Good morning, Ladies and Gentlemen, and, on behalf of LCILP, welcome to this workshop on IHL and Humanitarian Access in NIACs.

We are particularly fortunate to have delivering the workshop and leading our discussions, Dr Patrick Zahnd. Dr Zahnd spent 32 years with the ICRC and held senior managerial posts there. Amongst his assignments, he was political and diplomatic advisor to the Director of Operations and Head of ICRC Advisory Services in IHL in the CIS countries and the Americas. He holds a doctorate in Public International Law and Political Science and has taught PIL and IHL at the invitation of many universities around the world.

Before moving on to substantives, let me say a word about LCILP. LCILP is a London-based international institution committed to the advancement of global legal knowledge and the rule of law for the promotion of peaceful dispute settlement. It provides independent and practical research, criminal justice capacity building, and a technical advisory service to both the public and private sector. LCILP's experts work with clients in development, government, academia and a wide range of corporate sectors. LCILP has particular expertise in the criminal justice systems and legal frameworks of East Africa and the Middle-East.

T**he need to respect IHL after events at Aleppo, Yemen, Mosul and Raqqa.**

Aleppo, Mosul and Raqqa are cities and it is the conflict in urban areas in Yemen which has been primarily responsible for producing the horrifying figures of something like 10,000 civilian deaths and probably nearer 50,000 civilian injured.

Let me add some stark facts:

- Between 2010 and 2015, nearly half of all civilian war deaths worldwide occurred in Syria, Iraq and Yemen;

- Over the past three years, ICRC research shows that wars in cities accounted for 70% of all civilian deaths in Iraq and Syria

- Some 17.5 million people have fled their homes, creating the largest global refugee and migration crisis since World War II. 11.5 million people, more than three people a minute, have fled their homes in Syria alone, since the start of the war.

But it is not just the lives and homes of civilians that are being destroyed in these conflicts. The increasing use of explosive weapons that have a wide impact area, eradicate the varied systems of services such as electricity, water, sanitation, rubbish collection and health-care that civilians rely on to survive, making an eventual return to these cities even harder for those who have fled.

We must always have in mind that there is a detailed framework of protection afforded by IHL, even in a NIAC; but the essential problem is that there is a general lack of respect and adherence to those rules, to the laws of war. It may not be the case for all parties involved, but there is no doubt that the flouting is widespread. Civilians and civilian structures are being targeted and, of course, ordinary citizens trapped in sieges. Modern IHL is essentially protective in nature and demands from belligerents that constant care is taken not to target civilians. That message is being lost or ignored. Of course, the conflicts we are concerned with in this workshop find their expression principally in aerial bombardment and heavy artillery; deploy those in a densely populated area and the results are sadly predictable.

If our call is one for respect for IHL in NIAC in the Middle-East, what can be done?

There is no escaping the need for much more respect of the rules of IHL by those parties in conflict Iraq, Syria and Yemen; but a responsibility also lies with each of those states, from whatever region, supporting parties to those conflicts; they must be reminded that Common Article 1 of the Geneva Conventions requires that states parties 'ensure respect' for IHL and that, in the present setting, must include states exerting influence on those belligerents that they actually have influence over.

Then, as to the nature of the weaponry itself, although there is no express prohibition on the use of explosive weapons in an urban environment, there use must comply with IHL and with high population density, unguided weapons and those with a wide explosive radius, IHL compliance will be difficult to achieve. Belligerents need reminding of this; but, of course, the reminders will prove hollow, if those in violation know they will be unlikely to face subsequent sanction or penalty.

Those wielding state military power in these conflict zones must start taking on board the often difficult lessons learnt in the past by US and European militaries in respect of civilians and urban warfare:

- Planning/targeting: Rules of engagement and environment/context-specific tactical directives;
- Multi-strand intelligence for more precise targeting;
- Timing of strikes (to take account of the patterns of daily civilian life);
- Lists of 'no strike' objects (especially where close to military objectives) and target vetting;
- Proper application of proportionality analysis (especially where military use of otherwise civilian object such as infrastructures)
- Contingency planning;
- Safe exit routes.

Sadly, we are sometimes witnessing not simply a lack of impetus to address IHL obligations positively, but a wilful disregard of the legal protective framework. One example that springs to mind is the credible reports of so-called 'double-tap bombing' of targets in Yemen by the Saudi coalition. The so-called 'double-tap' tactic involves launching an attack or dropping a bomb, followed swiftly thereafter by a second strike. This is a practice entirely at odds with IHL because, of course, it is likely that the wounded or medical personnel/first responders will be victims of the subsequent attack. Remembering that one of the key principles for those selecting a target is that of proportionality; one cannot help but conclude that, in the case of double-tapping, either no meaningful assessment as to proportionality takes place or, if undertaken, any such assessment is then disregarded.

A further example may be gleaned from Aleppo, with the use of aggregation in targeting; in other words, lumping together a number of separate military objectives, typically in a town or city, and treating them as a single target. In this instance, Article 51(5)(a) of the Additional Protocol I to the Geneva Conventions explicitly provides that indiscriminate attacks are prohibited and that an attack will be considered indiscriminate if it amounts to *"…an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects".*

A third example is that legal protections for hospitals and medical personnel are often not being robustly safeguarded. A medical unit is a civilian object but, over and above that, it has particular protection under IHL. A medical unit might be a civilian or military establishment and could be a hospital, clinic or other medical facility. Whereas a civilian object can become a military objective if being used for a military purpose (and will sometimes cynically be so used), a medical unit will only become a legitimate target if it is being used, outside of its humanitarian function, to commit an act or acts harmful to the enemy. This test is, therefore, a stringent one.

Turning to the practical effect of Yemen being an NIAC, excluding issues of maritime warfare, the means and methods of war are almost entirely the same whether a conflict is international or non-international. Do we, therefore, need a new definition of IAC and NIAC, or even no distinction between them at all? The key protective difference is the existence of prisoner of war status in an IAC, which means that any captured combatants (i.e. a member of a national armed force or one of its associated militia) must be afforded full prisoner of war protection.

Turning to some wider issues that are relevant to IHL protection in an NIAC, Geneva Law, of course, provides two protective regimes. For combatants there is distinct protection when they are *hors de combat* and in the control of the other party, whether by injury, sickness, having been shipwrecked or having surrendered. For civilians, there is much greater protection, so long as they are not actively participating in hostile activities.

(Geneva I-III that addresses protection competence and Geneva IV that provides for civilians.) However, that distinction exists only in IAC; in NIAC there are no combatants, simply different categories of civilians, who are given various degrees of protection according to whether or not they are playing a part in the armed conflict.

This leads into the debate as to whether radical change to the IHL framework is needed and whether the present IAC/NIAC distinction is either an apt or helpful one. Taking the Yemen conflict as an example; we have an NIAC, with the key provision of treaty law applicable being Common Article 3 (all members of the coalition are states parties).

Why an NIAC? Under the Geneva Conventions (1949) and their two Additional Protocols (1977), the laws of war applicable to an IAC apply to any armed conflict that is between two or more States or armed groups under the effective control of a State. Although the conflict in Yemen and the involvement therein of the Saudi-led coalition entails the involvement of a number of states, it is not a conflict between states. It is, instead, a conflict between the forces of the Yemeni Government and a non-state armed group/groups, making it a NIAC.

The effect of that Article is to create a minimum protective set of standards applicable to every party in a NIAC. Although the status of combatant does not feature in NIAC-applicable treaty law, Common Article 3 provides a framework of safeguards or protections for both civilians and those no longer taking part in hostilities (i.e. the captured, the surrendered and those *hors de combat*). The principal aims of the protections are to prohibit the use of violence (including torture) and degrading or humiliating treatment against such persons.

Then, further reinforcing Common Article 3 is Additional Protocol II (1977), which was adopted in order to develop and supplement the standards set out in Common Article 3. Both Common Article 3 and APII apply with equal force to all parties in the Yemen conflict, whether government and coalition forces or non-state armed groups.

Further, to build an additional layer, we have customary international law, which is sometimes neglected in discussions as to the NIAC. In that regard, there has, over the last twenty years or so been concerted efforts to show that those customary norms traditionally associated with IACs are, in large part, equally applicable to NIACs. Indeed, the Customary Law Study of the ICRC (2005) concluded that most of the rules of the Additional Protocols are applicable in both types of conflict, even though the precise detail of those common rules will not always be the same. The commonality is, however, in the principle, even if not in the word by word detail. Thus, in the Study the following customary law rules are said to be common to both IACs and NIACs:

- Rule 11: Prohibition of indiscriminate attacks;
- Rule 22: Duty of parties to the conflict to take all feasible precautions to protect the civilian population and civilian objects;
- Rule 25: Respect and protection of medical personnel;
- Rule 53: Prohibition of the use of starvation of the civilian population as a method of warfare;
- Rule 74: Prohibition of the use of chemical weapons; and
- Rule 90: Prohibition of torture, cruel or inhumane treatment.

If IHL is to be respected, there is undoubtedly a need to sensitise all belligerent parties as to the constraints and parameters imposed by custom in an NIAC.

At the same time, it must be accepted that there are those who argue that the conflict in Yemen is yet another example that shows that the current distinction between IAC and NIAC is unhelpful and not particularly appropriate in many 21st century armed conflicts, especially where there is an international context and cross-border consequences, along with factual conflict scenarios not envisaged in the immediate post-WWII period. They might go on to argue that a less piecemeal framework that has to rely on custom to supplement treaty provisions might be a much more powerful driver for IHL compliance. Certainly, it can fairly be said that Yemen reflects a type of armed conflict that has emerged more markedly in the current millennia, where a multinational force or forces join with those of the host state against an organised armed group, with the conflict occurring

within the host's territory. Such critics of the present distinction might even argue that the situation in Yemen demonstrates that an armed conflict should be defined simply as that, without any international/national divide.

Humanitarian Access & Relief

IHL provides that parties to a conflict (IAC or NIAC) must grant humanitarian organisations rapid and unimpeded access to an affected population. But it should be had in mind that states should not overlook their duties: indeed, it is the state that has the primary responsibility for ensuring the essential needs of civilians under their control. It is when a state is unwilling or unable to comply with that responsibility that IHL provides for relief actions by others, principally, humanitarian organisations (such as the ICRC).

In a NIAC, Common Article 3 and Article 18 of APII provide the legal framework for humanitarian access and assistance, along with customary norms on the rapid and unimpeded passage of relief and the freedom of movement and protection afforded to relief personnel.

A relief action shall be undertaken when the population lacks the essential supplies for its survival, but it is subject to the consent of the state concerned. However, consent may not be arbitrarily refused, so long as the relief is humanitarian, impartial and is to be delivered without any adverse distinction.

However, the conditions for delivery of relief still require greater clarity in the case of a NIAC. There is little by way of treaty or customary provision and no firm guidance on matters such as the types of goods that may be provided and the regulation of relief personnel. Moreover, for both IACs and NIACs, there is a general recognition that greater definition is needed addressing the rights and obligations, in relation to relief operations, of the parties to the conflict themselves.

The interface between IHL & IHRL

IHRL applies during an armed conflict and co-exists with IHL. IHL norms may not be derogated from, whereas subject to some restriction and

conditions, some IHRL norms may be the subject of derogation during, for instance, an armed conflict.

In a NIAC it must be had in mind that IHL applies equally to state forces and non-state armed groups. It establishes an equality of rights and obligations which, of course, may not equate with domestic criminal law. Conversely, an armed group will not have the capability to comply with a full range of IHRL obligations since it does not perform a governmental or, at least, government-like (i.e. acting as a *de facto* state authority), function. IHRL, arguably, binds only states and does not create legal obligations on non-state actors. In any event, the majority of obligations under IHRL that an armed group could, in practice, perform would be binding on them in an armed conflict under IHL in any event.
