

**EXPERT MEETING ON THE RIGHT TO LIFE IN
ARMED CONFLICTS AND SITUATIONS OF
OCCUPATION**

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Abbreviations

API I	- First Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts
API II	- Second Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of Non-international Armed Conflicts
CAT	- United Nations Committee Against Torture
ECHR	- European Court of Human Rights
FARC	- Fuerzas Armadas Revolucionarias de Colombia
GCs	- Geneva Conventions of 1949
GC III	- Geneva Convention Relative to the Treatment of Prisoners of War
GC IV	- Geneva Convention Relative to the Protection of Civilian Persons in Time of War
HRC	- United Nations Human Rights Committee
HRL	- International human rights law
HRs body	- Human rights law body
IAC	- International armed conflict
ICCPR	- International Covenant on Civil and Political Rights
ICESR	- International Covenant on Economic, Social and Cultural Rights
ICJ	- International Court of Justice
ICRC	- International Committee of the Red Cross
IHL	- International humanitarian law
NIAC	- Non-international armed conflict
OP	- Occupying Power
PKK	- Partiya Karkeren Kurdistan (Kurdish Workers` Party)
POW	- Prisoner of War
UK	- United Kingdom
UN	- United Nations
US	- United States

Executive Summary

The purpose of the meeting was to examine the differences between how international humanitarian law (IHL) and international human rights law (HRL) govern the taking of life in situations of occupation and non-international armed conflict (NIAC) with a view to bridging these differences to the degree possible.

Interpretation of the right to life in armed conflicts by human rights bodies

The major human rights bodies (UN Human Rights Committee, European Court of Human Rights, Inter-American Commission and Court of Human Rights) have applied HRL rules on the use of potentially lethal force in situations of armed conflict and occupation. Under HRL the State may only resort to the use of potentially lethal force where absolutely necessary and may only use that amount of force which is necessary to deal with the threat posed. The State is under an obligation to attempt to effect an arrest wherever possible. This standard applies both at the planning and the on-the-ground action phases of an operation: the State must plan its operations so as to maximize the opportunity to effect an arrest, and forces responding to a threat must attempt to arrest those posing the threat whenever possible.

Use of potentially lethal force in occupation

Relatively “calm” occupation

The law of occupation does not explicitly regulate the Occupying Power’s use of force. The experts agreed that human rights law rules govern the use of force by an Occupying Power where its forces carry out functions aimed at maintaining public order and safety. All but two experts agreed that this model also governs the Occupying Power’s response to hostile acts threatening its security. Nearly all the experts agreed that enemy combatants cannot be targeted on sight by the forces of the Occupying Power where there has not been an “outbreak” or “resumption” of hostilities.

Resumption or outbreak of hostilities

It was agreed that hostilities will be governed by the applicable rules of IHL provided that a certain type or degree of violence occurs. Where the *hostile activity is by members of the armed forces of the occupied country*, the IAC “resumes,” and IHL relating to the conduct of hostilities in IAC applies to the specific place concerned and for as long as the occupied armed forces continue their hostile actions. Where the *hostile activity is by a resistance movement* in the occupied territory, IHL is not clear as to the threshold to be reached for the IHL rules on the conduct of hostilities to apply. The experts felt that they needed to invent one and agreed that the threshold for determining the existence of a Common Article 3 NIAC provided a very workable threshold.

Targeted killings

The experts agreed that such killings would generally be unlawful in occupied territories since the Occupying Power would exercise sufficient control to implement the law enforcement model and attempt to arrest persons who pose the threat. There may be areas in occupied territory, the experts observed, that are not administered by the Occupying Power either because it has agreed to confer authority for the area to the local population or because it has lost control over the area. The experts concluded that on the basis of Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials that targeted

killings are not necessarily unlawful in occupied territory (1) where they are carried out by the Occupying Power in an area where the Occupying Power does not exercise effective control such that the Occupying Power cannot reasonably effect an arrest of the individual, (2) where the Occupying Power has sought to effect the transfer of the individual from whatever authority is in effective control of the area, assuming there is such an authority, (3) where the individual has engaged in serious, life-threatening, hostile acts and the Occupying Power has reliable intelligence that the individual will continue to commit such acts, acts which threaten the lives of persons the Occupying Power is under an obligation to protect and (4) where other measures would be insufficient to address this threat. The experts further agreed that given the serious risk of abuse, the law imposes a number of crucial, procedural requirements where the Occupying Power undertakes to carry out a targeted killing.

Relationship between HRL and IHL in non-international armed conflicts

The experts disagreed as to whether there are clear categories of combatants and civilians under the IHL of NIAC. Most of the experts were of the view that, given the (1) lack of consensus as to whether there exists a category of rebel “combatants” and (2) given the lack of clarity under the current law as to what constitutes direct participation in hostilities, the law enforcement model provided under HRL actually provides greater clarity as to when a State’s forces can exercise potentially lethal force against rebel fighters. The experts observed that, under the jurisprudence of the major human rights bodies, HRL takes cognizance of the situation of NIAC and thus does not require a State to respond to rebel forces in an unrealistic way: where the State’s forces are able to effect an arrest, they are so required; where these forces cannot, i.e., because they operate in territory over which the State has no effective control, the State is permitted to take those military measures which are necessary to deal with the threat posed by rebel groups. Some experts expressed concern that such an obligation to arrest rebels where possible perpetuated the so-called revolving door and a situation of inequality of belligerents in NIAC, although others disagreed with this assessment. All the experts noted, however, that this HRL legal regime addresses how a State can respond to the threat posed by rebels without creating categories of people who can be targeted and killed on sight as under the IHL of IAC.

A. Introduction

The purpose of this meeting was to examine the differences between the human rights law on the right to life and the rules of international humanitarian law which have the effect of permitting the loss of life in situations of occupation and non-international armed conflict, with a view to bridging these differences to the degree possible. This report reproduces presentations made during the meeting and provides a summary of the main points that emerged during the discussions.

The meeting brought together experts in both international humanitarian law and international human rights law, all attending in their personal capacity. While a list of the participants is provided in the Annex, the meeting was otherwise conducted according to the Chatham House Rule, which provides that “participants are free to use the information received, but neither the identity nor affiliation of the speaker(s), nor that of any other participant, may be revealed.” Accordingly, in relating the discussions that occurred during the meeting, this report does not attribute any of the opinions expressed.

* * *

The University Centre for International Humanitarian Law (UCIHL) would like to thank the Directorate of International Law of the Swiss Federal Department of Foreign Affairs (DFA) for providing the funds which enabled this meeting to take place.

B. Human Rights Law on the right to life and the use of potentially lethal force

1. The law enforcement model: necessity, proportionality and the obligation to arrest where possible

With respect to the use of potentially lethal force, HRL provides what the experts referred to as the law enforcement model. There are two main features to this regime, as it has been developed by the three major HRs bodies and by State practice generally. First, the use of potentially lethal force is restricted to a narrow range of circumstances. Likewise, the use of potentially lethal force must be proportionate; it must be limited to addressing the threat which is posed. The other main feature of the law enforcement model is that, where possible, State officials must arrest rather than kill persons who are posing a threat. Likewise, States must plan their operations so as to maximize the chances of being able to effect an arrest. In this respect, the law enforcement model provided by HRL differs from the IHL rules on the conduct of hostilities in IAC, which provide, of course, that potentially lethal force may be used against enemy combatants, i.e., such combatants may be targeted, regardless of whether they could be captured or arrested.

2. Relevant issues addressed by three major human rights bodies

These are the fundamental features of the law enforcement model as understood by all the experts. The meeting began with two experts providing overviews of the jurisprudence of three major HRs bodies: the UN Human Rights Committee (HRC), the European Court of Human Rights (ECHR), and the Inter-American Commission and Court of Human Rights. These presentations illustrated these two main features of HRL's law enforcement model. Also, these presentations addressed the following issues: 1) how these HRs bodies have formulated the basic rules on the use of potentially lethal force on the basis of the different HRL treaties they are charged with interpreting; 2) how they have interpreted and applied the rules; 3) to what extent they have dealt with cases arising out of situations of IAC, occupation or NIAC, and how each they took the situation into account; 4) and the extent to which they have applied IHL in such situations.

3. Overview of the jurisprudence of these three major human rights bodies

a) The UN Human Rights Committee

One expert made a presentation on the jurisprudence of the HRC. This expert began by noting that the textual basis of the HRC's jurisprudence is Art. 6 of the International Covenant on Civil and Political Rights (ICCPR), which provides that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."¹ Given that there is no applicable limitation clause with respect to Art.

¹ U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

6, most of the jurisprudence regarding the use of potentially lethal force effectively hinges on the word “arbitrarily.” Nevertheless, the HRC has found that the use of potentially lethal force can be in violation of the second sentence of Art. 6 as well. The communication of *Guerrero v. Colombia*, this expert noted, illustrated these two types of violations of Art. 6.² Here, the Colombian police believed that a hostage had been taken by a group of rebels to a particular house; when the police discovered that, in fact, no hostage had been taken, they nevertheless waited outside the house and shot rebels as they arrived there. The HRC found this use of force to be a violation in the sense of “arbitrarily” depriving life, since it was disproportionate to the requirements of law enforcement. These rebels probably could have been arrested, and thus there was no need to use lethal force as the police did. The HRC laid out several factors for determining whether the use of force is proportional: whether a warning or opportunity to surrender is given; whether the use of force is in self-defence or in defence of others; whether the use of force is necessary to prevent escape; and whether the persons targeted are deprived of the protection of due process of law. The HRC also found a violation of the second sentence of Art. 6, which requires that the right to life be “protected by law.” The HRC considered the legal framework established by the State within which potentially lethal force could be used. Colombia had enacted legislation under which police could not be prosecuted for deaths which occur during police operations. As this expert noted, this law granted to police a sort of impunity, a veritable “license to kill.”

This expert also reviewed the relevant jurisprudence of the HRC as set out in its General Comments and Country Reports. In General Comments 6 and 14 the HRC considered the very existence of war in terms of the right to life.³ In its 2003 Country Report on Israel, the HRC set out very clearly the State’s obligation under HRL to arrest where possible: “[b]efore using deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.”⁴

The *Guerrero* Communication arose in the context of the so-called dirty war conducted by Colombia against the rebel M-19 Movement, an arguable NIAC meeting the threshold set out in Common Article 3 of the GCs. The HRC did not, however, take the existence of this IHL situation into account. In the 2003 Country Report on Israel, the HRC addressed Israel’s policy of targeted killings in the occupied territories, an occupation situation as well as a possible armed conflict, whether a NIAC or an IAC. Here, as this expert noted, the HRC did appear to take the armed conflict situation into account to insofar as seemed to accept, at least to some extent, Israel’s framing of the issue in IHL terms. Israel had argued that its targeted killings had respected the “principle of proportionality” and had only targeted persons “taking a direct part in hostilities.” Ultimately, however, the HRC did not apply IHL rules on the conduct of hostilities; rather, it held Israel to the HRL standard requiring an arrest to be made where possible. In the opinion of this expert, the HRC has not systematically addressed how the right to life is to be applied in situations of occupation and IAC; rather, it is yet unclear whether and how the HRC would apply IHL or otherwise use IHL in order to interpret what constitutes an arbitrary taking of life under Art. 6.

² Communication n° R.11/45 (5 February 1979), UN Doc. Supp. No. 40 (A/37/40) (31 March 1982), para 13.3.

³ General Comment 6 on Art. 6, The Right to Life, U.N. Doc. HRI\GEN\1\Rev.1 at 6 (1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 6 (1994); General Comment 14 on Art. 6, War and Nuclear Weapons (1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 18 (1994).

⁴ Concluding Observations of the Human Rights Committee: Israel, CCPR/CO/78/ISR (21 August 2003), para.15.

Another expert agreed that the HRC's analysis in this Country Report on Israel was a purely HRL / law enforcement model type of analysis. Yet another expert, however, felt that the HRC's analysis here combined elements of IHL with HRL.

The International Court of Justice (ICJ) in the 1996 *Nuclear Weapons* Advisory Opinion referred to the IHL rules on conduct of hostilities as constituting the *lex specialis* where interpreting the meaning of "arbitrarily" in Art. 6 of the ICCPR in the context of the use of nuclear weapons.⁵ The ICJ reaffirmed this interpretation more recently, of course, in the *Palestinian Wall* Advisory Opinion,⁶ though, in the opinion of all the experts, the Court's conception of *lex specialis* is far from clear. In contrast to the ICJ, the presenting expert noted that the HRC has never explicitly affirmed the *lex specialis* nature of IHL in armed conflict; rather, the HRC has accepted only the complementary character of IHL in its General Comment 31.⁷

b) The European Court of Human Rights

This same expert also made a presentation on the ECHR. The right to life is contained in Art. 2 of the European Convention on Human Rights, which provides exhaustively the three purposes for which potentially lethal force may be used: "(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."⁸ Art. 2 also makes clear that, where force is used for one of these purposes, no more force may be used than is "absolutely necessary."

The ECHR's interpretation of Art. 2, this expert noted, was laid out in the *McCann* case, where the Court held that "the force used must be strictly proportionate to the achievement of the aims set out in" Art. 2(2).⁹ This standard of strict proportionality has been applied by the Court using a three step test: the Court will ask 1) whether the force was used for one of the law enforcement aims set in Art. 2(2); 2) whether the level and kind of force employed was absolutely necessary to achieve the declared aim, and 3) whether the level and kind of force employed was proportionate to the importance of the government's declared aim.

In the opinion of this expert, the first question has been largely formal, i.e., whether the government pleaded a legitimate Art. 2(2) law enforcement aim. In addressing this second question, the Court has set out the standard requiring that an arrest be made whenever possible: killing a suspected criminal is never permitted unless capturing him would pose too great a risk to the government's law enforcement officials or to other members of society. The third question concerns the proportionality of the use of force. The Court, this expert noted, has ruled out the use of force against certain individuals regardless of the fact that the use of force against them might literally fall within the meaning of Art. 2. The Court has held that "recourse to potentially deadly force cannot be considered "absolutely necessary" when it

⁵ *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996, paras. 24-25.

⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, paras. 104-106.

⁷ General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 11.

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222.

⁹ *McCann v. United Kingdom*, ECtHR, App. No. 18984/91, Judgment of 5 September 1995, para. 149.

is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence.”¹⁰

With respect to the proportionality analysis employed by the ECHR, another expert pointed out that proportionality under HRL is not the same as proportionality under IHL. First, in HRL, we are not concerned with proportionality in relation to a military objective but rather with proportionality in relation to the protection of the right to life. Proportionality in HRL is really a matter of necessity, this expert maintained, and the ECHR test requires absolute necessity.

The presenting expert also observed that, in applying this interpretation of Art. 2, the Court has distinguished between the planning and the on-the-ground action phases of operations. The Court did this clearly in the *McCann* case. There, British soldiers shot and killed several members of the IRA. The soldiers had been briefed that these IRA members were likely to detonate a car bomb with a push-button detonator. This intelligence was in fact erroneous. The Court found a violation of the right to life at the planning but not at the on-the-ground action phase. That is, for the soldiers on the ground, it may have appeared “absolutely necessary” to shoot and kill these IRA members, since they believed the latter were about to detonate a bomb. The State had violated the victims’ right to life at the planning stage, however, by conveying the erroneous intelligence to the soldiers and by allowing the operation to progress to a point where arrest was no longer possible. The HRL standard requiring arrest must be applied at both the planning and on-the-ground action phases of an operation.

The ECHR, therefore, this expert noted, has applied this same doctrine, the law enforcement model, to both armed conflict and occupation situations: in Northern Ireland, e.g. in *McCann*, which was arguably a Common Article 3 NIAC; in south-eastern Turkey, a clear Common Article 3 NIAC; and Chechnya, arguably an AP II NIAC. This expert pointed out that, in the *Isayeva* case arising out of the NIAC in Chechnya, the ECHR described a battle between Russian forces and over 1000 Chechen rebels; the Court described the insurgents as manifesting “active resistance to...law enforcement bodies” and criticized the armed forces for failing to exercise “the degree of caution expected from a law-enforcement body in a democratic society.”¹¹ This expert observed that the ECHR has never applied this doctrine in an IAC, though other experts noted later that it has addressed the right to life, at least in terms of a State’s obligation to conduct investigations into disappearances which occur in life-threatening circumstances, in the situation of occupation arising out of the IAC between Cyprus and Turkey.

With respect to the use of potentially lethal force, the ECHR has thus never applied IHL, at least explicitly. Nevertheless, this expert noted, in cases arising out of south-eastern Turkey, the Court has applied HRL rules which require measures not unlike the precautionary measures required under IHL. Another expert agreed that the Court had required the State to take what amounted to precautionary measures in cases arising out of south-eastern Turkey and Chechnya,¹² though this expert felt this aspect of the jurisprudence would be more coherent, were the court to take IHL into account more consciously.

¹⁰ *Nachova v. Bulgaria*, ECtHR, App. Nos. 43577/98 and 43579/98, Judgment of 6 July 2005, paras. 15, 107.

¹¹ *Isayeva v. Russia*, ECtHR, App. No. 57950/00, Judgment of 24 February 2005, paras. 180, 191.

¹² *Isayeva*, supra, paras. 176, 189; *Mahmut Kaya v. Turkey*, ECtHR, App. No. 2253593, Judgment of 28 March 2000, paras. 85 et seq.

Another expert agreed that, where the ECHR deals with the right to life in the context of a NIAC, it applies Art. 2 in the same straightforward manner it would outside of the context of an armed conflict.

Another expert confirmed the observation that the ECHR has never applied IHL, referring, in fact, to the Court's "ostrich mentality" when it comes to IHL. Even where IHL arguments are pleaded, and even where pleaded in such a way as to reinforce a HRL analysis, this expert pointed out, the Court will not resort to IHL in order to interpret the meaning of the right to life under Art. 2. In the opinion of this expert, the ECHR has no business determining violations of IHL. Rather, the worry is that the Court's failure to take IHL into account threatens the coherency of its case-law on the right to life as well as the case-law's consistency with IHL.

While the Court does not take IHL into account, in the opinion of this same expert, the fact of an armed conflict has nevertheless had a bearing on the way the ECHR has dealt with cases. The Court will take note that the facts of the case have arisen in the context of an armed conflict, using the term armed conflict explicitly. Further, this expert pointed out, where the State's forces resort to the use of potentially lethal force in the context of an armed conflict, the Court will tend to assume the lawfulness of the decision to resort to the use of force. In other words, given the situation of an armed conflict, the Court will no longer ask whether the resort to force was lawful; it will simply proceed to consider whether the use of force was proportionate. In some sense, this is a matter of the pleadings, since, where the government alleges there was a clash between rebel and government forces, the Court will assume this clash did occur, at least where the complainant cannot prove that the clash did not occur. This was true, this expert observed, in the case of *Isayeva*, where the Russian government alleged that its forces had come under attack from a convoy, though it presented little evidence that this had, in fact, happened.¹³ This expert also pointed out that, more generally, the ECHR has a tendency of ignoring some of the questions which are pleaded. In the view of this expert, this is likely because the Court has concluded in such cases that it will find a violation on another basis.

Of course, this point concerning the Court's tendency to assume that the State's resort to force was lawful comports with the earlier observation that the first step in the ECHR Art. 2 analysis is largely formal.

This same expert also observed that the standard requiring that an arrest be made where possible is not entirely relevant in all cases, i.e., situations of quelling riots and insurrections. Here, this expert pointed out, the State is not thinking in terms of arrest. In such cases, another expert observed, the question would be one of the precautions taken, whether the government's response was proportionate, and whether its actions were absolutely necessary. This expert cited the example of the *Güleç* case, where Turkish police fired on demonstrators even though there was no evidence that the demonstrators had fired on the police; the Court held that this response was excessive.¹⁴

The presenting expert addressed a final issue with respect to the ECHR jurisprudence on the right to life: the possibility of derogations. Under both the ICCPR and the American Convention on Human Rights, States are not permitted to derogate from those provisions

¹³ *Isayeva v. Russia*, ECtHR, App. No. 57950/00, Judgment of 24 February 2005; *Isayeva, Yupova and Bazazeva v. Russia*, ECtHR, App. Nos. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005, para. 181.

¹⁴ *Güleç v. Turkey*, ECtHR, Judgment of 27 July 1998, 28 Reports 1998-IV, fasc. 80, paras. 69-73.

guaranteeing the right to life. Under the European Convention of Human Rights, however, States are permitted to derogate from the right to life “in respect of deaths resulting from lawful acts of war.”¹⁵ This expert pointed out, however, that such a derogation under the European Convention need not be read as permitting all actions which would be permissible under IHL, because no derogation is permitted unless “strictly required by the exigencies of the situation.” Whether the standard for exercising lethal force of “strictly required” in an emergency situation might be less stringent than the normal “absolutely necessary” standard has never been clarified by the ECHR.

No State, this expert observed, has ever derogated from the right to life. One possible explanation forwarded was that, while a derogation to the right to liberty requires only that a State declare a public emergency, a derogation from the right to life under the European Convention would require the State to declare that it is involved in a war, and States have generally not been willing to concede that they are engaged in internal armed conflicts: the UK, Turkey and Russia have all maintained that their forces are conducting law enforcement operations. Another expert further pointed out that States often fear that acknowledging a situation of NIAC implies a sort of recognition of the rebel group as a belligerent. While the law has gone to great lengths to alleviate this fear, beginning with Common Article 3, States are nevertheless very reluctant to operate openly under the law of NIAC due to this fear of creating some sort of status for the rebel fighter.

A number of experts doubted whether this derogation possibility under the European Convention was ever meant to encompass the situation of NIAC, especially as NIAC was never referred to as “war” when the Convention was drafted.

One expert asserted that, in the view of States, there is no need for a State to derogate from the Convention in order to engage in an armed conflict and kill enemy combatants or fighters in either IAC or NIAC. The application of IHL is automatic.

c) The Inter-American Commission and Court of Human Rights

A different expert made a presentation on the jurisprudence of the Inter-American Commission on Human Rights and Court of Human Rights. This expert began by noting that the relevant provision on the right to life in Art. 4 of the American Convention on Human Rights makes use of the same wording as the ICCPR: “No one shall be arbitrarily deprived of his life.”¹⁶ The American Convention does not exhaustively enumerate the grounds for which potentially lethal force may be used, though this expert asserted that the term “arbitrarily” allows for the use of force for, at least, the three grounds listed in the European Convention. Both the Commission and the Court, this expert noted, have often referred to the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and applied these standards before they were adopted by the UN General Assembly. These grounds are listed in Principle 9, which also limits the use of force to what is strictly necessary

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 grave threat to life, to arrest

¹⁵ Art. 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222.

¹⁶ American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123

a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional use of firearms may only be made when strictly unavoidable in order to protect life.¹⁷

The controlling standards for the use of force for the Commission and Court, this expert explained, have been necessity and proportionality. With respect to proportionality, the Commission and Court face the same problem as the other HRs bodies: proportionality is difficult to measure. This expert cited a couple of cases. The *El Frontón* case involved a prison riot in Peru.¹⁸ In order to cope with the riot, the Peruvian authorities demolished the prison with prisoners inside it. In the *Brothers to the Rescue* case, a Cuban MiG 29 fighter plane shot down a small civilian aircraft which had allegedly violated Cuban airspace.¹⁹ The Court held that the State's response in both cases was utterly disproportionate. The problem, this expert noted, is that in such cases where the response is so egregious, it is easy to reach a finding of disproportionality. In closer cases, this expert pointed out, the Court will tend to shy away from the proportionality analysis, leaving much to be done in terms of jurisprudential elaboration.

While the ECHR has never, at least explicitly, taken IHL into consideration, a number of experts observed that the both the Inter-American Court and Commission have. And of the two, the presenting expert noted, the Commission has done so more assertively. The Commission has consistently applied "principles derived from IHL," and has addressed issues such as the execution of persons *hors de combat*, the principle of distinction and the prohibition against indiscriminate attacks in its country reports. The Commission will not determine violations of IHL but rather will interpret the right to life under HRL by reference to IHL. This expert gave the examples of the *Tablada* case, which involved an attack by a group of civilians against a military barracks in Argentina,²⁰ and the *Bámaca-Valásquez* case, which involved the capture and execution of a rebel leader.²¹ In the latter case, this expert pointed out, the Commission held that it could take certain provisions of the Geneva Conventions into account in order to reach its decision. Observing that the Commission there went very far toward applying IHL directly, another expert questioned whether the Commission had gone farther in this direction than the Court would be willing to go. The presenting expert responded that, indeed, the question of just how far IHL can be used to interpret the right to life under the American Convention is still something of an ongoing debate between the Court and the Commission.

¹⁷ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, and adopted by the General Assembly in Res. 45/166, 18 December 1999, para. 4 (The General Assembly "welcomes the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials..., and invites Governments to respect them and take them into account within the framework of their national legislation and practice.")

¹⁸ *Neira Alegria et al. v. Peru*, Inter-American Court of Human Rights, Judgment of 19 January 1995, Series C, No. 20, para. 69.

¹⁹ *Brothers to the Rescue case*, or *Armando Alejandro Jr. and Others v. Cuba*, Inter-American Commission on Human Rights, Case No. 11.589, Report No. 86/99, 29 September 1999, Annual Report of 1999, paras. 37, 45.

²⁰ *Tablada case* or *Juan Carlos Abella v. Argentina*, Inter-American Commission on Human Rights, Case No. 11.137, Report No.55/97, 30 October 1997, Annual Report of 1997, paras. 157 et seq.

²¹ *Bámaca-Velásquez v. Guatemala*, Inter-American Court of Human Rights, Judgment of 25 November 2000, Series C, No. 70, para. 204 et seq.

4. Case-law of the International Court of Justice on the applicability of HRL in situations of armed conflict and occupation

The experts observed that the ICJ has held in the *Palestinian Wall* Advisory Opinion that HRL applies in occupied territory. The case stands for the proposition that, where a State exercises effective control, HRL applies to its actions. One expert pointed out, however, that the ICJ was not dealing in that case with a situation where the Occupying Power is not exercising effective control, giving the example of the fighting in Fallujah in November of 2004. The Court's holding, in this expert's opinion, does not necessarily mean that HRL would apply in such a situation. Another expert also expressed the view that the Court's holding in the *Palestinian Wall* case does not really bear on the question of the use of potentially lethal force in an occupied territory.

The experts also discussed the earlier *Nuclear Weapons* Advisory Opinion in their discussion on the meaning of *lex specialis*, addressed below. Here, all the experts accepted that this was a case in which the Court was determining whether the hypothetical use of a nuclear weapon, presumably in a situation of armed conflict, would violate the right to life. As one expert noted, while the Court looked to IHL, it did so in order to interpret the meaning of "arbitrarily" in Art. 6 of the ICCPR.

5. Conceptual difficulties in applying HRL treaties in situations of armed conflict and occupation

One expert discussed the theoretical difficulties in applying the ICCPR and ICESR in armed conflict and occupation situations. These are treaties, this expert pointed out, which envision an entire legal regime of human rights. It is difficult for the Occupying Power, therefore, to know which rights it must guarantee to the population of the occupied territory.

Also, this expert observed, the law of occupation presents an additional conceptual problem. The Commentary to GC IV makes clear that the term "occupation" in Art. 6 does mean same thing as "occupation" in Art. 42 of the Hague Regulations.²² In the view of the Commentary, this expert noted, territory can be occupied for the purposes of GC IV before it is occupied under the Hague Regulations. As the Commentary puts it, "there is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation." Under this interpretation, the law of occupation of GC IV begins to apply even as the armed forces are engaging in the hostilities phase of the IAC. But the HRL that is applicable in occupation cannot be said to govern the conduct of hostilities during this invasion stage because of the lack of effective control exercised by the State.

In this expert's view, however, these conceptual problems are not such crucial issues with respect to the use of potentially lethal force in occupation situations, since the law enforcement model would apply simply by virtue of the fact that the forces of the Occupying Power are for the most part carrying out law and order functions in the occupied territory. This expert observed that, for example, until the recent intifada broke out in September of 2000, Israel applied the law enforcement model in the occupied territories not as a matter HRL but as a matter of the law of occupation.

²² Pictet (J.) (ed.), *Commentary to Geneva Convention IV*, ICRC, Geneva, 1958, p. 59.

6. State practice: widespread and general acceptance of the applicability of HRL in situations of armed conflict and occupation

Aside from the practice of these three HRs bodies and the ICJ, the experts also discussed whether State practice supported the conclusion that HRL is applicable in situations of occupation, especially with respect to the right to life.

One expert noted that there were a number of General Assembly Resolutions in which States have asserted that HRL applies in situations of occupations, as well as the 1968 Tehran Conference.²³ One such resolution, which both the US and UK supported, made clear that HRL applied in Iraqi-occupied Kuwait in 1990.²⁴ Another expert doubted whether this really constituted valid State practice, given that the US and UK both denied the applicability of HRL during their more recent occupation of Iraq. For this expert, relevant State practice is 100% clear: every State which is an Occupying Power denies the applicability of HRL with respect to its occupation. Responding to this argument, yet another expert pointed to evidence that US and UK practice is not itself entirely clear. With respect to the UK, while the government argued before its own courts that HRL was not applicable in occupied Iraq, the government nevertheless did not argue that HRL is never applicable in an occupied territory. Rather, the government argued it was a matter of whether the State exercises sufficient control in the territory.²⁵ Also, with respect to the US, this same expert pointed out that, in its second report to the Committee Against Torture, the US has reported on detentions in Iraq and Afghanistan.²⁶ This expert also observed that no European State has objected to the insistence by the Committee of Ministers of the ECHR that Turkey pay the damages awarded by the ECHR in the *Louizidou* case.²⁷ In other words, every European State has accepted that HRL applies in occupied Northern Cyprus.

Finally, with respect to NIACs, yet another expert noted that Russia has never denied the applicability of HRL in its operations in Chechnya, though Russia clearly refuses to characterize the situation there as an internal armed conflict.

One expert observed that, while State practice may not be completely uniform, it need only be virtually uniform, and that in any event, there is no extensive State practice contrary to the doctrine developed by the HRs bodies.²⁸

7. How detailed are the HRL rules on the use of potentially lethal force?

²³ Resolution XXIII “Human Rights in Armed Conflicts,” adopted by the International Conference on Human Rights, 12 May 1968, U.N. Doc. A/CONF. 32/41 (1968).

²⁴ UN GA Res. 46/135, 17 December 1991.

²⁵ *Al Skeini and others v. Secretary of State for Defence*, High Court of Justice, Queen’s Bench Division, Divisional Court, Judgement of 14 December 2004.

²⁶ Second Periodic Report of the United States of America to the Committee Against Torture, submitted May 6, 2005, published on the website of the US State Department, http://www.state.gov/g/drl/rls/45738.htm#part_one.

²⁷ See Interim Resolution DH 105 concerning the Judgment of the European Court of Human Rights of 28 July 1998 in the case of *Louizidou* against Turkey, adopted by the Committee of Ministers on 24 July 2000 at the 716th Meeting of the Ministers’ Deputies, available http://www.coe.int/T/CM/WCD/humanrights_en.asp#.

²⁸ *North Sea Continental Shelf Cases (Federal Republic of Germany / Denmark; Federal Republic of Germany / The Netherlands)*, I.C.J. Reports 1969, paras. 73-74.

Having reviewed the jurisprudence of the HRs bodies on the right to life, the experts considered how detailed the HRL rules are with respect to the use of potentially lethal force. The experts agreed that HRL provides the law enforcement model under which the use of force is limited by the principles of necessity and proportionality. These principles create an obligation whereby a State must effect an arrest where possible. This opportunity to arrest standard applies at both the planning and on-the-ground phases of operations as well as in what were termed reactive situations, i.e., where a State's forces must react to an unexpected threat. Of course, in these latter situations, the standard cannot be applied in the same way, and necessity and proportionality must play a greater role in balancing the need to use lethal force, on the one hand, against the danger posed by the individual targeted, on the other. One expert noted, however, that all of the cases concerning arrest have arisen in the context of planned operations. The State must plan its operations so as to maximize its chances of being able to effect an arrest.

One expert posed the question, given its acceptance, what are the parameters of this standard of opportunity to arrest? What if, for example, a State's agents chose not to arrest a suspected terrorist at one point during an operation when they could have done so as to have an opportunity to monitor this person for intelligence or in order to gather evidence to be used against him in a criminal prosecution. Having made this decision, however, the situation progresses to a point at which the agents have no other choice but to shoot and kill the person. Would such a killing be in violation of the right to life? Another expert responded that the need to gather evidence for a criminal case would not justify allowing the situation to develop such that agents would have to use lethal force.

One expert observed that suicide bombers present particular difficulties for the exercise of this standard. Here, a State's agents cannot effect an arrest of an individual they think is a suicide bomber because this will cause him to explode the device.

The experts discussed this standard requiring arrest where possible throughout the meeting in the context of occupation situations, targeted killings and NIAC situations. The experts repeatedly contrasted this HRL standard with the conduct of hostilities rules found in the IHL of IAC. Under the IHL of IAC, there are clear categories of people. With respect to the IHL of IAC, combatants can be targeted and killed on sight, regardless of what they are doing at the time they are targeted; likewise, there is no requirement that forces attempt to capture enemy combatants, though forces must accept a surrender. Some experts were of the view that there are also clear categories of people under the IHL of NIAC, and a couple of experts objected to the idea that, in the context of a NIAC, rebel forces could not be targeted and killed on the basis of their membership in the rebel group as such.

In contrast, the experts noted throughout the meeting, there are no categories under HRL. HRL therefore does not permit the targeting and killing of a person on the basis of any sort of status alone, irrespective of what that person is doing and irrespective of the State's ability to effect an arrest of that person in the given situation.

Accordingly, one expert posed this question: has there ever been a case in which a person whom we would think of as a rebel fighter or "combatant" in a NIAC was targeted and killed while not in the process of taking a direct part in hostilities and where the HRs body held that this killing was not a violation of the right to life? The idea here, this expert pointed out, was that such a killing under the IHL of IAC would be perfectly lawful. Was it therefore sufficient in the context of NIAC that this person was a fighter and had directly participated

and posed a threat in the past? The existence of such a case would provide some clear parameters with respect to the opportunity to arrest standard.

The *McCann* case was suggested but rejected, as in this case the soldiers who shot and killed the IRA members believed the latter were in the process of detonating a bomb. Another expert suggested the *Ergi* case, which involved the ambush by Turkish security forces of a group of PKK members; the ECHR there did not inquire whether those members posed a threat at the time of the ambush.²⁹ Another expert disagreed, since the case did not really involve PKK members. In this expert's view, had PKK members truly been present during the incident in question, the Court would have examined whether the Turkish forces had planned their operation in such a way as to maximize the chances of being able to capture the PKK members. This view answered the question posed: there are no cases in which HRs bodies have found situations in which a State's forces could simply target members of a rebel group on the basis of their previous involvement in hostilities. According to this expert, this leads to the conclusion that, where possible, such forces would be obliged to attempt to arrest these rebels, or at the least, plan their operation in such a way as to maximize their chances of being able to effect an arrest. This expert observed, however, that no such clear case was ever likely to arise, since whenever a State's forces use lethal force against rebels in the context of a NIAC, the State will always be able to claim that its forces had reason to believe that the persons killed were using or about to use force when killed. The applicant must show that the State's forces could not have reasonably believed the persons killed were in the process of using force at the time. Proving the unreasonableness of this belief, this expert pointed out, is nearly impossible.

One expert again related the HRC communication of *Guerrero v. Colombia*. In this case, the Colombian police believed that a hostage had been taken by a group of rebels to a particular house; when the police discovered that, in fact, no hostage had been taken, they nevertheless waited outside the house and shot rebels as they arrived there. The rebels here, it seems, were probably involved in activities related to the NIAC at the time they were targeted. The HRC found a violation, however, because these persons could probably have been arrested, and the government forces made no attempt at all to arrest them. Rather, these rebels were being targeted, in effect, on the basis of their past participation in the NIAC. The case may, therefore, provide some parameters with respect to the arrest standard in NIAC.

Another expert observed that there has never been a complaint brought to the effect that Colombia has violated the right to life where its forces bomb FARC camps when these rebel forces were not actively involved in combat operations. Such bombings occur quite often, and in this expert's opinion, no one would attempt to argue that this sort of bombing is prohibited by HRL. The rationale here is that such rebels, armed, assembled and organized, cannot be arrested. This example, therefore, further provides parameters for the application of the right to life in NIAC.

C. The Issues of the *Lex Specialis* Nature of IHL With Respect to the Use of Potentially Lethal Force and the Parallel Applicability of HRL and IHL

²⁹ *Ergi v. Turkey*, ECtHR, Judgment of 28 July 1998, 28 Reports 1998-IV, fasc. 81.

Throughout the meeting the experts dealt with the question of the interplay between HRL and IHL in situations of occupation, NIAC and with respect to targeted killings. Before relating their discussions with respect to these topics, it is helpful to consider the experts' views on this overarching issue.

It was noted during the initial presentation on the jurisprudence of the HRC that the ICJ in the 1996 *Nuclear Weapons* Advisory Opinion held that IHL constituted the *lex specialis* with respect to interpreting "arbitrarily" in Art. 6 of the ICCPR in the context of armed conflict.³⁰ It was also noted that, in contrast to the ICJ, the HRC has never explicitly affirmed the *lex specialis* nature of IHL in armed conflict, although it referred to the complementary character of IHL in its General Comment 31.³¹

The experts noted that the ICJ again referred to IHL as constituting the *lex specialis* in armed conflict in the *Palestinian Wall* Advisory Opinion.³² All of the experts were of the opinion that ICJ's understanding of the *lex specialis* concept was not entirely clear.

A couple of experts recalled the Court's assertion in the *Palestinian Wall* case that, while IHL constitutes the *lex specialis* in armed conflict, only some rights are governed exclusively by IHL, while others are governed exclusively by HRL and still others are governed by both bodies of law. A number of these experts characterized this analysis as utterly unhelpful.

One expert described the state of the law as one in which both IHL and HRL apply in parallel in situations of occupation, NIAC and with respect to targeted killings. Given the parallel applicability of IHL and HRL in these contexts, according to this expert, the HRL 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.

Another expert felt that the Court's holding here dictated some sort of parallel applicability of IHL and HRL, and that the Court merely chose to use the terminology of *lex specialis*. For this expert, the Court clearly did not hold that IHL, where applicable, utterly displaces HRL.

Another expert objected to the Court's use of the *lex specialis* concept. In the opinion of this expert, where there is a *lex specialis*, it must govern exclusively. Such is not the situation with respect to the law governing in armed conflict, even according to the ICJ. This expert therefore agreed that the state of the law is one of parallel applicability of IHL and HRL, at least in situations of occupation. Here, which body of law provides the applicable rule in a given situation, according to this expert, depends upon the function being carried out by the State's armed forces. In NIAC situations, this expert was of the view that, while, at one level, IHL and HRL apply in parallel, the *lex specialis* concept is being used to determine which body of law provides the applicable rule.

Other experts, accepting the parallel applicability of IHL and HRL in armed conflict in general, nevertheless felt that, with respect to the right to life, HRL was clearly subordinate to and displaced by the IHL rules on the conduct of hostilities. For these experts, this conclusion

³⁰ *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996, paras. 24-25.

³¹ General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 11.

³² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, paras. 104-106.

is necessitated by the very nature of the *lex specialis* concept as well as dictated by the ICJ in the *Nuclear Weapons* case.

A number of experts disagreed with the proposition that IHL displaces the applicability of HRL entirely with respect to the right to life. One of these experts pointed out that the ICJ's holding in the *Nuclear Weapons* case was limited to the context of the use of nuclear weapons; the ICJ did not hold that the right to life in armed conflicts was always governed by reference to IHL as the *lex specialis*. This expert sought to clarify what exactly the *lex specialis* concept means under general international law. In the view of this expert, there can only be a *lex specialis* where there is body of law with provisions which are more detailed, more specific and, most importantly, clearer than are the provisions in the law generally, or the *lex generalis*.

One expert disagreed. In this expert's view, a *lex specialis* need not necessarily be more detailed, more sophisticated or clearer than the rules that could be found in the *lex generalis*; the *lex specialis* need only have been designed for the given situation.

D. The Right to Life in Situations of Occupation

1. Background presentation on the use of potentially lethal force by the Occupying Power under the IHL law of occupation

One expert made a presentation on the law of occupation governing the use of potentially lethal force by the Occupying Power (OP) in occupation situations. This expert began by observing that there are two grounds on which the forces of the OP are entitled to exercise potentially lethal force. First, the OP is entitled, and indeed obliged, to restore and maintain public order and safety. This obligation arises under Art. 43 of the Regulations annexed to the Hague Convention IV respecting the Laws and Customs of War on Land (Hague Regulations) and under Art. 64(2) of GC IV. This obligation, which empowers the forces of the OP to exercise potentially lethal force, must also be viewed in connection with the obligation to leave unchanged as far as possible the political, economic and social system of the occupied territory. Second, the OP is entitled to use potentially lethal force in order to provide for its own security. This expert stressed that it was very important to distinguish between these two different goals with respect to the applicability of HRL rules on the use of potentially lethal force.

Another important point to keep in mind, in the view of this expert, is that occupation law is part of the larger body of IHL which applies to IAC. An occupation is part of an IAC, and thus the IHL of IAC continues to apply. As a result, where there is a necessity to apply the IHL rules of IAC on the conduct of hostilities in an occupation, these rules apply. The special rules provided by the law of occupation apply, therefore, only to the extent that the forces of the OP are exercising the authority required for there to be an occupation.

This expert also pointed out that the law of occupation is premised on the idea that the sovereignty of the occupied country continues. In the view of this expert, this idea assumes that there continue to be operable authorities and a functioning political system within the occupied territory. This is not always the case, however, the expert observed, citing the

example of Iraq. This expert therefore referred to the *debellatio* concept under which the powers of the OP in such a situation are necessarily greater than they otherwise would be.

Noting that the law of occupation constitutes a rather elaborate regime in many respects, this expert nevertheless noted that, with respect to the rules governing the non-POW detainees, for example, there are gaps in the law of occupation which must be filled by reference to HRL standards.

2. The law of occupation does not regulate the use of potentially lethal force in any detail.

Following this presentation, another expert pointed out that Art. 43 of the Hague Regulations and Art. 64 of GC IV do not provide any detail as to when it is lawful for the forces of the OP to resort to potentially lethal force in occupied territory. Also, this expert noted, the Commentary is not helpful on this point.

The presenting expert agreed that there was no clear standard laid out in the law of occupation as such and observed that HRL would govern the use of force by the OP with respect to the OP's entitlement and obligation to restore and maintain public order and safety. Where the OP is taking action to provide for its own security, however, this expert felt that the OP's resort to force would be governed exclusively, or nearly so, by the rules on the conduct of hostilities of IHL of IAC.

This interpretation, the other expert pointed out, is a matter of logic; there are no provisions in the Hague Regulations or GC IV which provide that the rules which govern the OP's use of force depend upon the purpose for which the OP is exercising force. Since it does not explicitly regulate the use of potentially lethal force in any detail, this expert sought to determine whether the law of occupation makes any assumptions which imply that either IHL or HRL rules on the use of force apply. This expert observed that under Art. 68(2) of GC IV, the OP "may impose the death penalty on a protected person only in cases of where the person is guilty of espionage, of a serious act of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons..." This provision, this expert pointed out, seems to assume that, even where there are persons in the occupied territory committing acts which endanger the security of the OP, some such persons will be captured alive. This assumption, in turn, arguably implies that the OP is not necessarily entitled to resort to the IHL rules on conduct of hostilities in all situations where persons in the occupied territory are threatening its security. This assumption implies, in other words, that the forces of the OP must often comply with the HRL rules on the use of potentially lethal force when acting against persons who are threatening the security of the OP, the most prominent feature of which is that such forces must attempt to effect an arrest.³³

³³ The observation regarding what implications could be drawn from Art. 68(2) of GC IV, which refers to protected persons, sparked some disagreement among the experts as to who is a protected person in occupied territory within the meaning of Art. 4 of GC IV. One expert observed that the position of the ICRC has always been that everyone in the occupied territory is considered "in the hands of... the Occupying Power" and thus a protected person, whether that person commits acts harmful to OP or not. This expert then cited the Commentary on this point: "the mere fact of being in the territory of a party to the conflict or in occupied territory implies that one is in the power or hands of the Occupying Power." One expert was of the opinion that it was not possible to categorize all persons in the occupied territory protected persons; whether one is protected

Another expert agreed that Art. 68(2) does imply that law enforcement rules on the use of force, provided today by HRL, were indeed envisioned by the law of occupation as being applicable in occupied territories. This expert also pointed to the clear distinction drawn in the Hague Regulations between the rules on the conduct of hostilities in Section II and the rules on occupation in Section III. This distinction likewise implies that the law of occupation assumes the applicability of rules on the use force other than the rules governing the conduct of hostilities. In the view of this expert, these rules are provided by necessity by the law enforcement model. In other words, the law enforcement model is the default legal regime governing the use of potentially lethal force in occupation situations. For this expert, the law enforcement model would therefore apply in all occupation situations unless there was either (1) a resumption of the hostilities of the IAC which gave rise to the occupation, or (2) an outbreak of hostilities distinct from the “original” IAC and possibly constituting a NIAC.

3. The rules on the use of potentially lethal force which govern in the “calm” occupation, i.e., the occupation in which there has been no “resumption” or “outbreak” of hostilities

All the experts agreed that there are different sorts of occupations as a factual matter. Some are fairly calm and stable, while in others, the OP only barely exercises sufficient control for its presence there to be considered an occupation. Also, all the experts acknowledged that, within a country involved in an IAC, it may be that only some portion of its territory can be said to be under occupation. All the experts likewise agreed that, following the establishment of an occupation regime by an OP, it is possible that the OP may subsequently find itself involved in combat operations against either the armed forces of the occupied country or a resistance movement which arises in the occupied territory. In such a situation, there has been what the experts described as either a “resumption” or “outbreak” of hostilities, and the rules of IHL on the conduct of hostilities govern the OP’s use of force. The question then becomes how to determine when this “resumption” or “outbreak” of hostilities has occurred. The experts considered this problem later, and their discussion is related below. This section of the report relates the experts’ discussion regarding the rules governing the OP’s use of

person depends upon what one is doing. Another expert pointed out, however, that this interpretation does not make sense in light of the right of the OP under Art. 5 to derogate from the protections provided by GC IV with respect to persons who pose a threat to its security. Another expert pointed out, however, that if all persons in an occupied territory are protected persons, why does Art. 4 use the phrase “in the hands of” the OP instead of just “population of the territory?” In this expert’s view, the phrase implies that the OP exercises some degree of control over the territory before we say that the persons in this territory are protected persons. This degree of control, a couple of experts forwarded, is essentially the level of control required for the territory to be considered occupied. All the experts agreed therefore that, giving the phrase “in the hands of” in Art. 4 its widest interpretation, it was nevertheless clear that the population of protected persons would not be co-extensive with the population of the territory of the country occupied but rather only with the population of that territory which is actually occupied. One expert observed that this understanding of “in the hands of” therefore takes into account that the OP does exercise some level of control over the protected person; at the very least, the OP must be an OP, exercising the level of authority necessary for the territory to be considered occupied. Ultimately, all but two of the experts agreed that, assuming they were in occupied territory, so defined, whether or not such persons commit hostile acts toward the OP does not affect their status as protected persons under Art. 4 of GC IV. The dissenting experts felt that such persons could constitute unlawful combatants and would therefore not be protected persons. Conversely, all the experts agreed that, where a protected person engages in hostile acts against the OP, the forces of the OP may use potentially lethal force against such a person to the extent required.

potentially lethal force in “calm” occupations, i.e., occupations in which there are no hostilities.

a) The default model in occupation situations: the law enforcement model

As related above, the experts agreed that the HRL rules on the use of potentially lethal force can be described as the law enforcement model. The most prominent feature of this model is that it obliges the State to effect an arrest where possible. In this respect, one expert noted again the HRC’s Concluding Comments on the report from Israel: “before resorting to the use of deadly force, all measures to arrest and detain persons suspected of being in the process of committing acts of terror must be exhausted.”³⁴ Furthermore, the experts observed, the use of force under HRL depends upon the seriousness and immediacy of the threat posed. As in IHL, the principles of necessity and proportionality govern the use of force, though, as related above, these principles are applied differently. Finally, this law enforcement model applies at the operational planning and the on-the-ground phases as well as in reactive situations.

All the experts agreed that the law enforcement model applies in “calm” occupations with respect to the use of force by the OP to maintain public order and safety. All but two of the experts agreed that the law enforcement model also governs the use of force by the OP in providing for its own security, at least where there are no hostilities in the occupied territory. The dissenting experts felt that, while HRL rules govern the OP’s resort to force for the maintenance of public order, where the OP is taking action to provide for its own security, its use of force must be governed by the IHL rules on the conduct of hostilities, since occupation law is merely part of the larger body of IHL of IAC; where there is an occupation, the IAC which gave rise to it continues and thus the IHL rules on the conduct of hostilities continue to apply.

b) Are enemy combatants targetable on sight in a “calm” occupation?

With a view to illustrating the different consequences which result from the application of HRL rules and IHL rules, the experts discussed the issue of targeting in occupation situations where there has been no “resumption of hostilities.” One expert described the categories of persons that can be targeted and killed on sight under the IHL of IAC: members of the enemy armed forces and members of organized resistance movements fulfilling the requirements set out in Art. 4(A)(2) of GC III. In such an occupation situation, where the forces of the OP exercise sufficient control and could likely arrest such persons, are these forces obliged to attempt to effect this arrest, as would be required under the HRL rules, or may these forces simply target and kill these persons on the basis of their combatant status alone?

With respect to members of the armed forces of the occupied country in the occupied territory, one expert felt it was important to distinguish between former and current members of these armed forces. All of the experts agreed that former members could not be targeted and killed on sight on the basis alone of this former membership. Here, as one expert pointed

³⁴ Concluding Observations of the Human Rights Committee: Israel, CCPR/CO/78/ISR (21 August 2003), para.15.

out, the law of occupation itself provides the OP with a remedy to protect itself from the potential, hostile activities of such former members: the OP may intern them.

A couple of experts felt, however, that, where this person is a current member of these armed forces, even though these forces are not fighting in the occupied territory itself, this person could nevertheless be targeted and killed on sight in the occupied territory, regardless of whether or not the forces of the OP could effect an arrest of this person there. In the view of this expert, this is true because the IAC continues throughout any occupation. For example, it would be lawful to bombard an arms factory during a “calm” occupation. The other experts strongly disagreed that the arms factories in this example could be bombarded, since it could simply be captured. As far as combatants are concerned, they were of the view that, where the armed forces of the occupied State are not conducting combat operations within the occupied territory, they could not be targeted and killed on sight in the occupied territory. One of the experts pointed out that the nature of occupation dictates such a result. In an occupation, the current member of these armed forces, while formally a combatant, is no longer acting as a combatant, and the OP is exercising authority in the occupied territory. That the person still owes allegiance to his armed forces in some formal sense is irrelevant.

All the experts agreed the forces of the OP are entitled to use force, including potentially lethal force, against persons committing hostile acts, provided that such use of force complies with the rules of HRL.

On the other hand, where the armed forces of the occupied State are conducting combat operations in the occupied territory, a number of experts observed that the IHL rules on the conduct of hostilities rather than the HRL rules on the use of potentially lethal force would govern the OP’s response. In such a situation, either combat operations against the OP in the occupied territory have never ceased or they have “resumed” such that there has been a resumption of the IAC in the occupied territory. In this situation the experts were of the view that the normal IHL rules relating to resistance movements will apply, i.e., members of such movements are combatants by virtue of fulfilling the requirements set out Art. 4(A)(2) of GC III.

c) Targeting of foreign fighters entering the occupied territory

One expert suggested that, where persons cross the border into the occupied territory on behalf of a third State in order to fight against the OP, their hostile acts would trigger an IAC between this third State and the OP. The experts agreed that the threshold for determining that an IAC has broken out is very low. Consequently, where foreign fighters are sent by a third State and where they can be considered lawful combatants in an IAC, all of the experts agreed that they may be targeted on sight in accordance with the IHL rules of IAC.

Where these foreign fighters are not sent by the third State, that is, their acts cannot be imputed to the third State, the fighting may constitute a NIAC.³⁵

³⁵ The experts reserved the question of the rules regarding when persons may be targeted on sight in NIAC until their discussion on the right to life in NIAC. This discussion is related in the last section of this report.

In an occupation situation in which there are no hostilities, one expert argued that all foreign fighters would nevertheless be targetable on sight. In the view of this expert, the mere fact that these persons belong to a group which is attempting to attack the OP renders them legitimate military targets at all times. The forces of the OP would be able to target such persons on sight on the basis of the right of self-defence.

In fact, this expert argued, the right of self-defence would provide a sufficient legal basis for targeting these foreign fighters in either scenario, i.e., whether sent by a third State or not. Where self-defence is the legal basis, the question for the forces of the OP becomes whether there exist reasonable grounds for suspecting that this person is a member of a group which is regularly engaged in fighting the OP. The global war on terrorism, in this expert's view, is premised on this legal basis.

Another expert disagreed with this analysis insofar as these foreign fighters, where sent by a third State, can necessarily be considered combatants under the IHL of IAC. Such persons may not satisfy the requirements of AP I or GC III. If not, the question would become whether, as unprivileged combatants, such persons could be targeted on sight. This expert also disagreed with the proposition that the right of self-defence provides a sufficient legal basis for targeting persons who are not currently directly participating in hostilities. This expert noted that the ICRC Customary Law Study took the position that unprivileged combatants are civilians and are targetable only for such time as they directly participate in hostilities. In the view of this expert, the assertion that the OP is entitled to target such persons at all times is far from accepted.

This expert recalled the standard for self-defence set out by then US Secretary of State Daniel Webster in connection with the *Caroline* incident: the State must show that the threat posed is “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”³⁶ The right to self-defence, this expert noted, therefore had to be situated within the law enforcement model of HRL and, therefore, would not itself entitle an OP to resort to the IHL rules on the conduct of hostilities.

Most of the experts ultimately agreed that in a “calm” occupation, where the OP exercises sufficient authority, the forces of the OP would not be entitled to target such foreign fighters on sight on the basis of their membership alone in a group which is trying to threaten the security of the OP. Rather, the HRL rules would govern, and there would be an obligation to attempt an arrest.

d) Identification, threat perception and the rules on targeting

A number of experts pointed out that proper identification presents the major practical difficulty where the forces of the OP are targeting on sight persons suspected of entering the occupied territory in order to commit acts hostile to the OP. One expert noted one important rationale behind the rule that civilians may be targeted only for such time as they participate directly in hostilities, i.e., while they are participating in hostilities, these civilians can be properly identified. Another expert remarked that, in practice, where the OP deploys soldiers

³⁶ Letter from Daniel Webster to Lord Ashburton, 6 August 1842, reprinted in John Bassett Moore, *A Digest of International Law* vol. 2, section 217 (1906).

on the ground, the idea will generally be to effect an arrest. The difficulties posed by identification will be more likely to arise where the State makes use of air power to target individuals.

One expert questioned the efficacy of a rule allowing for on sight targetability which depends on the individual soldier's perception as to whether the person poses a threat. Another expert argued, however, that it was the threat perception of the State, not the individual soldier, which matters, requiring objective criteria as to what should and should not be perceived as constituting a threat.

e) Riots which threaten the security of the OP

One expert brought up the issue of riots in such occupations. In this expert's opinion, riots are the real moment of tension in the law, given that they can pose a significant threat to the security of the OP but nevertheless will often not involve the use of armed force by the rioters. This expert cited a riot in Al-Fallujah, in which American forces were surrounded by menacing demonstrators who were not, however, shooting.³⁷ In this expert's opinion, the response to such situations must be governed by the rules of the law enforcement model. The IHL rules on the conduct of hostilities simply offer no guidance on how to respond to riots. All of the experts agreed with this conclusion. The two experts who were of the view that the OP's response to security threats must be governed in principle by IHL rules, nevertheless agreed as well, since the situation posed a classical law enforcement type of scenario. All the experts, therefore, agreed that where the OP is confronted with demonstrations or riots, the fact that these are occurring in an occupation is irrelevant; the OP must respond to these situations according to the law enforcement model.

4. Thresholds for determining when there has been a "resumption" or "outbreak" of hostilities in the occupied territory such that the IHL rules on the conduct of hostilities become applicable

Again, a couple of experts felt that the IHL rules on the conduct of hostilities governed the use of force by an OP in all occupation situations, at least with respect to action taken to provide for its own security. The other experts were of the view, however, that there needs to be a situation of hostilities in the occupied territory in order for the IHL rules to become applicable. Accordingly, the experts addressed the question of when hostilities could be said to exist in an occupied territory.

In this respect, the experts all agreed with the suggestion of one expert that where the OP undertakes combat operations, the OP is clearly operating under IHL rather than HRL rules. Nevertheless, the experts rejected the notion that the mere use of military force by the OP of the kind normally governed by IHL could itself trigger the applicability of IHL rules. In a "calm" occupation, the hostilities must result from hostile activity initiated by those challenging the OP. In other words, the OP must be responding to a threat which requires the

³⁷ Violent Response: The U.S. Army in Al-Falluja, report by Human Rights Watch, released 17 June 2003 available at <http://www.hrw.org/reports/2003/iraqfalluja/>.

sort of military force which is governed by IHL rules. In a “calm,” where the law enforcement model governs, the OP cannot simply conduct a military operation, create hostilities, and then claim that the rules of IHL now govern.

During the course of the meeting, it was noted repeatedly that occupation situations differ tremendously. There is little violence in some occupations, such as, for example, in the Turkish occupation of Northern Cyprus, while in other occupations there is considerable violence and disorder, such as, for example, in the recent occupation of Iraq.

The experts agreed that a situation of considerable violence and disorder does not, however, necessarily constitute a situation of hostilities. As one expert observed, without the sort of hostilities which characterize an armed conflict situation, an OP simply cannot resort to the IHL rules on the conduct of hostilities. All of the experts therefore agreed that, where faced with riots and ordinary criminal activity, the OP must respond in accordance with the law enforcement model.

All the experts agreed that, in order for violence to constitute hostilities, it must stem from either (1) hostile activity of the armed forces of the occupied country or (2) resistance activity within the occupied territory. One expert observed that, while the distinction makes sense, it may create problems for the forces of the OP on the ground. Where these forces must respond both to ordinary criminal activity and to attacks launched against them as agents of the OP, they must be able to distinguish between the two in order to know which body of rules, HRL or IHL, governs their use of force in response.

a) Hostile activity of members of the armed forces of the occupied country

With respect to violence which stems from hostile activities of members of the armed forces of the occupied country, the experts observed that hostilities between such forces and the forces of the OP would constitute a clear “resumption” of the hostilities of the ongoing IAC which gave rise to the occupation. Here, the experts noted, the threshold for an IAC is very low under Art. 2 common to the GCs. Any amount of inter-State violence will arguably amount to an IAC. Furthermore, the experts noted, in this case the IAC is already ongoing; this violence merely constitutes a “resumption” of the hostilities.

In the occupation situation, therefore, all the experts agreed that, where members of the armed forces of the occupied country attack the OP, i.e., begin to conduct military operations against the OP, the OP is entitled to respond to this attack in accordance with the IHL rules on the conduct of hostilities. Where the attacks are launched by members of the armed forces of the occupied territory, the threshold for this “resumption” of hostilities is thus the same as the threshold for the outbreak of an IAC. The experts all felt that this conclusion represented the current state of the law.

The question then arose, however, as to the territorial scope of the OP’s right to revert to the IHL rules. In other words, in a “calm occupation,” in which the armed forces of the occupied country had not been very active before, the OP will have been acting in accordance with the law enforcement model. As soon members of the armed forces of the occupied country launch one attack against the OP, is the OP then entitled to conduct military operations in accordance with IHL throughout the entire occupied territory? To illustrate this concern, one

expert gave a hypothetical example based on the occupation in Northern Cyprus. Where Greek Cypriots from Cyprus infiltrate into Northern Cyprus and attempt to carry out attacks against Turkish forces, can Turkey then claim a “resumption” of the hostilities and attack potential military targets throughout the occupied territory in Northern Cyprus as well as in Cyprus as well?

One expert was of the view that Turkey would be entitled to attack these targets because it was always permitted to do so given that the IAC is ongoing; the fact of occupation does not change this.

All the other experts pointed out that, as long as and to the extent that the OP is exercising effective authority and control over the occupied territory, its use of force must comply with the law enforcement model. Therefore the experts agreed that the situation of hostilities which results from this attack against the OP exists in the occupied territory only with respect to that incident and only for as long as the incident occurs.

b) Resistance activity by groups within the occupied territory

The experts agreed that the threshold for determining the “resumption” or “outbreak” of hostilities where these hostilities stem from resistance activity (i.e., not from members of the occupied State’s armed forces) in the occupied territory is not clear under current international law. Here, therefore, the experts made clear that they had to devise the most workable threshold.

In the opinion of one expert, fighting between members of a resistance movement and the OP may often create a situation of NIAC, since the resistance movement will not necessarily “belong to a Party to the conflict” within the meaning of Art. 4 of GC III or Art. 43 of AP I. The expert cited the example of Palestinian resistance in the Israeli occupied territories; the original IAC which led to the current occupation was between Israel, Jordan and Egypt, none of which are at war now. Any Palestinian resistance movement cannot be said to belong to the parties to the original IAC. Likewise, the experts considered the hypothetical example of an uprising of the Greek Cypriots against the Turkish occupation in Northern Cyprus. If not acting on behalf of Cyprus, these Greek Cypriots would arguably be involved in a NIAC with Turkey.

The threshold for the existence of a NIAC is relatively clear, this expert observed. The ICTY has held that there is a NIAC where there is protracted armed violence between an armed group and a State which rises to a certain level of intensity.³⁸ Other experts referred to this threshold as the Common Article 3 threshold, distinguishing it from the threshold set out in AP II which requires, among other things, that the non-State armed group have control over part of the adversary State’s territory. In the view of this expert, therefore, since fighting between a resistance movement and the OP will often constitute a NIAC, the threshold for determining when the OP is entitled to resort to force in accordance with the IHL rules of NIAC on conduct of hostilities, rather the rules of HRL, is the threshold for determining the existence of a NIAC.

³⁸ *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October, 1995, Appeals Chamber, International Tribunal for the Former Yugoslavia, para. 70.

Several experts disagreed with this characterization of fighting between a resistance movement and the OP. In their view, since the occupation itself is part of an IAC, the related fighting between the resistance movement and the OP is also part of that IAC. One of these experts suggested that such a situation could not be considered a NIAC, at least where the armed group owes its allegiance to the displaced sovereign of the occupied territory. The only case in which it is not clear whether it is an IAC or NIAC, in the view of this expert, is where the displaced sovereign clearly does not support the resistance movement.

All the experts agreed, however, that the threshold for determining the existence of a Common Article 3 NIAC, i.e., armed violence of a certain intensity and duration, provided a useful threshold for determining whether there has been a “resumption” or “outbreak” of hostilities in the relevant part of the occupied territory where the hostilities stem from resistance activity. Where this threshold is reached, the OP’s use of force will be governed by the relevant rules of IHL (IAC or NIAC) on the conduct of hostilities. Isolated, sporadic attacks against the OP by an armed group within the occupied territory would not, therefore, be sufficient to constitute hostilities. Some experts observed that this NIAC threshold for determining the existence of hostilities in occupied territory also requires that there exist a party challenging the OP.

From an operational perspective, some experts noted that hostilities can be said to exist where the OP has lost the capacity to effectively mount law and order operations and must respond with the sort of robust means a State makes use of during the conduct of hostilities phase of an armed conflict.

c) Rules of engagement and the parallel applicability of IHL and HRL

One expert expressed concern regarding the implementation of IHL and HRL in one occupied territory. Where, in one occupied territory, hostilities have broken out in a part of the territory and not in another, the OP must, of course, respond differently in those different situations. Where hostilities have resumed or broken out, the forces of the OP must comply with the relevant body of IHL. Where the occupation is calm, the law enforcement model is applicable. Effective training and use of rules of engagement, this expert stressed, are essential if the OP is to deploy the same troops back and forth from one area to the other. Soldiers must be able to distinguish the warfighting situation from the law and order or peace support type of situation.

E. Lawfulness of Targeted Killings in Occupation Situations

The experts considered the question of targeted killings. A targeted killing, one expert clarified, is not a killing which takes place during the combat phase of an IAC, where one combatant targets and kills an enemy combatant on sight on the basis of the other’s status as an enemy combatant. A targeted killing, rather, occurs where the State considers a particular individual to pose a serious threat as a result of his or her activities and decides to kill that individual, even at a time when this individual is not in fact engaging in hostile activities.

1. Unlawful where the law enforcement model can be applied and where arrest is possible

In one expert's opinion, there was no way targeted killings could be justified in an occupied territory where forces are operating under the law enforcement model. In a "calm" occupation, the forces of the OP exercise effective authority and control, which means these forces can arrest individuals who pose a threat to the OP; these forces are thus required to attempt to effect this arrest. Given the authority and control exercised by the OP, the threat posed by an individual could never be considered immediate for the purpose of justifying a targeted killing. Certainly, the forces of the OP could target and kill this individual at the moment he or she is committing acts which pose a threat to the lives of others. Such a situation must be distinguished, this expert stressed, from the situation in which the forces plan and carry out an operation, the goal of which is to kill the individual at a moment when he or she is not in the process of committing a hostile act. For this expert, targeted killings can probably only be justified under the armed conflict model, i.e., where the IHL rules on the conduct of hostilities apply rather than the HRL rules on the use of potentially lethal force. The question then becomes, as already discussed, whether there has been a "resumption" or "outbreak" of hostilities in the relevant part of the occupied territory, such that the forces of the OP can no longer operate under the law enforcement model and the rules of IHL apply.

2. The "Area A" Situation: where part of the occupied territory is administered by the local population or otherwise cannot be administered by the Occupying Power

The experts therefore proceeded to consider the question of targeted killings with respect to an "Area A" type situation (like those created by the Oslo Accords in Israeli-occupied territory). For purposes of relating the experts' discussion, "Area A" describes an area either in which the OP has given up jurisdiction under an agreement with the local population or in which the OP cannot exercise effective control because it is under the physical control of the adversary.

It was recalled that, under the rules of HRL on the use of potentially lethal force the "absolutely necessary" standard required that the threat be imminent.

The expert who earlier doubted whether targeted killings could be justified outside of a situation of hostilities remarked that imminence was not a very useful standard for determining the lawfulness of a targeted killing in an "Area A" situation. The applicability of HRL, this expert pointed out, assumes that the area is subject to the State's jurisdiction, i.e., effective control. Where the State can exercise its jurisdiction, it can arrest the individual. With respect to the State's use of potentially lethal force, the immediacy or imminence standard makes sense. In this situation, the State's forces should only be permitted to use lethal force in response to an imminent threat. In the "Area A" situation, however, where there are no local authorities with whom to cooperate or where the local authorities are unwilling or unable to take action against the individuals who pose the threat, this imminence standard of HRL thus requires the State to actually wait until the threat becomes immediate before it can act, something the State would not have to do if it effectively exercised its jurisdiction in the area. The applicability of HRL in this context thus creates a real dilemma, this expert observed.

Another expert responded that, in these situations, perhaps the imminence of the threat is not the governing standard. Where there is no way for the State to exercise its authority in the area, and where the local authorities cannot or will not cooperate, the State cannot be constrained to act only where the threat itself is imminent. The governing standard for the use of potentially lethal force, this expert maintained, must also take into consideration the prior activities of the person the State wants to target. Where the person has previously committed serious, hostile acts and evinces a commitment to continue to do so, this expert was of the view that a State could target and kill this person, assuming that the State had sought to effect a transfer of this person from whatever authority is in control of the relevant area. An example would be the bomb-maker in “Area A” who has made and can be expected to continue to make bombs, and who quite often will have declared his intention to continue to make bombs. It is important to remember, this expert pointed out, that the State is under a legal obligation to protect the lives of the people under its jurisdiction, whether in its own territory or whether in the areas other than “Area A” in the occupied territory. Accordingly, this expert felt that this legal analysis is applicable outside of the situation of occupation. A State might be permitted to conduct a targeted killing where the “Area A” is in fact the territory of another State.

One expert noted that, under this analysis, the standard concerns not so much the imminence of the threat but the necessity and the imminence of the opportunity to use force.

Another expert observed that what was emerging was essentially a two-part test: (1) whether the State is entitled to target and kill the person depends on the danger that individual poses, i.e., the necessity, as well as whether the State has done all it can do to effect a transfer of the individual from the authorities in the area; and (2) whether the only opportunity to target this individual is imminent.

The experts then discussed whether imminence played any role in the standard and consulted Principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.³⁹

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 grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are sufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

The experts observed that the first clause describes a situation in which the threat must be imminent (“in self-defence or defence of others against the imminent threat of death or serious injury”). A couple of experts pointed out that the second clause, however, (“to prevent the perpetration of a particularly serious crime involving grave threat to life”) does not require that the crime that will be committed, as such, be committed imminently. Of course, Principle 9 nevertheless requires that the use of force be strictly necessary (“only when less extreme means are insufficient...when strictly unavoidable in order to protect

³⁹ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, and adopted by the General Assembly in Res. 45/166, 18 December 1999, para. 4 (The General Assembly “welcomes the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials..., and invites Governments to respect them and take them into account within the framework of their national legislation and practice.”)

life”). Most of the experts concluded that, while constrained by the principle of necessity, the use of potentially lethal force need not always be in response to an imminent threat. A targeted killing, a number of the experts observed, could be described as a use of force in order “to prevent the perpetration of a particularly serious crime.”

If the lawfulness of targeted killings rests on this rationale, i.e., the prevention of serious, hostile acts which would constitute serious, life-threatening crimes, a number of experts remarked that the quality of the intelligence upon which the OP acts becomes extremely important. The intelligence upon which the OP relies in order to determine that the individual will continue to commit such hostile acts, these experts pointed out, would have to be very reliable.

The experts also noted, however, that the Basic Principles were drafted with law enforcement officials using firearms in mind rather than military personnel using aircraft. Nevertheless, the experts agreed that military personnel can come within the definition of “law enforcement officials” provided in Art. 1(4) of the Code of Conduct for Law Enforcement Officials, to which the Basic Principles makes reference.⁴⁰ Military personnel will constitute law enforcement officials where they “exercise police powers.”

All the experts concluded that on the basis of Principle 9 targeted killings are not necessarily unlawful in occupied territory (1) where they are carried out by the OP in an area where the OP does not exercise effective control such that the OP cannot reasonably effect an arrest of the individual, (2) where the OP has sought to effect the transfer of the individual from whatever authority is in effective control of the area, assuming there is such an authority, (3) where the individual has engaged in serious, life-threatening, hostile acts and the OP has reliable intelligence that the individual will continue to commit such acts, acts which threaten the lives of persons the OP is under an obligation to protect and (4) where other measures would be insufficient to address this threat.

3. Difficulties with respect to accountability: jurisdiction

Such a standard for the lawfulness of targeted killings necessarily requires that the State be unable to exercise effective control in this “Area A;” otherwise, the State should simply exercise its authority and attempt to arrest the individual. Paradoxically, one expert observed, this might mean that the State does not exercise jurisdiction in this “Area A” for purposes of being compelled to answer for its actions before a HRs body. The ECHR in the *Banković* case, this expert pointed out, held that there was no jurisdiction where NATO States intentionally bombed a building in Belgrade, killing a number of people.⁴¹ This expert was of the opinion that the relevant standard for determining jurisdiction, understood in this sense, should be whether the State is exercising effective control over the means of the violation. Under such a standard, where the State has effective control over, e.g., the airspace, the pilot, the plane, and the weapon, as would be the case in a targeted killing, the persons affected

⁴⁰Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, 17 December 1979, Annex, Article 1(a); The Basic Principles makes reference to this definition provided by the Code of Conduct in a footnote appearing at the end of the document: G.A. Res. 45/166, 18 December 1999, para. 4. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, and adopted by the General Assembly in Res. 45/166, 18 December 1999, para. 4.

⁴¹ *Banković and others v. Belgium and others*, ECtHR, App. No. 52207/99, Decision on Admissibility, 12 December 2001.

would be considered within the State's effective control for purposes of determining jurisdiction before the HRs body. This is not the current interpretation of the ECHR, however, this expert observed, so there is a potential lack of accountability for a State's operations in an "Area A."

Another expert was confident, however, that the HRC would not follow the *Banković* holding. In this expert's view, the HRC made its position on this question clear in its General Comment 31.⁴²

4. Considerable potential for abuse

One expert felt that the standard arrived at is a good one, but only if implemented in good faith. The problem, a number of experts observed, is that such a standard is liable to considerable abuse by States. Several experts acknowledged that such an entitlement would undoubtedly be overused, misused and abused by States.

With respect to the potential for abuse, one expert raised the question of the level at which decisions to conduct targeted killings would be made. Was it for the military commander on the ground to make the determination that the targeted killing was justified? Or is this a decision that must be made by policy makers higher up the chain of command? This expert could envision this decision being made at either the tactical or strategic level. Another expert, however, observed that the potential for abuse might be greater where the decision is made at the strategic level by policy makers. This expert wondered whether policymakers would be more likely than commanders in the field to be tempted by the prospect of simply eliminating individuals whom they consider pose an obstacle to their strategic policy goals.

5. Procedural requirements

The experts considered whether this standard would be supplemented with certain procedural requirements to serve as safeguards against abuse.

One expert pointed to decisions of the ECHR which have held that, whenever a person has been killed by a use force by the State, the State must conduct a credible investigation into whether the State's use of force was lawful.⁴³ Another expert observed that there is considerable case-law to this effect: the obligation to protect the right to life entails an

⁴² General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10: "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation."

⁴³ *Mahmut Kaya v. Turkey*, ECtHR, App. No. 2253593, Judgment of 28 March 2000, para. 102.

obligation to plan beforehand and investigate afterwards. All of the experts agreed that such a requirement would also apply where the State conducted a targeted killing in an “Area A.”

One expert doubted, however, whether the ECHR, on the basis of *Banković*, would actually compel States to conduct such an investigation where the targeted killing was aimed at a person outside the State’s territory and in an area outside its effective control. Another expert noted that there was no doubt that HRC would impose such a requirement, given how it has regarded the actions of Syria and Israel in Lebanon.⁴⁴

One expert remarked that, as these targeted killings were likely to be conducted using air power, there will have to be some sort of targeting process before the operation is conducted, creating the documentary evidence necessary for conducting an investigation afterwards, at least with respect to the conduct of the operation, such as damage assessments and video.

The experts then considered the question of procedural requirements to be fulfilled before the targeted killing is conducted. With respect to the conduct of the operation, one expert stressed there would have to be a planning process so as to ensure that persons in the vicinity of the targeted person were not killed. The experts agreed that there would be an obligation to conduct some sort of procedure beforehand to consider (1) whether the individual the State wants to target is indeed someone who has committed and will probably continue to commit serious, hostile acts and (2) whether there exists a necessity to kill this person in order to protect the lives of others.

On this point, however, several experts acknowledged that such a procedure, while crucial for the lawfulness of targeted killings, nevertheless could not help but resemble something of trial *in absentia* to determine whether the individual will be executed. These experts noted, therefore, that it was very important to stress that such a procedure is merely intended to hold the State to its duty of establishing that there exists a necessity to conduct the targeted killing. Such a procedure should not be understood as relieving the State in any way of its obligation to arrest, to try and to afford all the necessary juridical guarantees to individuals over whom it can effectively exercise its authority.

One expert noted that the obligation to investigate, which is clearly required under HRL, is not so clearly required under IHL. In this expert’s view, where there is a resumption or outbreak of hostilities in the occupied territory, these obligations on the part of the OP may be affected. Where the armed conflict model governs, States do not agree that they must investigate every instance in which their soldiers open fire. Another expert noted that this was only clearly the case with respect to IAC. Yet another expert felt that such an obligation could be implied from the general obligation on the State to ensure that its forces comply with IHL, at least with respect to the use of force in occupied territory, and arguably even where hostilities have resumed or broken out.

⁴⁴ Concluding Observations of the Human Rights Committee: Israel, CCPR/CO/78/ISR (2003), para.15; Concluding Observations, Lebanon, U.N. Doc. CCPR/C/79/Add.78 (1997), para. 9; Concluding Observations, Syrian Arab Republic, U.N. Doc. CCPR/CO/71/SYR/Add.1 (2001), para. 10.

6. Incitement as a sufficiently serious hostile activity?

The experts also discussed whether incitement could constitute an activity of sufficient gravity to render an inciter subject to a targeted killing. Some experts thought an argument could be made that a proven and successful inciter could be targeted and killed. The State would have to be able to show that the individual has incited and will continue to incite people to commit serious, life-threatening, hostile acts against the State and people the State is obliged to protect. The inciter here can be likened to someone who is a recruiter, increasing the number of people who will commit hostile acts. Where it is not permitted to target this one inciter, the State is effectively required to wait and allow more persons to be recruited, increasing the risk to its security and to the lives of persons it is obliged to protect. One expert felt that a distinction might be drawn between those who incite attacks against a State's military forces and those who incite attacks against civilians whom the State is obliged to protect.

Some experts felt that incitement of a general nature could render the inciter subject to a targeted killing, assuming the inciter is someone capable of influencing others to commit serious acts of violence they might not otherwise commit. Here, the individual is merely inciting others to conduct attacks against the forces of the State or persons under the State's jurisdiction without inciting these persons to commit a particular attack.

Some other experts felt that, at the very most, a person could only be targeted for incitement where the causal link between the inciting speech and the act of violence incited is very close.

Other experts expressed concern that allowing targeted killings on the basis of incitement alone, especially in the case of general incitement, was subject to tremendous abuse and felt that such killings could not be permitted. These experts observed that it is impossible to draw a line (1) between speech a State considers incitement and speech a State just does not like and (2) between individuals whose speech probably influences others to some extent and individuals who are held to be in such a position of influence that their speech can be considered incitement. In the view of these experts, one simply cannot fashion sufficiently objective criteria.

F. The Right to Life in Non-International Armed Conflicts

The third major issue the experts considered was the right to life in NIAC. One expert began by laying out the basic questions. In contrast to HRL, under which people are not categorized, there are clear categories of people under the IHL of IAC: combatants and civilians. With respect to the rules on targeting, civilians may only be targeted for such time as they directly participate in hostilities, while combatants may be targeted on sight, that is, targeted and killed at all times, whether they are engaging in hostilities or not. Combatants are targetable on the basis of their status alone.

In contrast, arguably, there is no clear category of "combatants" in NIAC. If there is no such formal category, how can rebel fighters be targeted on the basis of their belonging to a category that does not exist?

Arguably, however, the IHL of NIAC does implicitly recognize a category of combatants. Where this is the case, are the rules of the IHL of NIAC on the conduct of hostilities the same as the rules of the IHL of IAC? Are the rules of the IHL of NIAC clear with respect to targeting? Given the parallel applicability of IHL and HRL in NIAC, do the HRL rules on the use of potentially lethal force govern the targetability of rebel fighters to some extent?

1. Are there “combatants” in NIAC? Is there combatant status in NIAC?

A few experts were of the opinion that there is clearly a category of “combatants” in NIAC. One of these experts observed that, since the IHL of NIAC recognizes a category of civilians, there must clearly exist a category of non-civilians. One might choose to call them fighters or belligerents instead of the term “combatants” so as to avoid implying that these rebels enjoy the combatant’s privilege to participate in hostilities. Nevertheless, there is a clear category of “combatants” in NIAC. Such “combatants” cannot merely be considered civilians who take part in hostilities, given that they are members of armed groups which are regularly engaged in hostilities. Common Article 3 refers to parties to the conflict, and Art. 1(1) of AP II refers to “dissident armed forces or other organized armed groups,” implying a recognition that there are groups of non-civilians who are engaged in hostilities with the armed forces of the government. Likewise, this expert pointed to the Commentary on Art. 13(3) of AP II, which asserts that persons “who belong to armed forces or armed groups may be attacked at any time.” In the view of these experts, there has been a recognition, therefore, that there are rebel “armed groups” in NIAC.⁴⁵

Since civilians, non-members of such groups, could nevertheless directly participate in hostilities, these experts were of the opinion that there are, in essence, three categories of people in NIAC: 1) members of the government’s forces, 2) rebel “combatants” and 3) civilians who take part in hostilities and can be targeted only for such time as they do.

One of these experts argued that Art. 13 of AP II supports this conclusion. Art. 13(3) sets out that “civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.” If everyone in the territory where there is a NIAC is a civilian, and rebels are merely civilians who directly participate in hostilities, this expert pointed out, the use of the term “civilians” is meaningless. The drafters could have used a more general term to describe all the persons in the territory in which the NIAC is going on. The use of the term “civilians,” a term of art within IHL, necessarily implies a group of non-civilians, i.e., “combatants.”

Other experts disagreed that a category of “combatants” was implicitly recognized under the IHL of NIAC. It was not necessarily illogical, one expert argued, for the drafters of AP II to categorize all persons not belonging to the armed forces of the government as civilians, including rebel fighters; under this interpretation, such rebel fighters do not constitute a distinct category but are merely civilians who directly participate in hostilities. Another expert agreed that Art. 13 did not support the proposition that there exists a category of non-civilians; AP II was drafted so as to avoid implying any sort recognition of rebel “combatants” or belligerents. In the view of this expert, it cannot be argued that Art. 13(3) of AP II makes a distinction between those who are permanent members of rebel groups and

⁴⁵ Sandoz (Y.), Swinarski (C.), Zimmermann (B.) (eds.), *Commentary to the Additional Protocols of 1977*, ICRC, Geneva, 1987, para. 4789.

those who merely participate sporadically and thus remain civilians who are targetable only for such time as they participate. Had the drafters of AP II intended to draw this distinction, they would have elaborated on it throughout the Protocol.

2. Are the IHL rules on the conduct of hostilities clear in NIAC?

Some experts cited the Commentary to Art. 13(3) of AP II: “Those who belong to armed forces or armed groups may be attacked at any time.” The “armed groups” referred to here, this expert observed, must be rebel groups, given the same term is used in Art. 1(1) of the Protocol to describe a group engaged in hostilities with government forces: “between its armed forces and dissident armed forces or other organized armed groups...” The IHL of NIAC taken on its own, the expert observed, therefore seems to allow a State to target members of a rebel group at any time. Other experts agreed with this conclusion.

During the drafting of AP II, one expert observed, the drafters were indeed close to adopting this “membership approach” with respect to targeting rules but ultimately did not. Other experts agreed that the accepted interpretation of AP II today is that rebels are civilians and can only be targeted when directly participating in hostilities. One expert pointed out that there are some who argue that this interpretation is strictly conventional and does not represent customary law. Other experts, on the other hand, pointed out that the Customary Law Study repeats the formula of “direct participation.”⁴⁶

For a number of experts, the governing rule for targetability in NIAC, therefore, hinges upon direct participation in hostilities. Acts which constitute direct participation will render a rebel combatant targetable for such time as that individual is committing those acts. All the experts observed that what acts constitute direct participation in hostilities, however, is far from clear under IHL at the moment.

Some experts were therefore of the view that the IHL of NIAC does not provide clear rules on when rebel fighters may be targeted (1) because it is not clear that these fighters constitute a recognized category under the IHL of NIAC and (2) because, of the acts these rebels commit, it simply is not clear which acts (other than the direct use of force) constitute direct participation in hostilities.

3. Are the HRL rules on the use of potentially lethal force in NIAC clear?

All the experts observed that HRL, in contrast to the IHL of IAC, does not categorize people. One expert noted that this aspect of HRL is essential in understanding how HRL would govern the targeting of rebel combatants in NIAC.

As related earlier, the experts observed that the HRC, the ECHR and the Inter-American Court and Commission have all considered cases arising out of situations of NIAC and, to various extents, applied HRL to determine the lawfulness of the State’s use of force. While reviewing the jurisprudence of the HRs bodies, the experts noted that HRL provides what the experts referred to as the law enforcement model. The use of potentially lethal force is

⁴⁶ Henckaerts (J.M.) and Doswald-Beck (L.), *Customary International Humanitarian Law*, ICRC, Cambridge, Vol. I, Rules, Rule 6, pp. 19-24.

governed by the principles of necessity and proportionality. The experts observed that these principles translate into the rule requiring the State's forces to effect an arrest where possible, as well as to plan their operations in such a way as to maximize the opportunity of being able to effect an arrest. One expert remarked that this rule of HRL provides greater clarity than does the IHL of NIAC.

The HRL standard clearly applies in NIAC, several experts observed. One expert cited the HRC communication of *Guerrero v. Colombia* as an example of a clear instance in which, during the course of NIAC, government forces were under an obligation to effect an arrest of persons who could be described as rebel fighters because they could easily have made the arrests under the circumstances.⁴⁷

Other experts noted that, at the other end of the spectrum, there have been cases in which the State was clearly not under an obligation to attempt to arrest, given that the hostilities were such that the State could not have been expected to do so. In determining the lawfulness of the State's resort to force, the ECHR, one expert observed, will take into account the fact of a "clash" and apply the arrest standard accordingly.⁴⁸

Other experts agreed. These cases illustrate the outer limits of the obligation to arrest in NIAC. In other words, these cases demonstrate that HRL can take cognizance of the fact of hostilities and will not require the State to do what is impossible, i.e., arrest insurgent forces over whom the State cannot exercise sufficient control. As related earlier, another expert observed that no complaint has been brought against Colombia alleging that its bombing of FARC camps constitutes a violation of the right to life. Such a case, in this expert's view, was pretty unthinkable, given that Colombia clearly does not exercise sufficient control over these areas to conduct operations aimed at capturing these rebel forces. In situations of NIAC, another expert surmised, the immediacy of the threat may not play as great a role as in law enforcement situations.

4. With respect to rules on targeting, do the IHL rules of NIAC displace the HRL rules as a lex specialis?

As related earlier, all the experts observed that the ICJ has referred to IHL as constituting the *lex specialis* in situations of armed conflict, although the Court did not hold that IHL entirely displaces HRL with respect to all rights under HRL. Citing the *Nuclear Weapons* Advisory Opinion, a few experts felt that it was clear that HRL was subordinate to IHL with respect to the right to life. Under this view, HRL is entirely displaced by IHL on this question, and therefore the issue of when rebel fighters can be targeted must be resolved by IHL alone.

⁴⁷ *Guerrero v. Colombia*, Communication no. R.11/45 (5 February 1979), UN Doc. Supp. No. 40 (A/37/40) (31 March 1982), para 13.2.

⁴⁸ This expert observed that, where the ECHR applies HRL in a NIAC, the Court will actually tend to assume the lawfulness of the State's resort to the use of potentially lethal force. While the Court should take into account the fact of active fighting, this expert observed, the Court should not merely allow the State to plead that there was a "clash" and thus its resort to force was lawful, at least where there is no evidence to this effect or even evidence to the contrary. This expert cited the three cases as examples: *Isayeva v. Russia*, ECtHR, App. No. 57950/00, Judgment of 24 February 2005; *Isayeva, Yupova and Bazazeva v. Russia*, ECtHR, App. Nos. 57947/00, 57948/00 and 57949/00, Judgment of 24 February 2005; *Mahmut Kaya v. Turkey*, ECtHR, App. No. 2253593, Judgment of 28 March 2000.

Another expert disagreed, pointing out that the ICJ's holding to this effect in the *Nuclear Weapons* Advisory Opinion was specifically limited to context of the use of nuclear weapons. Moreover, this expert objected to the idea that the IHL of NIAC could constitute the *lex specialis* with respect to the right to life in NIAC. For an area of law to constitute a *lex specialis*, this expert maintained, that area of law must provide more specific, more detailed, and most importantly, clearer rules than the *lex generalis*.

With respect to the rules on the conduct of hostilities in NIAC, one expert observed that the rules of customary IHL of NIAC are fairly detailed and mirror the rules found in API to a great extent. In this sense, the rules of IHL are arguably more detailed than the rules of HRL on the use force in NIAC. With respect to the rules governing when rebel fighters may be targeted, however, this expert agreed that, given the lack of clarity regarding what constitutes direct participation in hostilities, the IHL of NIAC is not entirely clear.

The other expert observed that, in contrast, the HRL rules are clear on this question. Given that it is not clear under the IHL of NIAC (1) whether there exists a category of rebel "combatants" in NIAC and (2) what constitutes direct participation if rebel fighters can only be targeted for such time as they participate in hostilities, there is no clear answer under IHL when rebel fighters can be targeted. In contrast, the HRL rules on the use of potentially lethal force do provide a clear answer: if the State is able to arrest the person, it must attempt to. In the view of this expert, it is the HRL rules, rather than the IHL rules of NIAC, which provide the *lex specialis* with respect to targeting in NIAC.

This expert gave the hypothetical situation of a known rebel fighter during a NIAC in a non-combat context: shopping at the supermarket. Could the State target this individual on sight and kill him, or must the State attempt to arrest him? The example is useful, this expert pointed out, in testing the assumptions upon which everyone is basing their opinions, though such situation, another expert noted, does occur in reality: there have been FARC leaders that have been arrested in Bogotá.

Another expert observed that there are other concrete situations which arise in NIAC in which it is more difficult to determine whether the State's forces should attempt to arrest rebel forces. This can be especially true where State forces operate in an area which is neither clearly under governmental or under rebel control.

The experts who felt that the IHL rules of NIAC did displace the HRL rules disagreed with the rationale for this point. In view of one of these experts, it is clear under the IHL of NIAC that rebels could only be targeted for such time as they participate in hostilities, and thus there is a clear answer in the supermarket situation: the State may not target and kill the rebel, since his shopping cannot be described as direct participation in hostilities.

Again, other experts disagreed as to whether rebel fighters could be targeted on the basis of their membership, at least under the IHL of NIAC alone. One expert felt it would be lawful for the State to target the rebel at any time on the basis of his membership in the rebel group, i.e., even when he is shopping in a supermarket. Another expert agreed that, while they would likely in practice attempt to effect an arrest in the supermarket scenario, States did not necessarily believe that they are obliged to do so, at least with respect to "bona fide rebel combatants," as opposed to civilians who sporadically participate.

Even if it were accepted that under the IHL of NIAC targetability depends on whether the person is directly participating in hostilities at the time, all the experts observed that what direct participation means is far from clear at the moment. As the situation moves away from the supermarket, therefore, the answer to the targetability question under the IHL of NIAC becomes ever more unclear.

Given that HRL provides a clear standard and, at least in the supermarket scenario, a clear answer as to targetability, one expert stressed that, in helping to develop the IHL rules on direct participation in hostilities, lawyers should be careful to take note that HRL provides this clarity on the issue of targetability in NIAC. In this expert's view, since there are no clear categories under the IHL of NIAC, any attempt to embrace a membership approach to targetability will simply result in the creation of new categories of people who can be targeted and killed on sight. Such would not, this expert observed, be a very welcome development from the perspective of HRL. Such a development, this expert pointed out, would also run counter to the thrust and spirit of the IHL of NIAC. Common Article 3 was introduced in 1949 in order to put in place some protections were there had not been any in international law. AP II was adopted to expand those protections. The idea was never, this expert noted, to create categories of people who could be targeted and killed on sight. Those proposing new interpretations of the IHL of NIAC should be careful, this expert cautioned, not to create the possibility of lawfully attacking more people than before.

Another expert seconded the observation that the primary goal of the IHL of NIAC was to afford protection. Nevertheless, this expert observed, there were other interests behind the drafting of AP II. States were adamant that the IHL of NIAC would not affect the status of rebels. States also sought to preserve their military rights of action with respect to insurgencies.

5. Parallel Applicability: what is the interrelationship between IHL and HRL with respect to rules on targeting?

Given the parallel applicability of IHL and HRL in NIAC, one expert felt that the rules on targeting depended upon how one worked out the interrelationship between these two areas of law. In the opinion of this expert, it was clear that there is a category of rebel fighters and that, under the IHL of NIAC, these rebel fighters could be targeted on sight on the basis of their membership alone. Nevertheless, the applicability of HRL in NIAC changes this result. Where the State exercises sufficient control over an area to allow it to reasonably arrest such rebel fighters, the State is under an obligation to do this. As in the situation of occupation, this expert was of the view that HRL is the default legal regime, at least where the State is operating in its own territory or territory in which it effectively exercises authority.

A second expert observed that under this theory of the parallel applicability of IHL and HRL, the question is no longer whether the persons are participating in hostilities but whether the State is in a position to effect an arrest. The assumption would be, that where a State has an armed insurrection on its hands, there would exist a necessity to use lethal force to address this threat. Yet another expert remarked that such a necessity exists because the State is under an obligation under HRL to protect the lives of persons in its territory or under its jurisdiction. In practice, the other expert observed, there would be situations in which, while it would not be clear whether the rebels fighters could be described as directly participating in hostilities under IHL, it would be clear that the State would be entitled to use potentially lethal force

given there is no reasonable chance it could arrest these rebel fighters and given that the State is obliged to address the threat.

Having introduced this understanding as to how the parallel applicability of IHL and HRL governs the issue of targeting, the expert who spoke previously observed that there exists a sort of scale: at one end is the lone rebel fighter in the supermarket whom the State must attempt to arrest, and at the other end is a battle between government and rebel forces. Of course, there may well be many situations falling between these two extremes, creating grey areas; nevertheless, the continuum is clear, as is the standard requiring the State to effect an arrest whenever reasonably possible. Whatever their views as to the clarity or lack of clarity under the IHL of NIAC with respect to targeting, several experts agreed with this analysis.

6. Where HRL rules apply in NIAC, does this result in a situation of inequality of belligerents?

One expert raised the question of the effect such HRL rules on targetability would have on the revolving door. In this expert's opinion, the basic rule on targetability in NIAC is clear: rebel combatants do not constitute a category and can only be targeted for such time as they take a direct part in hostilities. This rule creates the revolving door: rebel fighters are essentially civilians who go back and forth from being rebel fighters to being civilians, depending upon what they are doing. The revolving door, this expert pointed out, creates a situation of inequality between the belligerents in NIAC: government forces may be targeted at any time by rebel forces, but rebel forces may only be targeted for such time as they are directly participating in hostilities. Since this revolving door puts government forces at a disadvantage, this expert observed, States and their militaries are very unhappy with the rule. Another expert agreed and felt that such a rule had not been accepted by States and thus did not represent the governing rule of the IHL of NIAC, particularly with respect to bona fide rebel fighters, as opposed to civilians who sporadically participate.

One expert disagreed that this revolving door created a legal inequality between the belligerents. One cannot talk of the rights of rebel fighters to target forces in NIAC, since such rebel fighters are criminals under the domestic law of the State and IHL gives them no such rights at all. Certainly domestic criminal law, along with IHL, continues in force during a NIAC. Another expert observed that the possibility of criminal prosecution in fact creates an inequality under IHL to the disadvantage of rebel fighters.

The other expert was of the opinion, however, that domestic law should not be taken into consideration given that there is little likelihood that mere participation in hostilities will be prosecuted in States where there is an ongoing NIAC. As a practical matter, this expert remarked, IHL and HRL are the only bodies of law which have any chance of being observed and respected. Another expert observed that, if true, this inequality under IHL would affect governmental action in a way it would not affect rebel action. That is, the government may refrain from conducting attacks because the civilian-rebel fighters whom they might otherwise attack are, at the moment, on the civilian side of the revolving door. For the rebel fighters, this is never a consideration. Where there is an inequality under IHL, this expert remarked, the basis of reciprocity on which the observance of IHL largely depends, is threatened. Other experts, however, doubted whether this inequality under IHL really has this effect in practice.

One expert argued that the revolving door threatened the capacity of IHL to fulfil its protective role. In this expert's view, the IHL of NIAC is most concerned with protecting those who are purely civilians, i.e., those who do not directly participate in hostilities. Where there is a revolving door, there is less incentive for participating civilians to remain pure civilians, which in turn threatens the protection of all who are pure civilians.

For one expert, who was of the view that the revolving door represented the current state of the IHL of NIAC, the introduction of HRL rules on targetability which require the State's forces to arrest rebels where possible further perpetuates this revolving door. Government forces are obligated to effect an arrest where possible, while rebel fighters are not. On the other hand, given that rebel fighters are criminals under domestic law, this imbalance in targeting rights is irrelevant; rebel fighters are not entitled to target government forces anyhow. To the extent that HRL and IHL are the only bodies of law governing a NIAC in a practical sense, however, this expert noted that this imbalance may negatively impact respect for IHL and HRL. Another expert agreed that an obligation to arrest under HRL would inevitably endorse the revolving door.

One expert, however, observed that the applicability of HRL rules would not necessarily perpetuate the revolving door. The requirement that lethal force be used when absolutely necessary and the requirement that a person be currently taking a direct part in hostilities in order to be targeted will not always coincide. For example, as several experts observed, it may well be necessary for a State to attack a rebel camp even at a time when the rebels are not taking a direct part in hostilities. One could reject a revolving door interpretation of the IHL of NIAC and yet insist that it is unlawful for the State to target persons on sight where it could effect an arrest. The HRL standard of "absolute necessity" should be applied regardless whether a membership approach or a revolving door approach is taken.

Another expert observed that, even if one accepts that the applicability of HRL creates a practical imbalance between government and rebel forces during a NIAC, this fact does not allow a State to ignore its obligation to protect the right to life. This is an obligation States accepted when they ratified the relevant treaties. While the standards regarding when life has been taken "arbitrarily" will necessarily be different in many situations during a NIAC, these standards cannot be lowered simply because the operation of these standards, in practice, leads to a legal inequality between governmental and rebel forces under IHL.

Annex

List of Participants

1. Mr. William Abresch: Director, Extra-Judicial Executions Program, Center for Human Rights and Global Justice, New York University School of Law.
2. Mr. Yuri Boychenko: Head of Division for Human Rights and Humanitarian Affairs, Permanent Mission of the Russian Federation, Geneva.
3. Dr. Knut Dörmann: Deputy Head of the Legal Division, ICRC, Geneva.
4. Professor Louise Doswald-Beck: Director, University Centre for International Humanitarian Law; Graduate Institute of International Studies, Geneva.
5. Mr. Frederico Andreu Guzman: Senior Legal Advisor, International Commission of Jurists, Geneva.
6. Professor Françoise J. Hampson: University of Essex; Member of the UN Sub-Commission on Human Rights; Governor of the British Institute of Human Rights.
7. Professor Wolff Heintschel von Heinegg: Europa Universität Viadrina, Frankfurt (Oder).
8. Professor David Kretzmer: The Hebrew University of Jerusalem.
9. Colonel Philip McEvoy: Legal Advisor, Army Legal Services, United Kingdom.
10. Ms. Jelena Pejic: Legal Advisor, ICRC Legal Division, Geneva.
11. Mr. Steven Solomon: Principal Legal Officer, World Health Organisation, Geneva, former Deputy Legal Advisor, U.S. Mission, Geneva.
12. Mr. Wilder Tayler: Legal Director, Human Rights Watch.

Rapporteur: Mr. Harry Fogler, Student, University Centre for International Humanitarian Law, Geneva.

Administrator: Ms. Laure Bally Cergneux, Administrator, University Centre for International Humanitarian Law, Geneva.

The following experts were expected but owing to supervening circumstances were unable to attend.

Professor Robert Goldman: American University Washington College of Law; Former member of the Inter-American Commission in Human Rights.

Professor Lindsay Moir: The University of Hull School of Law.

Program

Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation

The purpose of this meeting is to examine the differences between the human rights law on the right to life and the rules of international humanitarian law which have the effect of permitting the loss of life in situations of occupation and non-international armed conflict, with a view to bridging these differences to the degree possible.

to be held in Geneva from 1 to 2 September 2005

Draft Agenda

First day (1 Sept.)

Human rights and humanitarian law in occupation

This discussion will focus on law-enforcement, which could involve the use of potentially lethal force, in order to maintain order and security in occupied territories. It will examine the extent to which maintenance of order in such situations is actually regulated in any type of detail in IHL and how HR law would apply in practice. It will then attempt to elucidate if the normal rules relating to the conduct of hostilities (which allow attacks on combatants and civilians taking a direct part in hostilities) can apply in occupation situations under the present law and if so, in what situations precisely. Finally, in the light of the results of these deliberations, the issue of “targeted killings” will be considered.

9.30-11.00. The rules relating to the right to life and law enforcement under human rights law with and without the declaration of a State of emergency: treaty-law; case-law; the UN Code of Conduct for Law Enforcement Officials and Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (this section will not concentrate on occupation situations only as this part is also useful for the discussion on non-international conflicts).

Coffee break

11.30-13.00 The rules relating to public order and safety in occupied territories under the Hague Regulations and the Fourth Geneva Convention.

Lunch

14.30-16.00 The afternoon will be devoted to an examination of the law relating to the use of force in occupied territories. In particular, it will address the following questions:

- How has State practice (in particular UN resolutions), the International Court of Justice and treaty-body practice required human rights law to be applied in occupation situations?
- Is the use of human rights standards the normal standard to be used in relation to the maintenance of order and security in occupation situations? Does it depend on whether

the “disorder” stems from resistance activity as opposed to any other form of criminal activity? Does it depend on the degree or type of disorder?

- Does occupation have to in effect slide back into an international armed conflict for the application of the law on the conduct of hostilities? If so, would this be for part of the territory or all of it – is there a time limitation?
- Does the introduction of the entitlement by resistance groups to POW status under Article 4 of the Third Geneva Convention have any bearing on this question as a whole?

Coffee break

16.30-18.00 Discussion continued

Second day (2 Sept.)

9.30-11.00 Are “targeted killings” in occupation situations extra-judicial executions, lawful acts of armed conflict or use of force as a last resort in law-enforcement?

Can lethal force be used against resistance groups abroad (excluding neutrality issues)

Coffee break

Right to life in non-international armed conflicts

The major difference between international and non-international armed conflict is that in the former the status of “combatant” exists for the purpose of bestowing the right to use potentially lethal force by combatants and against them. There appears to be no official status of “combatant” in non-international conflicts. On what basis therefore can potentially lethal force be used? In the case of uncertainty in IHL to what extent should human rights law be the appropriate standard?

11.30-12.00. Introduction to the difference between international and non-international armed conflicts as regards combatant and prisoner-of-war status.

12.00-13.00. Do references to “members of the armed forces” in Common Article 3, or “armed forces and armed groups” in Additional Protocol II imply combatant rights i.e. to shoot others on sight? If not, can they be shot on sight whatever their behavior and at any moment– if so, on what basis precisely under IHL? Or is Article 13 of APII the only relevant criterion?

Lunch

14.30-16.00 How would the normal rules of HR law apply in such a context? Would it make any difference if the State declared a State of emergency? Given the uncertainty of what is meant by “taking a direct part in hostilities” under IHL, which normally implies shooting on sight, should the further interpretation of this concept take into account the human rights rule limiting the use of potentially lethal force and favouring arrest where possible? Is there any place for “targeted killings” in non-international armed conflict?

16.30-17.00 What should be done further?