

EDITORIAL

DELINEATING THE BOUNDARIES OF VIOLENCE

What does the legal regulation of armed conflict at the beginning of the twenty-first century look like? Is it legally permissible to target anyone, anywhere, with armed drones? Can and should States apply their own human rights standards when they are involved in a multinational operation abroad? When, if ever, would a cyber-operation amount to an armed conflict? Some of these questions come up time and again as we scroll through the daily news feed. They all relate to what we call the “scope of applicability” of the body of law regulating armed conflict – international humanitarian law (IHL) – and its interaction with other legal regimes.

Today, some of the foundational concepts of this set of rules are debated – and sometimes challenged – in view of the evolution of armed violence and the means and methods of warfare. At first sight, the modern face of conflict seems to challenge the construction of IHL. So-called “cyber-attacks” challenge our traditional understanding of war, as do other new technological developments, such as increasingly autonomous weapon systems.¹ With its dichotomies between “international armed conflict” (IAC) and “non-international armed conflict” (NIAC) or between “civilians” and “combatants”, IHL may seem at first sight ill-suited to deal with the complex shades of reality. As we see in the Democratic Republic of the Congo, Iraq or Syria today, contemporary armed conflicts often involve non-State armed groups; they may involve the intervention of one or more foreign State armed forces; some of those who fight tend to hide among the civilian population; private contractors are available to carry out functions traditionally performed by States; local conflicts often take regional or even international dimensions; some conflicts and situations of occupation tend to be protracted in nature, with no prospect of political settlement; and the civilian population continues to bear the brunt of the fighting and its consequences, including insecurity and collapse of the rule of law.

Furthermore, crimes – notably acts of terror – and the repressive measures adopted by States in response – to such acts are now often carried out using military means. They can be conducted on a large scale by actors who operate across different territories, facilitated by the use of technologies such as satellite imagery, drones or the Internet. Responsibility for attacks taking place in Kenya or the United States is claimed by groups operating from abroad and can trigger military operations and drone strikes in distant countries in response. The classic rhetoric and lexicon of warfare is often used by all sides to justify crimes and exceptional measures. Relayed by the media, overly simplistic war semantics may

add a layer of confusion to complex and multiform phenomena. In the face of these challenges, one might ask, how does IHL accommodate the political, military and humanitarian realities of today? Is it still fit for purpose?

As with all law, IHL is subject to interpretation, evolution and development. It cannot be applied in isolation of societal and political factors, of other legal regimes or of the changing nature of the very matter it seeks to regulate: armed conflict. The past decades have seen the continuation of the development of IHL, with major contributions brought in notably by treaty law, in particular regarding the regulation of weapons. We have also witnessed the level of protection afforded by the law of NIAC being brought closer to that of IAC. Considerable efforts have been invested in clarifying existing law through interpretative documents and other soft-law instruments such as codes of conduct.² Recently, the expanding role played by private military and security companies has been addressed by the Montreux Document, a commentary of which appears in the *Reports and Documents* section of this issue.

IHL is but one branch of international law, and others, importantly human rights law, also play a role during armed conflict. The interaction between IHL and human rights law has been discussed by many legal scholars in the *Review* and elsewhere. This has been accompanied by the development of rich jurisprudence of regional human rights bodies, such as the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human and People's Rights. It is virtually impossible to account for all available interpretations of the relationship between human rights law and IHL rules in times of armed conflict. Operationally, the difference in interpretations has found particular relevance in instances where States operate outside their own territories and/or vis-à-vis non-nationals. Col. Kirby Abbott discusses these tensions in this issue using the example of interoperability between troops from different NATO Member States.

The *Review* regularly publishes pieces by authors who go beyond the presentation of the law as it stands, taking stock of the existing applicable rules but also exploring new avenues for legal development. In recent years, the *Review* has devoted thematic issues to several specific debated areas: the application of the law to and by armed groups, in situations of occupation, by multinational forces, vis-à-vis medical personnel, and so on. The discussions in the journal have echoed the ongoing debates and the challenges to IHL raised by parties to modern conflicts, experts and scholars.

- 1 For an overview, see *International Review of the Red Cross*, Vol. 94, No. 886: "New Technologies and Warfare", 2012, available at: www.icrc.org/eng/resources/international-review/review-886-new-technologies-warfare/index.jsp (all internet references were accessed in March 2014).
- 2 See, for instance, Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, May 2009; *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Humanitarian Policy and Conflict Research, Harvard University, May 2009; *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge March 2013. For an example of a recent code of conduct, see the International Code of Conduct for Private Security Service Providers, available at: www.dcaf.ch/Project/International-Code-of-Conduct-for-Private-Security-Service-Providers.

This issue of the *Review* seeks to address various questions regarding IHL's applicability: What? Where? When? Who? The answers to these questions matter because they define the scope of the protection that IHL can afford to people in times of armed conflict, and for the International Committee of the Red Cross (ICRC) and other humanitarian actors, they define the normative framework and conditions under which such actors can assist and protect those in need. This issue of the *Review* will highlight how the most complex and nuanced debates on IHL actually relate to these simplest of questions.

To what does IHL apply?

As has been much discussed in recent times, “war” is a political concept, in contrast to the term “armed conflict”, which has legal meaning in contemporary IHL. In broad strokes, the use of force can be divided into IAC, NIAC and other situations of violence, the last of these not triggering the application of IHL. The debates around the material scope of IHL have recently focused on the relevance of the IAC–NIAC typology to capture the scenarios of today’s armed conflicts. It is a truism to write that NIACs represent the vast majority of armed conflicts today, and that the humanitarian consequences they engender, such as regional destabilization, refugee flows and the potential for escalation to inter-State conflict, can be significant. The typology of NIACs has also become increasingly rich over time, and imbued with correspondingly nuanced terminology: NIACs today are described as “spillover”, “multinational”, “cross-border”, “transnational” and so on. Each subcategory refers to a particular set of factual circumstances that would trigger the applicability of IHL. This being said, fundamentally there do not appear to be types of armed violence between organized parties today that would not be captured by the IAC–NIAC dichotomy.

Following 11 September 2001 and the subsequent US-led invasion of Afghanistan, some initially claimed that the United States and its allies were engaged in a new type of “global” conflict to which old rules could not apply. Subsequently, the law of NIAC was said to regulate the operations against “Al-Qaeda, the Taliban and associated forces” across multiple territories.³ Claus Kress argues in the *Debate* section of this issue that, in the context of the “war on terror”, IHL was invoked *in a permissive way*, in order to accomplish objectives that States would otherwise be restrained from accomplishing under a law enforcement paradigm.⁴

Conversely, in many other contexts, the trend is to frame many situations as acts of terrorism or domestic criminality, thus rejecting the applicability of IHL to situations which factually amount to armed conflicts. This narrative, branding all armed actors as criminals, can – and in fact already does – have implications for

3 *Hamdan v. Rumsfeld*, 548 US 57, 2006.

4 Claus Kreß, “Debate: The Regulation of Non-International Armed Conflicts: Can a Privilege of Belligerency Be Envisioned in the Law of Non-International Armed Conflicts?”, in this issue of the *Review*.

certain multinational operations. To define some operations not as participation in an armed conflict but simply as “counter-terrorism” or law enforcement measures is an approach that risks straining the acceptance of IHL’s applicability. Here again, the challenge seems to be not the content of IHL *per se*, but the policy choices behind its application.

Where does IHL apply?

The transnational character of armed violence has challenged the classical conception of an armed conflict being confined to a particular territory. Questions that come up time and again include the issue of whether IHL applies to the *entire* territory of the parties to the conflict, and if it applies extra-territorially, in particular on the territory of neutral or non-belligerent States.

Recently, the use of drones and operations involving special forces to carry out attacks against individuals or networks of individuals in various contexts around the world has given rise to heated debates on the applicable legal framework governing such operations. Discussions focus on the question of whether and in what circumstances targeting people with military means – with the possibility of causing harm to civilians and civilian objects – in any location on the planet is lawful under IHL. In this issue, Jelena Pejic analyzes, among other things, the geographical scope of NIAC under IHL in the context of drone strikes. She emphasizes the importance of a proper legal classification of each context in which drones are being used for targeted strikes, in order to determine whether or not IHL regulates such actions.

To whom does IHL apply?

With the increased involvement of multinational/peacekeeping forces in modern armed conflicts, the question of which States and international organizations can be considered a “party to” a conflict has repeatedly arisen; particularly challenging scenarios are the ones in which States have approved of a multinational military operation conducted by an international or regional organization and provide logistical support but do not participate in the hostilities. Are such States to be considered party to a conflict or not? The question is not purely semantic, as the armed forces have to know on the basis of which legal regime they will deploy and which rules will protect them. The *Review* addressed this topic in its previous issue on “Multinational Operations and the Law”.

We often look at IHL as a series of obligations rather than as a series of protections extended to people in war, including journalists, medical personnel and private entities. Importantly, IHL also applies to and protects humanitarian actors who offer assistance to affected populations. Such assistance traditionally depends on State consent for access to the populations in need. The ICRC’s “Q&A and Lexicon on Humanitarian Access” and Françoise Bouchet-Saulnier’s

Opinion Note provide two perspectives in this issue of the *Review* on the rights that IHL gives to humanitarian actors to provide assistance when the parties to the conflict themselves are unable to meet the needs of the populations under their control.⁵

When does IHL apply?

Two of the trickiest questions on the temporal scope of application of IHL are “when does an armed conflict begin?” (in other words, what is the threshold of violence necessary to bring about an armed conflict, thus triggering the applicability of IHL of IAC or NIAC) and “when does it end?” (related to but separate from the question of when all IHL-related obligations terminate).

Regarding the beginning of a NIAC, the International Criminal Tribunal for the former Yugoslavia (ICTY) jurisprudence has indicated the criteria that need to be taken into account.⁶ There are no similar indications in IAC law, and opinions may diverge as to when an IAC begins, mainly between the majority view that IHL applies as of the “first shot” fired (also known as the “Pictet theory”), and the theory that a higher threshold of violence is necessary – in other words, that only a certain level of intensity in the use of force would trigger the applicability of IHL to an IAC.⁷ The end of an IAC is arguably more straightforward to determine, though there is much commentary and confusion regarding the expressions “cessation of active hostilities” and “general close of military operations”. Marko Milanovic and Julia Grignon both highlight the complexity of interpreting the end of a NIAC, and the legal consequences engendered by a “declassification” of a conflict.

How should IHL be interpreted?

Year in, year out, the scope of protection that IHL affords to those affected by armed conflicts has continued to expand. Overall, IHL concepts stand the test of time because they are practical and adaptable. True, IHL does not provide a universal formula for when, where or for how long its rules apply. Today’s conflicts also continue to require additional efforts not only to explain the law and reassert it wherever its protections are challenged, but also to identify gaps and possible areas of development. But it seems that the key concepts of IHL have repeatedly been tested against the challenges of armed conflicts, including in the last two

5 See previously Emanuela-Chiara Gillard, “The Law Regulating Cross-Border Relief Operations”, *International Review of the Red Cross*, Vol. 95, No. 890, pp. 351–382.

6 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, paras 561–568; see also ICTY, *The Prosecutor v. Fatmir Limaj*, Case No. IT-03-66-T, Judgment, 30 November 2005, para. 84.

7 International Law Association, *Use of Force: Final Report on the Meaning of Armed Conflict in International Law*, report, 2010, available at: www.ila-hq.org/en/committees/index.cfm/cid/1022.

decades. IHL rules seem to have operated as a backbone: rigid enough to make the body stand, yet flexible enough to allow for movement.

In international law, States play a key role in interpreting existing law and initiating new developments. The *Review* asked for the perspective of Richard Gross, the Legal Adviser to the Chairman of the US Joint Chiefs of Staff, on the lessons learned by the United States since the 2001 invasion of Afghanistan and subsequent armed conflicts there and in Iraq. In his opening interview in this issue of the journal, he provides insights into combating terrorism in the framework of armed conflict, importantly pointing out the growth in understanding of the role played by the ICRC in providing neutral and independent humanitarian assistance.

For its part, the ICRC has always attempted to stay abreast of developments in the nature of warfare and seek the humanitarian solution, including in the law. Since 2003, the ICRC has been regularly taking stock of the challenges to IHL in its reports presented every four years at the International Conference of the Red Cross and Red Crescent (“International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”). The purpose of these reports is “to generate reflection and debate on a number of current challenges in the field of IHL identified by the [ICRC] and to outline prospective ICRC action aimed at clarifying and developing IHL”.⁸

Where the nature of conflict evolves, it creates unprecedented new problems. For each new development, the ICRC has to carefully assess whether IHL applies, and if so, which IHL rules apply exactly: those of IAC or those of NIAC. Do drones, cyber-warfare, the use of private contractors or attacks far from the battlefield as traditionally understood really unmask gaps in the law, or can we deal with them by interpreting existing rules? The debate over terrorism prompted the ICRC to focus on the reaffirmation of certain aspects of the law, while accepting the need to clarify or develop other aspects, such as procedural safeguards for internment or administrative detention,⁹ or the notion of direct participation in hostilities.¹⁰ The ICRC is currently also engaged in a major project to update its Commentaries to the 1949 Geneva Conventions and 1977 Additional Protocols, capturing the developments in the practice of IHL since the drafting of the previous commentaries in the 1950s and 1980s respectively.¹¹

In some areas, complex interpretations of the law are – and will remain – required in view of the ever-changing reality of collective violence. Discussions on

8 See above note 3. See also the 2003 report, available at: www.icrc.org/eng/resources/documents/misc/5xrdcc.htm; and the 2011 report, available at: www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm. For further interest, see the “Contemporary IHL Challenges” series on the *Intercross* blog, available at: <http://intercrossblog.icrc.org/law-and-policy>.

9 See Jelena Pejic, “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence”, *International Review of the Red Cross*, Vol. 87, No. 858, 2005.

10 See N. Melzer, above note 2.

11 See Jean-Marie Henckaerts, “Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the Twenty-First Century”, *International Review of the Red Cross*, Vol. 94, No. 888, pp. 1551–1566.

the scope of the law regulating that reality often feature multiple, sometimes opposing interpretations. As legal interpretation can be tainted with ideological, political or strategic motives, this raises the question of what should serve as a compass in this endeavour. In this context, it may be useful to recall, at least as far as treaties are concerned, the principle of good faith in interpretation, in keeping with the object and purpose of the rules in question.

It is nevertheless important to recall that the answer cannot be found in the legal field only. It is common to read that today's crises are "complex" or "increasingly complex". It may not be that the crises we face today are fundamentally more complex than, say, the Second World War, the Cold War or decolonization. Likely, it is our capacity to better understand their multidimensional nature and the need to find durable solutions which is at play.

Paradoxically, we now possess more expertise and tools than ever to address crises, yet we live in a time where there is little appetite for complexity and where leaders seem to favour short-term, emotional and reactive postures over drawing a vision of the future. In order to create an environment conducive to respect for the law, it remains key not only to work at the legal level but also to include the legal considerations in a broader policy dialogue with authorities, directly and indirectly through civil society and – most importantly – in investing in long-term IHL education and prevention of crimes.

The most important question to ask when applying the law to armed conflict remains, "why?" What do we have the law for? The sophisticated legal discussions that we have on IHL and other regimes today should not obscure what this is all about: the protection of the life, dignity and property of people. Faced with the legal reasoning of the defendants to justify acts of plunder and spoliation, the Nuremberg Tribunal felt the need to assert that "it is essential to point out that acts forbidden by the laws and customs of warfare cannot become permissible through the use of complicated legal constructions".¹²

In order to be applicable by weapon bearers in the heat of the battle, there is a need for interpretations of IHL to offer clear and practical solutions for the realities in the field, respecting the inherent balance between humanitarian imperatives and military necessity. The "principles of humanity and the dictates of public conscience"¹³ are the bedrock of IHL. Delineating the complex shape and scope of the law is thus "simply" about defining the boundaries of violence – the limits beyond which humanity must prevail.

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12 *Krupp Trial* (Trial of Alfred Felix Alwyn Krupp von Bohlen und Halbach and eleven others, United States Military Tribunal sitting at Nuremberg, 17 November 1947–30 June 1948), United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. 10, 1949, pp 130–159, excerpt available at: www.icrc.org/casebook/doc/case-study/united-states-nuremberg-krupp-case-study.htm.

13 Additional Protocol I, Art. 1.2.