, 2011, p.187.

⁴ As will be seen below, under three HRs treaties it may be possible to accommodate targeting by reference to status in situations of armed conflict without the need to modify the treaty. That is not true of the European Convention on Human Rights (ECHR).

When considering human rights law, the meeting needs to take account not only of the binding legal judgments of regional human rights courts and the authoritative decisions of the Human Rights Committee under the first Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). Attention should also be paid to Advisory Opinions, Concluding Observations on State reports and General Comments of those bodies and to the work of Special Procedures and holders of analogous mandates (e.g. Commissioner for Human Rights of the Council of Europe).⁵

It is vital that, when looking at the case law of human rights bodies, the meeting distinguishes between two completely separate issues.

A judicial or quasi-judicial human rights body is well qualified to make authoritative determinations as to the violation of human rights law. In doing so, it will develop an authoritative view of the separate components of the right. The death being investigated by the human rights body may have occurred during an armed conflict. *That does not mean that the human rights body will be taking account of IHL or will have asked itself the question whether the appropriate framework of analysis is IHL or human rights law.*

It cannot be assumed that just because a human rights body uses words more commonly found in an IHL context (e.g. civilian) that it is taking account of IHL.⁶

The meeting *must* take account of the case law of human rights bodies because that is the forum which will most commonly be used by individuals alleging the unlawfulness of deaths in armed conflict. However, we must distinguish between cases that are based exclusively on human rights law and in which the possible relevance of IHL is not addressed at all and ones where the decision has required the body to determine whether to apply an IHL or a human rights paradigm, even if, at the end of the day, the body is only competent to find a violation of human rights law. A classic example of the latter is the *Abella* case before the Inter-American Commission of Human Rights.⁷ The Commission, *proprio motu*, determined that IHL was relevant, used IHL concepts which have no apparent relevance to human rights law (the use of a white flag; the use of unlawful weapons) and explained why they were relevant even in a situation which was argued to come within common Article 3 of the Geneva Conventions. Before a decision of a human rights body can be regarded as relevant to the questions which the meeting is addressing, it is necessary that it shows on the face of the decision

- that IHL was potentially relevant;

⁵ One of the challenges for the European Court of Human Rights is that it cannot deliver Advisory Opinions on substantive HRs questions, does not receive State reports and does not formulate General Comments. It therefore does not have the opportunity to ask itself general questions (e.g. the relationship between IHL and Human rights law) outside the framework of the individual case before it. It can and does ask itself general questions in the context of specific cases but there is a risk that the specificity of the case will distort the general thinking; see further below.

⁶ ECtHR, *Ergi v. Turkey*, 28 July 1998, para. 79: "... the responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to *avoiding and, in any event, to minimising, incidental loss of civilian life.*" (emphasis added). See further below.

⁷ IACCommHR, *Abella v. Argentina*, 18 November 1997.

- either that IHL was not in fact relevant;
- or that IHL was actually relevant.

It is to be hoped that the body will also give reasons for its determinations. Where the body has not previously addressed the question, it may, as a preliminary matter, need to address *whether* it can take account of IHL, whether IHL includes both treaty law and customary IHL rules, *when* it will take account of IHL and *how* it will take account of IHL.

On this basis, the case-law of the European Court of Human Rights (ECtHRs) is only relevant as a very detailed analysis of the requirements of human rights law. Not once has it addressed on the merits the relationship between IHL and human rights law, whether IHL was relevant or how it should take account of IHL. That is about to change. In the second inter-State case brought by Georgia against Russia, arising out of the armed conflict between the two States, Russia argued that the ECtHRs does not have jurisdiction since the issues are regulated by IHL, the applicability of which displaces that of human rights law. In its admissibility decision, the Court decided that the possible relevance of IHL was a question for the merits stage of the case.⁸

These brief comments will address the relevant treaty provisions under the ECHR, the detailed framework of analysis of the relevant right and the case law of the ECtHRs dealing with deaths in situations in which IHL was potentially relevant.

2. The ECHR treaty provisions relevant to the use of potentially lethal force

The relevant ECHR provisions are unlike the equivalent provisions in other treaties. The ICCPR, the African Charter on Human and Peoples' Rights and the American Convention on Human Rights prohibit arbitrary killings. The provision is non-derogable.⁹ What is arbitrary in peacetime is not necessarily the same as what is arbitrary in time of armed conflict. The texts therefore provide no barrier to the human rights bodies, should they wish to take account of IHL in determining what is an arbitrary killing in situations of conflict.

That is not true of the ECHR. Article 2 lists the only grounds on which State agents may resort to potentially lethal force.¹⁰ They are all based on the behaviour of the person targeted and represent the essence of a law and order paradigm. The threshold which has to be crossed to open fire on such a ground is that the use of force is "absolutely necessary."¹¹

⁸ ECtHR, *Georgia v. Russia II*, 13 December 2011.

⁹ Derogation permits a State in defined circumstances to modify the scope of certain HRs obligations. It is a facility available to States. If they do not invoke it, the HRS body will not do so *proprio motu*. This is unlike IHL which is applicable as a matter of law in defined circumstances. It is not a matter of the State invoking its applicability.

¹⁰ ECHR, article 2 provides "Everyone's right to life shall be protected by law. (...) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary a. in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c. in action lawfully taken for the purpose of quelling a riot or insurrection." It is possible that the Court would nowadays apply such a high threshold to the second ground (whilst committing a crime or fleeing having done so) as to make it, in effect, no longer a justification for resort to potentially lethal force.

¹¹ This looks like a higher threshold than "reasonably necessary" but may be a distinction without a difference; see ECtHR, *Stewart v. United Kingdom*, 10 July 1984.

In a situation of war or other public emergency threatening the life of the nation, a State may seek to modify Article 2 by including “lawful acts of war.” No State has ever sought to invoke this provision.¹²

The wording of the ECHR prevents the ECtHRs from taking account of IHL as a simple matter of treaty interpretation. As will be seen, there is another way in which it could do so.

Article 2, this time like other human rights treaties, specifically requires States to protect the right to life.

3. The framework of analysis of an allegedly unlawful killing under the ECHR.

Where an alleged human rights violation has occurred against the backdrop of a situation of systematic or widespread violation of human rights law, the most important issue is often to establish the facts. If the facts are as alleged by the applicant, it is often clear that there will have been a violation of human rights law. Such situations are often characterised by impunity, at least at the domestic level. In such a situation, scant regard will be paid to domestic or international law because State security agencies do not expect to be called to account. Much of the experience of the Human Rights Committee, the African Commission and the Inter-American Commission and Court of Human Rights has been with such situations. The experience of the ECtHR is different. It includes situations where an allegedly unlawful killing occurred against a backdrop of general respect for the law and the general availability of a domestic remedy. This means that the former European Commission and the Court have often dealt with cases close to the border between unlawful and not unlawful killings. The case law of the ECtHR provides a rich and detailed analysis of the relevant concepts.

a. The context of the killing

The context in which the killing took place is likely to have a significant impact on the handling of the case, particularly when it comes to assessing necessity and proportionality. Context will include planned detention operations,¹³ other planned operations,¹⁴ and situations in which there was no expectation that it would be necessary to open fire. The more an operation is planned, the more the Court will expect the State to seek ways to minimise the need to open fire. If a State is seeking to foil a bank raid, for example, it cannot only place snipers on adjacent roof-tops, since the only way to stop the robbers will be by firing on them. Under the ECHR, the acts of those who actually open fire may not violate the Convention, whilst the way in which the State planned the same operation may be found to violate the Convention.¹⁵ It does not appear to make a difference

¹² It is not clear whether this is a limited derogation provision or a defence. It is addressed separately in ECHR, article 15, the derogation provision.

¹³ E.g. ECtHR, *Gül v. Turkey*, 14 December 2000.

¹⁴ E.g. *Ergi*, *supra*, note 6, where the security forces were allegedly seeking to ambush the PKK and to prevent their infiltrating a village.

¹⁵ This is best illustrated by ECtHR, *McCann and others v. UK*, 27 September 1995 (Gibraltar killings). The Court found that the act of the SAS in opening fire against the known terrorists on mission in Gibraltar

whether the security forces in question are police, gendarmes or armed forces. It is not clear whether the Court treats deaths resulting from the use of airpower any differently from those at the hands of ground forces.¹⁶

b. Does the victim have to be dead to invoke Art.2?

There has to be a use of potentially lethal force but it does not need to result in death. It may have been thought that this meant the provision applied to life-threatening attacks. In *Ilhan v. Turkey*, the victim was on the ground and surrounded, the security forces reversed their weapons and beat him about the head with rifle butts. He suffered permanent brain damage which resulted in the partial paralysis of one side of his body. A majority of the Commission thought this was a violation of Article 2. The Court, however, held that Article 2 was not applicable and that the case had to be examined under Article 3 (prohibition of inhuman or degrading treatment). In the view of this author, the decision is wrong.

c. The grounds on which it is possible to resort to potentially lethal force

The grounds are precise, specific, exhaustive and speak for themselves.¹⁷

d. The threshold for resorting to potentially lethal force on a legitimate ground

The test of absolute necessity applies to opening fire and not to the analysis of the force used. The latter is examined under the requirement of proportionality. Whatever “absolutely necessary” means, it is clear that it is a high threshold.¹⁸

e. Proportionality

The Convention does not refer to proportionality but this requirement has been read into the Convention as a matter of treaty interpretation. It gives the Court some flexibility and enables it to take account of *all* the circumstances of the case. It applies to the *manner* in which force is used. There are at least three strands to the concept. First, the harm caused to the victim has to be proportionate to the risk which he/she poses to others.¹⁹ Second, in relation to the risk posed to others in the vicinity, considerable care must be taken to minimise that risk, although it is recognised that it cannot be eliminated. As part of the

did not violate the Convention but the way in which the whole operation had been planned did, since adequate steps were not taken to prevent the need to use potentially lethal force.

¹⁶ In addition to the notorious case of ECtHR, *Isayeva and others v. Russia*, 24 February 2005, there have been other cases involving airpower, even in what, in IHL terms, was an internal non-international armed conflict. Some were resolved by a friendly settlement e.g. ECtHR, *Isiyok v. Turkey*, 3 April 1995.

¹⁷ See *supra*, note 10.

¹⁸ See *supra*, note 11.

¹⁹ This is significantly different to the meaning of proportionality under LOAC; see further N. Lubell, “Challenges in Applying Human Rights Law to Armed Conflict,” *International Review of the Red Cross*, Vol. 87, No. 737, December 2005.

concern for the risk to bystanders, it is clear that indiscriminate firing is unlawful.²⁰ Third, the weapons used are relevant to the assessment of proportionality.²¹

Whilst the analysis of the ingredients of the protection of the right to life is fairly sophisticated, its application to the facts is sometimes surprising. The Court sometimes bases its decision on the lack of proportionality when, in fact, the grounds for opening fire did not exist.²² Perhaps the Court feels that that will achieve the same thing for the applicant whilst being less critical of the State. The displacement of the real violation can sometimes take a more dramatic and problematic form. In the case of *Özkan* a little girl died of injuries received in her home during an assault against a village.²³ The Court appears to have wanted to ensure that the State was held responsible for her death but was perhaps nervous of getting into a detailed analysis of the facts of the assault against the village. The applicant's lawyer argued that she died as a result of the indiscriminate use of force. Instead the Court focused on what happened when the security forces entered the village. The villagers were gathered together in two separate groups. The security forces asked if anyone needed medical treatment but did not go round inspecting each individual. The little girl's mother did not say anything, which is perhaps not surprising in the circumstances. Had the security forces not asked if there was a need for medical treatment or if they had not provided any treatment necessary, that would appropriately be a Convention issue.²⁴ They did ask however. The Court held the State responsible for failing to determine for itself whether treatment was necessary. The Court appears to have ended up putting a very onerous obligation on the State in the medical sphere, rather than finding the State responsible for a death resulting from the indiscriminate use of force.

The Court examines whether there has been a violation but generally does not inquire into how and why the violation arose. This is regrettable, if one of the goals is to reduce the chance of repetition. For example, in many cases it would be helpful to know the rules of engagement (ROE) under which the forces were operating.

²⁰ *Ergi*, *supra*, note 6 and discussion below.

²¹ In *Gül*, *supra*, note 13, the State was held responsible for a death resulting from the use of live ammunition during an unlawful demonstration. The Court said in terms that the State should have had available riot control equipment such as tear gas. See also *Stewart*, *supra*, note 11 (use of rubber bullets).

²² E.g. ECtHR, *Haran v. Turkey*, 26 February 1996; there was a fact-finding hearing by the Commission. The case was the subject of a friendly settlement.

²³ ECtHR, *Ozkan and others v. Turkey*, 6 April 2004.

²⁴ See for example *Gül*, *supra*, note 13. Access to effective medical care was an important issue in the recent case of ECtHR, *Finogenov & Others v. Russia*, 20 December 2011 (Moscow Theatre Siege).

f. Protection of the right to life and operational measures of protection

Generally speaking, a State protects the right to life by having appropriate laws and a policing and court system such as to enable the implementation of those laws. Exceptionally, where an individual can show they are at particular risk, there may be the need to take operational measures of protection.²⁵

g. Protection of the right to life and the investigation of any suspicious death

In order to protect the right to life, the State is required to conduct a prompt and effective investigation into *any* suspicious death.²⁶ This includes both deaths at the hands of State agents and those at the hands of third parties.²⁷ In order to be effective, the investigation has to be independent, which has particular implications where the suspected perpetrator is a member of the police or armed forces. Where an investigation has to be carried out in a conflict zone, it is important that the Court should take account of the impact of the situation on the ground when determining the requirements which the investigation should satisfy.²⁸

Where it is alleged that the resort to lethal force was based on discrimination, the investigation must examine not only the killing but also the specific allegation of discrimination.²⁹

4. Use of potentially lethal force where IHL was or was arguably relevant

The ECtHR has dealt with cases in which IHL was arguably or indisputably relevant. These include cases in which the applicants raised the relevance of IHL. The cases include international armed conflicts. Much of the litigation between Cyprus and Turkey subsequent to the latter's invasion and occupation of the territory of the former was only dealt with by the former European Commission of Human Rights but there has also been one inter-State case and Cyprus has intervened in cases brought by its nationals and arising out of the conflict.³⁰ The notorious *Banković* case was brought against all the European members of NATO.³¹ The applicants made considerable reference to IHL in their pleadings in relation to Articles 2, 10 and 13.

²⁵ ECtHR, *Osman v. United Kingdom*, 28 October 1998. For the application of the principle, see ECtHR, *Kaya v. Turkey*, 28 March 2000 and ECtHR, *Kilic v. Turkey*, 28 March 2000. It should be noted that, in those two cases, some measure of State complicity could be inferred. In other words, the risk to the individual came from State agents or persons under the control of State agents.

²⁶ There is a huge volume of case law on the obligation to investigate in the context of ECHR, article 2 in the cases arising out of the situations in South-East Turkey and Chechnya.

²⁷ This will include killings at the hands of members of an organised armed group. Human rights law only binds the State but non-State actors may be indirectly bound as a result of the State's obligation to protect people from HRs violations at the hands of such actors.

²⁸ See, e.g. ECtHR, *Al-Skeini v. United Kingdom*, 7 July 2011, which concerned the investigation of killings in Basra, Iraq.

²⁹ E.g. ECtHR, *Nachova & Others v. Bulgaria*, 26 February 2004 (First Section) and 6 July 2005 (Grand Chamber); the judgment of the Grand Chamber was more restrictive than that of the Chamber.

³⁰ In cases dealing with the conduct of the invasion, no issues were raised with regard to specific uses of force. There have been individual cases involving Turkey's use of force as an occupying power; see note 36 and accompanying text.

³¹ ECtHR, *Bankovic and others v. Belgium and 16 other members of NATO*, 12 December 2001.

Most recently, the second case brought by Georgia against Russia involves both an international and a non-international armed conflict.³²

The ECtHRs has also and more frequently dealt with cases arising out of situations in which many, including the ICRC, would have argued that IHL was applicable, even if the State did not acknowledge the fact. This is not the same as saying that the State was dealing with a domestic emergency. The situations include Northern Ireland, where the UK denied the applicability of the Geneva Conventions but permitted the ICRC to visit those detained on account of the conflict on the basis of its right to offer its services under the Statute of the ICRC. It also includes the situation in South-East Turkey in the 1990s, where Turkey denied the applicability of the Geneva Conventions. In the case of Chechnya, it is necessary to distinguish between the first and second Chechen wars. The Russian constitutional court determined that Additional Protocol II was applicable to the first Chechen conflict but acknowledged that no measures of domestic implementation of the Protocol had been taken.³³ Internationally, Russia has denied the applicability of the Geneva Conventions to the second Chechen war. Since 9/11, Russia has argued that it is just dealing with terrorism and criminal act. The ECHR cases arising out of the situation all concern the second Chechen war.

In short, the ECtHRs has had plenty of opportunities to address the relationship between IHL and human rights law or the relevance of IHL to its own human rights decisions but has not chosen to do so.

a. This raises two sets of questions. First, should and/or could the ECtHRs take account of IHL? Second, has the failure to take account of IHL made a difference to the result? Should/could the ECtHRs take account of IHL?

The view of the ICJ is that some situations are only regulated by human rights law, some only by IHL and some by both.³⁴ The fact that some situations are only regulated by IHL does not mean that a human rights body does not have jurisdiction, since the ICJ has also held that human rights law applies in all circumstances, subject only to derogation. Where IHL alone is applicable, a human rights body is presumably supposed only to find a violation of human rights law where there is a violation of IHL. Where both are simultaneously applicable, IHL is the *lex specialis*, whatever that means. On this basis, the ECtHRs *should* take account of IHL.

As already established, at least in the case of Article 2, the drafting of the Convention means that the Court cannot take account of IHL as a matter of treaty interpretation, unless the State invokes “lawful acts of war.” There is, however, another way in which it can do so. The ECtHRs has always taken the approach that the ECHR is located within

³² See *supra*, note 8.

³³ Judgment of the Constitutional Court of the Russian Federation of 31 July 1995 on the constitutionality of the Presidential Decrees and the Resolutions of the Federal Government concerning the situation in Chechnya, European Commission for Democracy through Law of the Council of Europe, CDL-INF (96) 1.

³⁴ ICJ, Advisory Opinion on the *Legality or Threat of Use of Nuclear Weapons*, 8 July 1996, para. 25 ; ICJ, Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 106 ; ICJ, *Case concerning armed activity on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, paras. 216–220.

the body of international law and that it needs to take account of other rules of international law when interpreting the Convention. The most striking example is the recognition that States may give effect to the rules of sovereign immunity when to do so results in individuals not being able to bring domestic proceedings for torture.³⁵ It is not clear whether the Court would draw a distinction between international law rules about the *operation* of the international legal system (e.g. sources; rules regarding treaty law; sovereign immunity) or whether that would also include other substantive rules of international law, such as IHL. There has been no indication that the Court makes such a distinction.

The Court has often invoked the Vienna Convention on the Law of Treaties *proprio motu* but that has not been controversial. When it has addressed the applicability of sovereign immunity, at least one of the parties has raised it and it was clear that that was at the heart of the case.

It would appear that, on the same basis, the Court *could* take account of IHL and could do so *proprio motu*.

b. Would it have made a difference to the decision if the ECtHRs had taken account of IHL in cases dealing with the use of potentially lethal force?

The cases arising out of the Turkish invasion of Cyprus did not involve specific killings. It is recognised that human rights law applies in occupied territory, at least where the occupation is settled and militarily unopposed. Human rights law has been applied to killings in this context.³⁶ The cases have involved the responsibility of the occupier to maintain law and order, rather than organised armed opposition to the occupier. The *Banković* case was declared inadmissible on other grounds.³⁷ To date, the cases where IHL might have made a difference have arisen in non-international armed conflicts. In all those non-international armed conflicts, the respondent government did not recognise the applicability of IHL and did not invoke it.

For the purposes of this discussion, it will be assumed that IHL generally prohibits the killing of a person in the power of the other side.³⁸ This includes persons in places of detention and persons, whether armed or not, who are surrounded by members of the security forces. In other words, the application of IHL or human rights law would give rise to the same result. The majority of cases from South-East Turkey and Chechnya come into this category.

Where there could be a different result is where a person is killed during the course of a clash between the security forces and organised armed opponents. In such a situation, IHL prohibits the targeting of persons not taking a direct part in hostilities

³⁵ ECtHR, *Al-Adsani v. UK*, 21 November 2001.

³⁶ ECtHR, *Isaak v. Turkey*, 24 June 2008 (killing in the buffer zone)

³⁷ The applicants were held not to be within the jurisdiction of the respondent governments; in other words, the case hinged on the scope of the extra-territorial applicability of Human rights law.

³⁸ There are exceptions, such as preventing escape and dealing with a person under the State's control who has not surrendered and who offers resistance.

and requires that precautions be taken to protect civilians. Human rights law has analogous requirements. That does not mean, however, that their application would result in the same conclusion. In this context, it is appropriate to consider the cases of *Ergi* and *Isayeva & Others* and *Isayeva*.³⁹ Where the difference would be most striking is where IHL permits something prohibited under human rights law. The most obvious example is targeting on the basis of status.

The ICJ pronouncements are not limited to circumstances in which the application of IHL would affect the result. Where IHL is to be applied, it is to be applied even if it gives rise to same result as human rights law. The standards of human rights law, at least as applied by the ECtHRs, are probably more rigorous than those of IHL. It is far from

³⁹ The *Ergi* case, *supra*, note 6, has to be handled with some care. The legal analysis does not match the findings on the facts. In order to understand the problem, it is necessary to read the Commission's Report of 20 May 1997. Given the precise configuration of buildings and the lie of the land, the bullet which killed Havva Ergi could only have been fired from a particular direction. The Commission accepted the sketch map annexed to its Report, which established that the security forces were present in the relevant area. At no point did the State suggest that the PKK had been present in that area. The Commission should have found that the shot which killed Havva Ergi was fired by the security forces and should then have examined whether they were firing indiscriminately. Instead, the Commission found that it was likely that the security forces fired the shot. It went on to establish Turkish responsibility on a much broader basis but one that contradicted the facts. Since the map established that the security forces were present in two places, in fact they *had* taken precautions to protect the village from the risk of cross-fire. If the PKK approached from the north-west, there were forces there. If they approached from the north-east, there were security forces south of there and east of the village. The Turkish government had claimed they only had forces to the north-west of the village. The map gave the lie to that claim. Had the claim been true, then the village would have been exposed to the risk of cross-fire. The case of *Isayeva and others*, *supra*, note 16, para. 178, involved air-strikes against a convoy. "The Court accepts that the situation that existed in Chechnya at the relevant time called for exceptional measures on behalf of the State in order to regain control over the Republic and to suppress the illegal armed insurgency. These measures could presumably include employment of military aviation equipped with heavy combat weapons. The Court is also prepared to accept that if the planes were attacked by illegal armed groups, that could have justified use of lethal force, thus falling within paragraph 2 of Article 2." The Court had considerable difficulty in establishing the facts. In particular, they could not substantiate the claim of the government that the aircraft were attacked from the convoy. "However, given the context of the conflict in Chechnya at the relevant time, the Court will assume in the following paragraphs that the military reasonably considered that there was an attack or a risk of attack from illegal insurgents, and that the air strike was a legitimate response to that attack. Thus, assuming that the use of force could be said to have pursued the purpose set out in paragraph 2 (a) of Article 2, the Court will consider whether such actions were no more than absolutely necessary for achieving that purpose. The Court will therefore proceed to examine, on the basis of the information submitted by the parties and in view of the above enumerated principles (see §§ 168-173 above), whether the planning and conduct of the operation were consistent with Article 2 of the Convention." (paras. 181-182) "To sum up, even assuming that that the military were pursuing a legitimate aim in launching 12 S-24 non-guided air-to-ground missiles on 29 October 1999, the Court does not accept that the operation near the village of Shaami-Yurt was planned and executed with the requisite care for the lives of the civilian population." (para. 199) The analysis in the case of ECtHR, *Isayeva v. Russia*, 24 February 2005, is broadly similar. The Court reached the conclusion that the operation against the village of Katyr-Yurt was not spontaneous (i.e. was planned). "The planes, apparently by default, carried heavy free-falling high-explosion aviation bombs FAB-250 and FAB-500 with a damage radius exceeding 1,000 metres. According to the servicemen's statements, bombs and other non-guided heavy combat weapons were used against targets both in the centre and on the edges of the village." (para. 190). "The Court considers that using this kind of weapon in a populated area, *outside wartime* and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society." (para. 191) (emphasis added).

certain that the attack against the convoy in the case of *Isayeva & Others* would be found to violate the IHL requirements as to precautions in attack and proportionality, although they certainly raise those issues. It should also be noted that the Court treated the attack in the case of *Isayeva* as occurring “outside wartime.”⁴⁰

Human rights bodies are likely to be reluctant to dilute existing levels of protection. That would be the result of applying customary rules on the means and methods of warfare in situations that fall within common Article 3 of the Geneva Conventions.

By way of bold assertion, I would propose:

- Where IHL is applicable but a State denies its applicability and/or does not invoke it, a human rights body should confirm its applicability as a matter of law but state that the respondent State has chosen to be judged by a higher standard and should then apply human rights law, with the benefit of derogation if applicable;
- Where the victim was, at the time of death, in detention or in the physical control of State agents, a human rights body should apply human rights law. It can reinforce its analysis by reference to IHL;
- Where the killing occurred in the context of ordinary policing, even if against the background of an armed conflict, a human rights body should apply human rights law. When applying necessity and proportionality, the human rights body can take account of the context of conflict (not the same as applying IHL);⁴¹
- Where the killing occurred in the context of a military operation but the intensity of the fighting is not such as to cross the threshold of applicability of Additional Protocol II, a human rights body should apply both human rights law and IHL prohibitions but not IHL permissions;
- Only where a killing occurs in a military operation in a non-international armed conflict which would satisfy the substantive conditions of applicability of Additional Protocol II should a human rights body only find a violation of human rights law if there is a violation of IHL;
- In the case of killings during military operations (i.e. not policing operations) during an international armed conflict, a human rights body should only find a violation of human rights law where there would be a violation of IHL.

This does not resolve the question of what constitutes policing and what constitutes a military operation, the subject of this meeting. This only serves to emphasise the importance of the questions which the meeting is going to address. The existing case law of the ECtHRs can offer absolutely no assistance. It has not addressed the issue. The Georgia/Russia case is of extraordinary importance. The Court will have to address the relationship between IHL and human rights law. It will then have to deal with conduct in both international and non-international armed conflicts, including activities not necessarily related to the conduct of military operations. There is an

⁴⁰ *Ibid.*

⁴¹ See the two cases against Russia discussed in note 39, where there was considerable emphasis on the context. The Court appears to have analysed the lawfulness of the types of weapons used assuming that what occurred was a policing operation.

urgent need of good amicus briefs by organisations genuinely “bilingual” in IHL and human rights law.

Appendix 4: Summary of the presentation by Juan Carlos Gómez Ramírez

Reflections on the Colombian Operational Law Manual (2009)

For decades, the Colombian government has been plagued by violence from guerrilla insurgencies and drug cartels. A peace process was conducted from 1998 onwards, but failed in 2002. Following the failure of the peace process in 2002, the government started an offensive against the organized non-State armed groups in Colombia. The military forces were increased from 300,000 to 420,000 soldiers. In 2006, more than 30,000 persons belonging to paramilitary groups were demobilised. Security started to improve as a consequence. From 2006, the organized non-State armed groups became weaker and were even defeated in some parts of the country. The operational environment changed: it switched from one of clear hostilities (2002-2006) to one where the fight against criminality was predominant (2006-2008). This constituted a real challenge for military forces. At the same time, because of the improvement of the security environment, individuals living in Colombia had more opportunities to exercise their rights. They could introduce judicial complaints without risk of retaliation. Public institutions – and in particular the judicial branch – were getting stronger in Colombia. In this context, the number of complaints in Colombian courts about alleged IHL and human rights violations by members of the military forces increased.

In order to address this situation, the Colombian Ministry of Defence adopted a number of measures, including the development of a Human Rights Policy and an Operational Law Manual that would help commanders to regulate the use of force and provide appropriate guidance to the soldiers as well as prevent IHL and human rights violations. The Operational Law Manual was drafted by academic and military experts and was published in 2009.

The 2009 Manual contains three main chapters. The first chapter is a legal one. It presents the situation in Colombia and concludes that the situation involved the parallel application of IHL and human rights law; however, at the time, for political reasons, the Government had not yet recognized the existence of a non-international armed conflict in Colombia.¹ As a consequence, the 2009 Manual avoids mentioning Additional Protocol II to the Geneva Conventions (to which Colombia has been a State Party since 14 August 1995).

The second chapter of the 2009 Manual introduces concrete rules of engagement to confront the Colombian situation. After very intense discussions and careful analysis, the authors of the Manual developed the rules of engagement based on two sets of cards. The so-called “blue cards” address the use of force in law enforcement situations, where an escalation of force procedure is needed. The so-called “red cards” refer to the use of force in military operations when confronting a military objective (i.e. conduct of hostilities). The reason why the drafters came up with this idea of two sets of cards was to have a simple and clear system that all soldiers could understand and easily implement.

¹ The Colombian government recognized the existence of a non-international armed conflict in 2010.

The third chapter comprises different protocols on specific topics, such as capture in combat, reaction in case of demobilization in combat, capture/“recovery” of child soldiers etc.

The Manual contains also a matrix to establish which groups should be dealt with under which cards. The decision to operate under red or blue cards is taken at a high level, by the commander of a battalion, after consultation with his legal advisers and taking into account policy considerations. In certain geographical areas where there are only members of organized non-State armed groups, such as in the jungle, the red cards are regularly used. Instead, in more populated areas or when the enemy is weakened, the commander may decide to use the blue cards. In such cases, enemy fighters are dealt with under the law enforcement paradigm. Members of groups that are not fighters (such as supporters and family members of FARC), are dealt with under the blue cards as well. Also, in order to fight criminal bands (such as the so-called ‘BACRIM’ – members of neo-paramilitary criminal gangs, considered by the Colombian government as common criminals but whose status as a potential party to the non-international armed conflict is disputed), the Colombian government issued a directive in February 2011 ordering that those bands should be dealt with by the military forces and the police under a law enforcement paradigm (blue cards).

Regarding the question of what the outcome or impact of the 2009 Manual has been, the answer depends on the perspective taken.

On a strategic level, the Operational Law Manual can be considered a success. It helped to change military practice and to ensure a better respect for human rights law and IHL. This contributed to reduce the human rights complaints against the armed forces at a domestic level.

On a tactical level, however, some criticisms have been expressed. Since the failure of the peace process in 2002, the operational context in Colombia has changed. Whereas in the past, fighting against organized armed groups was fierce, nowadays the fighting capacity of the enemy is substantially weaker. Because of this new operational context, most operations conducted since 2008 are governed by blue cards and thus by the law enforcement paradigm. The army has expressed some dissatisfaction with this evolution. Armed forces are not accustomed to conduct law enforcement operations. They are of the view that these should rather be conducted by the police. Moreover, they have difficulties in understanding why blue cards should come into play when fighting against members of opposing organized armed groups. The air force is less critical regarding the Operational Law Manual, since the air force intervenes only under the red cards, i.e. when the situation pertains to the conduct of hostilities.

Not only did the 2009 Manual – together with the change in the operational context – lead to an increase in law enforcement operations, but the Manual transformed the whole system of intelligence. The intelligence system is now used to understand better the operational context and make sure that IHL and/or human rights law are respected. For instance, prior to a military operation in which lethal force is going to be used, the intelligence service conducts an assessment of the military necessity and proportionality of the planned action. The documents regarding the planning of an attack are secret only

until the operation has been conducted. After the operation, the military discloses publicly some of these planning documents. The latter can constitute useful tools of defence if military commanders are subjected to criminal prosecution.

On a practical level, the card system has also raised some questions regarding the equipment of soldiers. Colombian soldiers often just carry a rifle and do not have law enforcement equipment with them. The question as to whether soldiers should be provided with such equipment or whether the number of police officers should instead be increased is the subject of ongoing discussion in Colombia.

In October 2011, the Ministry of Defence established a committee to review the strategy used against the illegal groups that are still operating in Colombia. The committee comprises three sub-committees: one dealing with operational questions, another with intelligence and the third with the legal framework. The two first sub-committees have completed their work, while legal issues are still open to discussion. There is some controversy around the rules of engagement of the 2009 Manual. While some committee members advocate for keeping the blue and red cards, others suggest abandoning the card system and adopting one single set of rules along the following lines: 1) force can be used in self-defence; 2) apply an escalation of force procedure; 3) when facing a military objective, lethal force can be used immediately.

In conclusion, the system under the 2009 Manual has improved the situation in Colombia. Progressively, as armed groups get weaker and as the conflict de-escalates, situations where red cards are needed decrease and operations are going to be mostly conducted under blue cards.

Appendix 5: Summary of the presentation by Richard Gross¹

The use of force in the different phases of the conflict in Afghanistan

The conflict in Afghanistan was initially an international armed conflict between the Taliban government of Afghanistan and the United States of America and its allies. However, it turned quickly into a non-international armed conflict when the Taliban were successfully removed from power. After the Bonn Conference in 2001, the interim government under now-President Karzai came into being and the International Security Assistance Force (ISAF) coalition was created under Security Council Resolution 1386 (2001), as an independent multinational organisation in order to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas. On 11 August 2003, NATO assumed leadership of the ISAF operation and since then the coalition has operated as a formalised body under NATO. In October 2003, Security Council Resolution 1510 extended ISAF's mandate to cover the whole of Afghanistan.

Regarding use of force issues, it is difficult to provide a straightforward answer as to whether operations in Afghanistan were/are conducted under a law enforcement or conduct of hostilities paradigm. The answer to this question might very much vary from one country to another or even from one person to another.

The rules governing the use of force by the ISAF coalition are indeed complex and of diverse origins. Besides the ISAF Rules of Engagement (ROE) and ISAF policy, each of the (currently) 50 countries in the coalition applies its own national caveats,² taking into account its domestic law and its international obligations, such as the obligations under the European Convention on Human Rights. Different nations thus have different rules to follow, including in particular different self-defence rules. These different legal frameworks make the planning of operations a daily challenge.

Against that backdrop of an extraordinarily complex legal framework, ISAF had to put in place policies to shape the use of force to fit a counterinsurgency. While early in the Afghan conflict, back in 2001-2002, the use of force was typical of the conduct of hostilities, the operational environment later changed towards a counterinsurgency campaign in an effort to provide stability and support to the Afghan government in helping it to establish a safe environment to govern the country. In addition, some countries – including the United States of America – conduct “counter-terrorism” operations against groups like the Taliban or Al Qaeda which are still in Afghanistan conducting military operations.

In a counterinsurgency, it is absolutely critical to win the will of the people, since insurgents want the people to turn against the lawful government in order to gain control over the country. In this context, it appeared that, sometimes, the use of force in such a

¹ The contribution of Richard Gross was based upon his own experience at the strategic and operational level when he served in Afghanistan, notably as Chief Legal Advisor for the International Security Assistance Force (ISAF) and as legal advisor for US forces in Afghanistan in 2009 and 2010.

² As examples of caveats, there are countries which do not do operations at night; others cannot conduct counter-narcotics operations; etc.

setting was counterproductive to winning the hearts and minds of the people. For example, when ISAF forces came under armed fire from a building or compound, they would sometimes respond in self-defence, calling in an airstrike to destroy the building, consistent with the principles of military necessity and proportionality. This response, though lawful, was counterproductive because it would often turn the population against the coalition and result in more civilians supporting the enemy. This is the famous so-called “insurgent math”: killing two insurgents gives rise to ten more insurgents because the family and community of the two insurgents killed might take up arms against ISAF in response to the deaths.

In order to respond to this situation, in 2009, General McChrystal issued the tactical directive.³ This tactical directive was a policy mechanism, which was given to commanders and intended to make them think about the broader effects of certain operations. The directive led to a diminution of air strikes by requiring in many cases the soldiers to withdraw or use small arms fire instead. Although there were a number of controversies around this directive – since some people were of the view that it tied the hands of soldiers – the tactical directive has been effective in reducing significantly the number of civilian casualties.

A second policy measure has been developed in order to reduce the use of force at checkpoints. Frequently in contexts such as Afghanistan or Iraq, cars speed up when approaching a checkpoint. One may question whether this is a hostile act. Taking into account the possibility that a car speeding toward a checkpoint might contain an improvised explosive device (IED), the soldiers manning the checkpoint might indeed consider it a hostile act and react to it with lethal force. However, sometimes the drivers appear to be Afghan civilians, afraid to be arrested for drug trafficking or other crimes. In order to avoid civilian casualties, ISAF has organised special training for soldiers manning the checkpoints, on different procedures for indicating to a vehicle that it should stop (such as warning signs, the use of a laser pointer and speed bumps to slow down the cars). In addition, ISAF entered into a dialogue with Afghan civilians in order to understand better the underlying reasons for the practice of Afghan cars speeding up when approaching checkpoints. Despite these efforts, the issue remains a difficult one and there is ongoing work to improve the policy to respond to it.

A third situation where the use of force is at stake is when soldiers are confronted with drug lords. On this issue, the ISAF ROE, as well as the US ROE, are very clear: absent any other indicators that might make them a lawful military target, drug lords may not be targeted in a military operation. There might however be a counter-narcotics type operation to seize a drug lab or assist the Afghan authorities in seizing a drug lab, but these are normally law-enforcement operations. The problem is however that many drug lords are very closely tied to the Taliban, or sometimes even form part of it. In the latter case, a person might be targeted if he or she is otherwise a lawful military target. The fact that he or she is a drug lord may influence the priority of targeting, but does not render the person targetable as such.

³ Parts of the tactical directive are available at: http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (Last accessed on 1 October 2013).

A more general problem is whether a legitimate target may be killed if capture is possible (also called “capture versus kill”). On this issue, there is no specific written ISAF policy, but in practice operational commanders will prefer the capture of someone rather than his killing. The reason for this preference is one of policy: a captured person can be interrogated and will possibly provide useful intelligence. Even though under international humanitarian law (IHL) a legitimate target may be killed, in practice his capture will be preferred.

In brief, it can be said that in Afghanistan a number of policy measures have been put in place in order to reduce the use of lethal force beyond what is required by IHL and this has proved successful in many respects.

It shall also be kept in mind that soldiers are put in very difficult situations and have to take split second decisions. In that context, it is crucial that the legal framework to be applied remains straightforward and easy to understand because the situations often involve a matter of life or death.

Appendix 6: Summary of the presentation by Olga Chernishova

Recent Developments in the Case-Law of the European Court of Human Rights Related to the Issue of the Use of Force¹

The European Court of Human Rights regularly finds itself in situations where it is called to review the lawfulness of the use of force by States in situations of armed violence. Thus, it is no stranger to the vivid discussion on the interplay between applicable norms of the European Convention on Human Rights (“the Convention”) and international humanitarian law.²

Two provisions of the Convention are of particular relevance: Articles 1 and 2.

Article 1 of the Convention secures the rights and freedoms defined in it to ‘everyone within [the] jurisdiction’ of the contracting States. The Court has ruled that the State’s jurisdictional competence is primarily territorial (*Bankovic*³, *Al Skeini*⁴). Jurisdiction is presumed to be exercised normally throughout the State’s territory, except if a State is prevented from exercising its authority in part of its territory, such as during a military occupation by the armed forces of another State (*Loizidou*⁵, *Cyprus v. Turkey*⁶) or when a non-state actor controls a part of the territory.⁷ On the other hand, acts performed, or producing effects, outside state territories can constitute an exercise of jurisdiction within the meaning of Article 1, albeit only in exceptional cases. The judgment of the Court in the *Al-Skeini* case delivered in July 2011 provides the latest summary of the Court’s position in this regard and lists a number of factual situations falling into one of the two following exceptions: control over an individual and effective control of an entire region, such as in the case of a military occupation. In light of this, the Court decided in *Al-Skeini* that the UK’s military action in Iraq came into the jurisdictional scope of the UK. The latest developments seem to demonstrate that the Court is not prepared to construe exceptions to extraterritorial application of the Convention all too restrictively.

As regards Article 2 (the right to life), the Court’s approach to claims brought under this provision have been forged in a series of cases. These included notably cases dealing with the events in the south-eastern part of Turkey where the security forces had faced a violent confrontation with the Kurdish armed groups.⁸ Other important (although not

¹ The views and statements expressed are those of Olga Chernishova and are strictly personal. On the basis of this presentation an article in Russian and English was published in *Prava Cheloveka. Praktika Evropeyskogo Suda po pravam cheloveka*, N 1, 2013.

² For most recent and authoritative views on the subject, see J.-P. Costa and M. O’Boyle, “The European Court of Human Rights and International Humanitarian Law,” in D. Spielmann, M. Tsirli and P. Voyatzis (eds.), *La Convention européenne des droits de l’homme, un instrument vivant / The European Convention on Human Rights, a living instrument. Mélanges en l’honneur de/ Essays in honour of Christos L. Rozakis*, Bruylant, November 2011.

³ ECtHR, *Banković and others against Belgium and others*, 12 December 2001, para. 59.

⁴ ECtHR, *Al Skeini and others v. UK*, 7 July 2011, para. 131.

⁵ ECtHR, *Loizidou v. Turkey*, 18 December 1996.

⁶ ECtHR, *Cyprus v. Turkey*, 10 May 2001.

⁷ ECtHR, *Ilaşcu and Others v. Moldova and Russia*, 8 July 2004, para. 312; ECtHR, *Assanidze v. Georgia*, 8 April 2004, para. 139.

⁸ See, e.g. ECtHR, *Ergi v. Turkey*, 28 July 1998.

equal in their seriousness and number) groups of cases included complaints against the United Kingdom arising out of the conflict in Northern Ireland,⁹ the situation in Northern Cyprus,¹⁰ the events which had taken place in the former Yugoslavia,¹¹ military interventions abroad (Kosovo, Iraq) and, lately, of the events in the South Caucasus (those cases have been declared admissible but not yet adjudicated). Since the early 2000's, the Court was faced with allegations of grave and numerous human rights violations arising out of the events in the Russia Northern Caucasus region, of which the events in the Chechen Republic (Chechnya) constitute by far the most important group.

Many of the above-mentioned situations could arguably be labelled as armed conflicts in IHL terms. However, the European Court has been reluctant to qualify them so in order to avoid unnecessary controversy – especially where the States parties do not themselves qualify the situation as an armed conflict. The Court thus failed to invoke IHL rules or relied on them only in order to support its interpretation of the Convention provisions. Arguably, the Court might use IHL as *lex specialis* in case a State derogates from the right to life under Article 15 para. 2 of the Convention ‘in respect of deaths resulting from lawful acts of war’. However, no such derogation has ever been made, and thus, in principle, the right to life remains fully applicable. With respect to this issue, the second inter-state complaint lodged by Georgia against Russia, which relates to the international armed conflict that opposed these two countries in 2008, will no doubt be of particular importance. In fact, the two countries did not enter any derogation to the Convention and the Russian Government has challenged its very applicability to the events, invoking IHL as a *lex specialis*. In view of the central role this question will play in the determination of its competence to review the alleged violations, the European Court has reserved it until the merits stage of the proceedings.¹²

In its analysis of Article 2, the Court often starts with the establishment of facts, since a common feature of such cases is the incompleteness of the domestic proceedings. The Court uses a variety of legal instruments to this end. Fact-finding missions and hearings remain an option, although more and more often the Court relies on presumptions and, having established a *prima facie* case, shifts the burden of proof to the contrary to the respondent Government. This approach, coupled with the Court's “priority policy” which obliges it to process claims concerning the violations of core rights first, has resulted recently in numerous findings of Article 2 violations.¹³

Once the facts are established, the Court proceeds with an assessment of the lawfulness of the State's action. Although Article 2 of the Convention does not require expressly that the limitations to the right to life should be prescribed by law, the Court has interpreted the provision as implying that an adequate legal basis for the use of lethal force must exist.¹⁴ This has led to findings of violations of that provision when there has been no

⁹ See, e.g. ECtHR, *McCann v. United Kingdom*, 27 September 1995.

¹⁰ See, e.g. ECtHR, *Varnava and Others v. Turkey*, 18 September 2009; ECtHR, *Cyprus v. Turkey*, 10 May 2001.

¹¹ See, e.g. ECtHR, *Palić v. Bosnia and Herzegovina*, 15 February 2011; ECtHR, *Jularić v. Croatia*, 20 January 2001.

¹² ECtHR, *Georgia v. Russia (II)*, 13 December 2011, paras. 10 and 27.

¹³ Only in 2010 the Court has found 54 substantive violations of the right to life, of which Russia was responsible for 34.

¹⁴ See, e.g. ECtHR, *Nachova and others v. Bulgaria*, 6 July 2005, paras. 99-102.

adequate legal basis for the use of lethal force, especially in the course of relatively routine police operations. In situations involving intense or large-scale violence, the Court is ready to accept the applicability of at least one of the exceptions of paragraph 2.¹⁵

Then, the Court examines whether the authorities ensured that the application of lethal force was no more than ‘absolutely necessary’ in the situations of permissible exceptions, as listed in Article 2, paragraph 2,¹⁶ of the Convention. In this context, the planning and control of the operation is often the part causing the greatest difficulties. The recent *Finogenov v. Russia* case serves as a good summary of the applicable approach.¹⁷ The case dealt with the hostage-taking of the Moscow theatre by Chechen rebels in October 2002. The authorities decided to storm with a certain type of gas to render the persons inside the theatre unconscious. The operation resulted in the death of approximately 125 hostages. All hostage-takers were moreover shot by the security forces who entered the building after the gas had been used. The Court’s analysis was built around two principal legal arguments. First, it drew a clear distinction between the “operative choices” made by the authorities in crisis situations, such as those caused by terrorist violence, and subsequent rescue operations. Within this framework the Court concluded that the unknown gas (its exact composition was never disclosed) had been at least potentially lethal; it however refused to reconsider, in hindsight, the “strategic political choices” to apply it and the moment chosen for the storming. The second part of the analysis, in contrast, found that the rescue operation, over which the authorities had sufficient control, had not been planned and executed with the requisite need to “minimise incidental loss of civilian life.” The Court referred extensively to the famous *Isayeva v. Russia* case¹⁸ – concerning a military assault involving combat aviation at a village seized by a group of Chechen armed insurgents in 2000 – where the Court reiterated that the State’s responsibility under Article 2 may be engaged “where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising, incidental loss of civilian life.”¹⁹ In the *Finogenov* case, however, it did not review the operational choice of using a potentially lethal weapon and left to the State a margin of appreciation in this regard.

Where the State itself is not directly responsible for the loss of life, its obligations do not cease. Thus, Article 2 sometimes might require additional positive actions by the State. This obligation would arise where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual by a third party or himself and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.²⁰

¹⁵ ECtHR, *Isayeva v. Russia*, 24 February 2005, para. 180, ECtHR, *Giuliani and Gaggio v. Italy*, 24 March 2011, para. 196.

¹⁶ ECHR, article 2 prohibits the use of lethal force, except if it is absolutely necessary in three particular circumstances: 1) in defence from unlawful violence, 2) to effect a lawful arrest or to prevent the escape of a person lawfully detained; 3) in action lawfully taken for the purpose of quelling a riot or insurrection.

¹⁷ ECtHR, *Finogenov and others v. Russia*, 20 December 2011.

¹⁸ See *supra*, note 15

¹⁹ See also ECtHR, *Ergi v. Turkey*, 28 July 1998, para. 79.

²⁰ ECtHR, *Osman v. the United Kingdom*, 28 October 1998, para. 115. See also: ECtHR, *Abdurashidova v. Russia*, 8 April 2010, para. 79.

Finally, the first phrase of Article 2 that “everyone’s right to life shall be protected by law” has been interpreted by the Court so as to include a positive obligation to carry out an investigation into each violent loss of life. In 2010, for example, the Court found 64 violations of the obligation to investigate under Article 2 of the European Convention. This is a detachable obligation which may arise where no substantive violation of Article 2 has been found,²¹ or where it is outside of Court’s jurisdiction, for example on temporal grounds.²² This obligation is one of means and not of results. However, even in difficult security conditions, the importance accorded to the right to life and the obligation to protect it by law under Article 2 demands that minimal guarantees of promptness, effectiveness and impartiality be respected.²³

²¹ ECtHR, *Rantsev v. Cyprus and Russia*, 7 January 2010, para. 232.

²² ECtHR, *Varnava and Others v. Turkey*, 18 September 2009, para. 185; ECtHR, *Cyprus v. Turkey*, 10 May 2001, para. 130.

²³ ECtHR, *Al Skeini and others v. UK*, 7 July 2011, para. 168.

MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.



ICRC