
FOURTEENTH ANNUAL GROTIUS LECTURE

CONFRONTING COMPLEXITY THROUGH LAW: THE CASE FOR REASON, VISION, AND HUMANITY*

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President Caron and Professor Hunter, distinguished scholars and practitioners, members of the American Society of International Law, ladies and gentlemen,

It is great honour for me to have been invited to deliver the Fourteenth Annual Grotius Lecture at the invitation of the American Society of International Law and the International Legal Studies Program of American University Washington College of Law. It is likewise a great pleasure to be speaking before the annual meeting of the American Society of International Law, which has for so many decades been dedicated to enabling open and creative discussions of the outstanding legal issues of the day. It must be admitted, however, that addressing the opening of an ASIL meeting entitled “Confronting Complexity” presents a great challenge, for the general theme seems to aptly encapsulate both the times we live in, which are undoubtedly complex, and calls on me to try to outline how we might deal with complexity.

It should come as no surprise that my remarks will primarily focus on the role of the law in confronting the complexity of violence, and particularly the role of international humanitarian law in confronting the complexity of armed conflict. It is fitting, in this context, to pay tribute to Hugo Grotius. In line with principles established by his

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Spanish and Italian intellectual counterparts Francisco de Vitoria and Alberico Gentili, he laid the foundations of international law, and in his timeless treatise *On the Law of War and Peace* determined that certain rules govern the conduct of war whatever the justness of its cause. We are far beyond the writings of Grotius today in terms of the elaborateness of the international legal framework, including the one governing armed conflict, yet we remain in his debt. He not only paved the way to our current thinking but showed us that complexity may—and can only be—addressed with reason, vision, and humanity.

What does complexity mean when armed conflict is the reference point for analysis? It means, first of all, that armed conflicts remain a tragic reality in the twenty-first century and that enormous human suffering continues to be caused by this form of violence. We are all witness to continued violations of international humanitarian law, including deliberate attacks against civilians, the destruction of infrastructure vital to the civilian population, the forcible displacement of entire communities from their habitual places of residence, and various forms of sexual violence inflicted against vulnerable individuals and groups. Persons deprived of liberty in armed conflict are likewise frequently subject to appalling behaviour by their captors, including murder, torture and other forms of ill-treatment, deprivation of humane conditions of detention, and denial of procedural safeguards and fair trial rights. Medical personnel and humanitarian workers are also an increased target of attacks. The law tries to prevent or put a stop to suffering and to deter future violations, but it cannot, by itself, eradicate abuses or be expected to do so.

Complexity may also be approached by examining the features of current armed conflicts and the political, economic, and social backdrop against which they take place—all issues which are beyond the scope of my remarks. Allow me, nevertheless, to note that the International Committee of the Red Cross, which has operations in some eighty contexts around the world, is involved in a range of situations: from those in which the most advanced technology and weapons systems are deployed in asymmetric confrontations, to an assortment of armed conflicts typified by low technology and high fragmentation of the actors involved. Each case must be approached on the particular facts and a humanitarian response devised to meet

the specific needs of those most affected, which is by no means a simple endeavour.

Increased complexity is also a feature of contemporary armed conflicts, the nature of which continues to evolve. The predominant form of armed conflict nowadays is non-international, often stemming from state weakness that leaves room for armed groups to take matters into their own hands based on—real or perceived—political, ethnic, or religious grievances. Some non-international armed conflicts are predominantly economically driven and revolve around struggles for access to key natural resources. Whatever the case, non-state armed groups tend to live off the civilian population and engage in appalling acts of brutality to ensure control, instil fear, and obtain new recruits. They frequently resort to looting and trafficking, extortion and kidnapping, as well as other acts amounting to profitable economic strategies that are sustained by the general lawlessness and by national, regional, and international economic and political interests. Thus, the coexistence of violence stemming from armed conflict and that linked to various forms of banditry and the blurring of lines between armed conflict and crime, including transnational, has become a complex reality defying easy practical or legal solutions.

The world is further beset by the combined effects of political, economic, and financial crises. Food prices continue to rise, affecting countless people already suffering from the effects of armed conflict. These trends, when compounded with the ravages of natural disasters, including drought and floods, are likely to continue to fuel unrest and armed conflicts in the years ahead.

Some of these characteristics are also present in situations of violence below the threshold of armed conflict, including instances of state repression, inter-communal strife, and urban violence. The humanitarian needs in these contexts may be just as grave as in situations of armed conflict. The ICRC relies on its right of humanitarian initiative provided by the Statutes of the International Red Cross and Red Crescent Movement to come to the aid of persons or communities in need when, among other things, its operational involvement is assessed as being of added value.

The very brief outline of current trends in armed conflict and other situations of violence begs the question of whether reality is really

becoming increasingly complex or whether, thanks to technology and new means of communication, we have more facts at our disposal. I will not attempt to answer it because the more important question, in my view, is: how do we use international law to address complexity, whether it is indeed increasing or is just perceived to be that. Based on historical observation and on an analysis of events over the past decade, I would submit that states and other actors have given essentially three responses.

When faced with impending or actual crises, domestic and international institutions have sometimes chosen to abstain from action. An obvious and tragic example was the inability of states to finalize a convention on the protection of civilians ahead of the Second World War, which contributed to the unspeakable consequences that we are all familiar with. On other occasions, the real or perceived complexity of a domestic or international crisis has led states to claim that existing law is not suited to the new circumstances at hand, resulting in the wholesale or partial rejection of longstanding and well-established precepts. This approach, when the legal framework in question is IHL, has the effect of depriving of protection the very persons it was designed to apply to. We are also familiar with the consequences of this option. A third approach, fortunately the most common, has been to uphold existing law in the face of new challenges, whether real or perceived, and to analyze that which is possibly new with a view to devising appropriate solutions. Over the course of the last years, this has also been the ICRC's approach. The organization has tried to understand and assess the reality of contemporary armed conflicts and to propose answers to some of the salient questions without departing from the balance underlying IHL, which is that between military necessity and the imperative of humanity.

Allow me to briefly touch upon another issue affecting the ability to resolve complexity through law, which is the relationship between international and domestic law. To begin with, the universality of a given norm may be hampered by the fact that a state may choose not to become a party to an international treaty. This may happen even if it took part in the negotiating process and obtained concessions from the other participants, with the implicit expectation that such accommodations will facilitate its signature and ratification. A state may also sign a treaty, but eventually not ratify or accede to it for a

variety of reasons, including domestic political considerations. While a state in this case may not act contrary to the treaty's object and purpose, it is nevertheless not bound by it. Even when states do agree on the content of a treaty and agree to be bound by it at the international level, implementation in a domestic legal system oftentimes remains uncertain, particularly if a treaty needs to be previously incorporated by means of domestic law. Thus, a key legal requirement at the national level may be missing.

A further and important cause of complexity is the way in which domestic courts approach and interpret international norms. Some courts ensure that a state complies with its international obligations, while others may choose to disregard international law. Approaches to customary international law and its acceptance by domestic courts also vary widely. This creates particular uncertainty in the area of international humanitarian law, which was initially customary law based, and in which customary law rules still constitute an important source of legal obligations. If customary law is disregarded, then the minimum safeguards provided for in IHL will not be implemented.

I do not, of course, have a solution to the complexity arising from the interplay of international and domestic law. I simply want to note that the uneven application of international law at the domestic level may give rise to the justified perception that international law cannot ensure consistent and equal outcomes when its rules are violated. In the IHL context this means, for example, that, depending on the operation of the variables I have outlined above, persons suspected of war crimes will in some cases be brought to justice, while others will escape it. States and other actors are thus called on to do their utmost to ensure that IHL performs its protective function in any situation in which it is legally binding. Applying it in good faith is always an indispensable starting point.

Ladies and gentlemen,

I would now like to turn to certain practical challenges related to situations of armed conflict and offer some remarks on how international humanitarian law may be used to address them. The topics are by no means exhaustive and include the classification of armed conflicts, the rules on detention related to armed conflict, the need to improve compliance with IHL, and the role of IHL in the face of new technologies of warfare. In some cases, we have the

advantage of hindsight. Other challenges are ongoing. Others are developing.

A key legal issue that has been, and is being, debated is whether the current IHL dichotomy—under which armed conflicts are classified either as international or non-international—is sufficient to deal with new factual scenarios, and whether new conflict classifications are needed. The question has arisen mainly because of the undoubted increase in non-international armed conflicts with an extraterritorial element. A typology of such conflicts has been outlined in the ICRC's recent Report to the 31st International Conference of Red Cross and Red Crescent, entitled *IHL and the Challenges of Contemporary Armed Conflicts*.

One example is a non-international armed conflict originating within the territory of a single state between government armed forces and one or more organized armed groups that has “spilled over” into the territory of a neighbouring state. Another example is a non-international armed conflict in which multinational armed forces are fighting alongside the armed forces of a “host” state—in its territory—against one or more organized armed groups. As the armed conflict does not oppose two or more states (i.e., as all the state actors are on the same side), the conflict is classified as non-international, regardless of the international component. An illustration of this type is the non-international armed conflict in Afghanistan. It may also be argued that a “cross-border” non-international armed conflict exists, possibly alongside an international armed conflict, when the forces of a state are engaged in hostilities with a non-state party operating from the territory of a neighbouring state without that state's control or support.

Yet another type of non-international armed conflict, believed by some to exist, is the one between Al Qaeda and “associated forces” and the United States, most often called “transnational.” It should be recalled that the ICRC does not share the view that a conflict of such scope, previously known as the “war against terrorism,” is taking place. Since the horrific attacks of September 11th 2001, the ICRC has referred to a multifaceted “fight against terrorism.” This effort involves a variety of counter-terrorism measures on a spectrum that starts with non-violent responses—such as intelligence gathering, financial sanctions, judicial cooperation, and others—and includes

the use of armed force at the other end. When armed force is used, the ICRC has taken a case-by-case approach to legally analyzing and classifying the various situations of violence that ensue. Some have been classified as international armed conflicts, others as non-international armed conflicts, while various acts of terrorism taking place in the world have been assessed as being outside any armed conflict. IHL rules governing the use of force and detention for security reasons are less restrictive than the rules applicable outside of armed conflicts governed by other bodies of international law, and IHL should thus not be applied to situations that do not amount to armed conflict.

It should be recalled that the key distinction between an international and a non-international armed conflict is the quality of the parties involved: while an international conflict presupposes the use of armed force between two or more states, a non-international conflict involves hostilities between a state and an organized non-state armed group or between such groups themselves. If one surveys armed conflicts going on in the world, there does not appear to be any current situation that would not fall into one of the two existing conflict classifications. Moreover, to the extent that new classifications have been called for, they would invariably result in a dilution of existing IHL protections, an outcome which the ICRC could not support, for obvious reasons.

IHL rules governing detention in armed conflict have also been the subject of much controversy over the past few years. While the relevant rules of the Third and Fourth Geneva Convention may be said to have withstood the test of time in international armed conflicts, recent practice has demonstrated that IHL governing detention in non-international armed conflict needs to be upgraded. Based on its operational activities, the ICRC has identified specific humanitarian concerns related to deprivation of liberty in this type of conflict, some of which are not, or are not sufficiently, addressed by international humanitarian law.

The first concern is poor material conditions of detention, which may, and often do, have direct and irreversible consequences on the physical and mental health of detainees. Detention conditions for persons under the control of a non-governmental armed group are oftentimes nothing less than dire, owing to lack of resources and

organization. Poor material conditions of detention commonly mean lack of adequate food, water, and clothing, as well as insufficient medical care. Detention facilities themselves are frequently unsuitable. Detainees often have limited contact with their families and are sometimes prohibited to see them even though family contact is both a legal obligation and constitutes sound detention policy. There is likewise a failure to register detainees, or to separate the different categories one from the other, or to allow detainees to practice their religion. Last but not least, overcrowding is a permanent characteristic of many places of detention. While objective circumstances are in some cases the cause, in many others inefficient or non-existent legal processes unnecessarily prolong detention or even prevent release.

While IHL contains detailed rules on conditions of detention in international armed conflicts, this is not the case in conflicts not of an international character, especially those governed by Article 3 common to the Geneva Conventions. Additional Protocol II provides an essential set of rules, but they are not sufficiently comprehensive, and the relevant norms of customary IHL are necessarily formulated in general terms.

In addition to the general protection applicable to all persons detained for reasons related to a non-international armed conflict, further provisions are necessary to address the specific needs of certain categories of persons. The situation of women, for instance, requires special attention. Children should also be better protected, and the needs of other categories of persons, such as the elderly and the disabled, should likewise be reflected in IHL governing non-international armed conflicts.

A particular humanitarian concern related to detention in non-international armed conflict is the lack of procedural safeguards for persons subject to internment. As already mentioned, most conflicts nowadays are non-international, and internment is widely practiced. In the absence of IHL norms, states often resort to policy directives or apply domestic law, neither of which has proven to be satisfactory from a protection standpoint. In practice, internees are not adequately informed of the reasons for their internment, and an established process allowing them to challenge the lawfulness of their detention and to obtain release if the reasons do not or no longer exist is

lacking. Regular, six-monthly periodic review is also missing. Uncertainty about one's legal situation is often compounded by prohibitions or restrictions on contact with the outside world, including families, leading to tensions within detention facilities that could be avoided.

Let me insert a bracket here and note the increasingly widespread use of the term "indefinite detention" as being synonymous with "law of war" detention. This is very unfortunate, as it may serve to create a perception of acceptability where none should exist. With the exception of prisoner-of-war internment in international armed conflict, the internment of any other person for imperative reasons of security in international armed conflict must end as soon as the reasons justifying it cease to exist. The same rule should be applied by analogy to internment in non-international armed conflicts. Initial and periodic review processes are provided for precisely because there is no assumption that a person will automatically constitute an imperative security threat until the end of an armed conflict. Each case has to be examined initially on the merits, and periodically thereafter, to assess whether the threat level posed remains the same. In view of the rapid progression of events in armed conflict, the assessment may, and in most cases does, change. There is also the outer temporal limit of internment, which is the close of active hostilities. Thus, to somehow imply that IHL allows indefinite detention as such risks misrepresenting the spirit and letter of this body of rules.

The reality and the urgency of the humanitarian problem caused by lack of procedural safeguards for internment in non-international armed conflicts is, to us, evident. Whether internment takes place in a state's own territory or is undertaken by states engaged abroad as part of a multinational coalition with a "host" state's consent, the absence of binding IHL rules has allowed divergent approaches to ensuring the procedural rights of internees. Customary IHL prohibits arbitrary deprivation of liberty but does not provide criteria for determining what is "arbitrary." Article 3 common to the Geneva Conventions contains no provisions regulating internment, apart from the requirement of humane treatment. Additional Protocol II mentions internment in Articles 5 and 6 respectively but likewise does not give details on how it is to be organized. In order to provide guidance to its delegations for their operational dialogue with states

and non-state armed groups, in 2005 the ICRC adopted an institutional position on procedural safeguards for internment. That position has served as a basis for bilateral discussions in a range of contexts in which internment for security reasons is being practiced and is believed to present a workable starting point for examining the key legal issues that arise.

The transfer of persons between states has also emerged as one of the defining features of armed conflicts over the past several years, particularly in situations where multinational forces transfer persons to a “host” state, to their country of origin, or to a third state. There is cause for concern from a humanitarian standpoint whenever there is a risk that a transferred person may be subject to serious violations, such as arbitrary deprivation of life, torture, and other forms of ill-treatment or persecution upon transfer.

The ICRC’s focus on the issue of transfers has arisen as a result of, broadly speaking, two operational situations. First, when persons it visits express concern that they will be at risk of violations upon transfer to the receiving state. Second, as a result of visits to persons who have been transferred, during which the ICRC observes that transferees have been subjected to prohibited treatment. The general international law principle prohibiting transfers to situations of abuse, known as *non-refoulement*, is not, however, explicitly provided for in IHL governing non-international armed conflicts. The lack of legal provisions suggests that it would be advisable to provide for a set of workable substantive and procedural rules that would both guide the action of states and non-state armed groups and protect the rights of affected persons. Current practice, in which more and more non-international armed conflicts involve coalitions of states fighting one or more non-governmental armed groups in a “host” country, indicates that uncertainty about how to organize a lawful transfer regime, including with regard to post-transfer responsibilities, is likely to increase, rather than decrease.

These and other issues—including the need to ensure ICRC access to persons detained in non-international armed conflicts—were the subject of an internal ICRC study and then a Report to the 31st International Conference of the Red Cross and Red Crescent entitled *Strengthening Legal Protection for Victims of Armed Conflicts*. A Conference resolution of the same name invited the ICRC to pursue

further research, consultation, and discussion in cooperation with states in order to identify and propose a range of options on how to ensure that IHL remains relevant in protecting persons deprived of their liberty in relation to armed conflict.

The other issue that the ICRC was similarly invited to work on by the Conference is enhancing and ensuring the effectiveness of IHL compliance mechanisms. This is a humanitarian imperative that must be addressed, because lack of respect for IHL remains, as I have noted above, the primary reason for enormous human suffering in armed conflicts.

Special emphasis has been placed in the past two decades, in particular, on developing mechanisms to ensure individual criminal responsibility for crimes under international law, including war crimes. States have enacted and implemented domestic legislation enabling them to prosecute perpetrators. The establishment of international criminal tribunals and the International Criminal Court are also invaluable steps in the effort to combat impunity. The Rome Statute provides a list of war crimes, including those that may be committed in non-international armed conflicts. However, although significant, these measures are not, by themselves, sufficient. The punishment of war criminals takes place once atrocities have been committed, which is often years after the events, while victims' needs are immediate and require mechanisms that are available to prevent violations and to halt them during armed conflict.

It has not been possible to meet this need with the machinery provided for in the Geneva Conventions and Additional Protocol I—the system of Protecting Powers, the formal enquiry procedure, and the International Humanitarian Fact-Finding Commission. The Commission, in particular, has never been called upon to act, although it has been ready to do so since 1991. The main reason is that the actual operation of the existing mechanisms requires the consent of the parties concerned.

In practice, it is mainly the ICRC that carries out certain supervisory tasks, such as visits to prisons, protection of the civilian population, confidential representations in the event of violations of humanitarian law, and so on. However, there are certain limits to the ICRC's role that are inherent to its mission and working methods. It is not the ICRC's policy to publicly condemn actors responsible for

violations of IHL. Except in strictly defined circumstances, the ICRC focuses on a confidential bilateral dialogue with the parties to a conflict, the purpose of which is to gain direct access to affected persons and to persuade the parties responsible for violations to change their behaviour and meet their obligations. Also, the ICRC does not necessarily have the formal authority to act in every case. In non-international armed conflicts, its ability to operate is subject to the consent of the parties involved through an offer of services. Fortunately, the offer is in most cases accepted.

The mechanisms provided for in IHL are, admittedly, not the only ones that may be relied on to protect persons in time of armed conflict. The United Nations system has for many years been involved in monitoring behaviour in armed conflicts, in particular through the General Assembly, the Security Council, and the Human Rights Council. Although these mechanisms sometimes include the establishment of independent procedures (commissions of inquiry, special rapporteurs), final decisions are often subject to political negotiation. And while diplomatic channels are a necessary means for implementing international humanitarian law, they also have limits. First, it is not certain that these channels are really an alternative to IHL mechanisms. Indeed, violations persist in many cases despite monitoring by the UN bodies. What is more, given their political dimension, intergovernmental bodies tend to be selective. Their decisions are liable to be perceived as biased by an involved party, which poses a problem from the point of view of international humanitarian law.

Regional mechanisms for protecting human rights have also helped meet the needs of victims of armed conflicts, particularly by ruling on individual complaints. The European and Inter-American human rights courts have made significant contributions to establishing justice, truth, and reparation, but they cannot compensate for the absence of a monitoring system specific to IHL. Their jurisdiction is limited to certain geographical zones, and their decisions are in principle based on the applicable human rights conventions rather than on IHL, which is a different branch of international law. Very importantly, the jurisdiction of human rights bodies does not cover non-state armed groups because, in contrast to IHL, human rights law does not, as a rule, bind such groups. The practice of regional mechanisms for protecting human rights can

therefore not make up for the absence of a fully effective mechanism specific to humanitarian law. It is liable to call into question the primacy of international humanitarian law as the specific legal framework for protecting the victims of armed conflicts, and to weaken its universality and coherence.

Thus, although the contribution of the United Nations and regional bodies must not be overlooked, the reality of contemporary armed conflicts demonstrates that the issue of sufficient and effective monitoring mechanisms has not yet been resolved. The question thus arises as to how the monitoring system established under IHL could be strengthened. Should the existing procedures (Protecting Powers, formal enquiry procedure, International Humanitarian Fact-Finding Commission) be modified with a view to ensuring that they operate effectively in all armed conflicts? Is it preferable to create new mechanisms that are better suited to contemporary realities? If so, what parameters should be taken into account to ensure that these mechanisms are effective?

Many proposals have been put forward on the subject in the course of the normative history of international humanitarian law. When the Geneva Conventions were being drafted, it was proposed, for example, that a “High International Committee” be established, which would be in charge of monitoring the Conventions’ application. Some twenty years later, the UN Secretary-General suggested that an “Observer-General” or “Commissioner-General” be appointed who would be in charge of setting up and running a system of asylum or refuge for civilian populations affected by armed conflicts. When the 1977 Additional Protocols were being drafted, the ICRC also put forward several options, pointing to the potential role of existing international or regional organizations or suggesting that an ad hoc commission be set up. More recently, the UN Secretary-General also suggested, in his Millennium Summit report, that a mechanism be established for monitoring the application of the provisions of international humanitarian law by the parties to conflicts. Lastly, in 2003, the ICRC launched a wide-ranging consultation process on the subject. The experts, including governmental, who were invited to take part mentioned the possibility of setting up one or several mechanisms that could carry out new functions to monitor respect for IHL: among them, a reporting system, an individual complaints mechanism, fact-finding

missions, and the quasi-judicial investigation of violations.

These and other ideas related to IHL compliance mechanisms will be the subject of further examination and work that the ICRC intends to conduct with the Government of Switzerland, which has likewise undertaken to explore and identify concrete ways in which the application of IHL may be strengthened.

Ladies and gentlemen,

Before I draw to a close, allow me to briefly draw your attention to a developing issue that is causing some complexity in the legal field. I refer to the legal regulation of cyberspace and, more specifically, to the role of IHL in regulating what has become known as “cyber warfare,” the subject of much discussion nowadays.

In recent years a wide array of new technologies has entered the modern battlefield. Cyberspace has opened up a potentially new war-fighting domain, a man-made theatre of war additional to the natural theatres of land, air, sea, and outer space. It provides worldwide interconnectivity regardless of borders, which means that whatever has an interface with the Internet can be targeted from anywhere in the world. Interconnectivity also means that the effects of a cyber attack may have repercussions on various other systems, given that military networks are in many cases dependent on commercial infrastructure.

The fact that a particular military activity is not specifically regulated does not mean that it can be used without restrictions. Means and methods of warfare which resort to cyber technology are subject to IHL just as any new weapon or delivery system has been so far. If a cyber operation is undertaken against an enemy in an armed conflict in order to cause damage, it can hardly be disputed that such an attack is in fact a method of warfare and is subject to prohibitions under IHL.

Reconciling the emergence of cyberspace as a new war-fighting domain with the legal framework governing armed conflict is nevertheless a challenging task in several respects and requires careful reflection. A few issues being debated include:

First, the digitalization on which cyberspace is built ensures anonymity and complicates the attribution of conduct. Thus, in most cases, it appears difficult if not impossible to identify the author of

an attack. Given that IHL relies on the attribution of responsibility to individuals and parties to conflicts, major difficulties arise. In particular, if the perpetrator of an operation and thus its link to an armed conflict cannot be identified, it is extremely difficult to determine whether IHL is even applicable.

Second, there is no doubt that an armed conflict exists and IHL applies once traditional kinetic weapons are used in combination with cyber operations. However, a particularly difficult situation as regards the applicability of IHL arises when the first, or the only, “hostile” acts are conducted by means of a cyber operation. Can this be qualified as constituting an armed conflict within the meaning of the Geneva Conventions and other IHL treaties? Does it depend on the type of operation, that is, would the manipulation or deletion of data suffice, or is physical damage as the result of a manipulation required? It would appear that the answer to these questions will probably be determined in a definite manner only through future state practice.

Third, the definition of the term “attack” is of decisive importance for the application of the various rules giving effect to the IHL principle of distinction. Additional Protocol I and customary IHL contain a specific definition of the term which is not identical to that provided for in other branches of law. Under Additional Protocol I, “attacks” means acts of violence against the adversary, whether in offence or defence. The term “acts of violence” denotes physical force. Based on that interpretation, which the ICRC shares, cyber operations by means of viruses, worms, etc. that result namely in physical damage to persons or damage to objects that goes beyond the computer program or data attacked could be qualified as “acts of violence” and therefore an attack in the sense of IHL.

Fourth, when cyber operations constitute an attack, Additional Protocol I imposes the obligation to direct attacks only against “military objectives,” prohibits indiscriminate and disproportionate attacks, and imposes an obligation to take precautions in attack. These rules operate in the same way whether an attack is carried out by means of traditional weapons or by reliance on a computer network. Problems that arise in their application are therefore not necessarily unique to cyber operations, but many questions can be posed.

Based on what is publicly known about cyber operations thus far, ensuring compliance with the prohibition of indiscriminate attacks poses very serious challenges. One issue is whether cyber operations may be accurately aimed at an intended target and, even if so, whether indiscriminate effects upon civilian infrastructure could be prevented due to the interconnectedness of military and civilian computer networks. As regards the prohibition of disproportionate attacks, one of the queries is whether it is in practice possible to fully anticipate all the reverberating consequences/knock-on effects on civilians and civilian objects of an attack otherwise directed at a legitimate military objective.

Respect for the principles of distinction and proportionality means that certain precautions in attack must be taken. Given that, in certain cases, cyber operations might actually cause less incidental harm to civilians or civilian objects than conventional weapons, it may be argued that the precautionary rule would require a commander to consider whether he or she could achieve the same military advantage by using cyber technology if practicable.

I would like to reiterate that despite the newness of the technology and some of the issues just raised, IHL constraints do apply to means and methods of warfare which resort to cyber technology. Cyber warfare, like any other warfare, may only be conducted with respect for existing rules if the humanitarian goal of sparing civilians from suffering and preventing the destruction of civilian objects is to be preserved.

Ladies and gentlemen,

I would like to end my remarks by recalling something I noted at the beginning. Hugo Grotius's work shows us that complexity may, and must be, addressed through law by the application of reason, vision, and humanity. Reason means, among other things of course, that the validity of existing international norms must be acknowledged and that the relevant rules must be implemented, until changes are agreed to. Any other approach risks unravelling the hard-won compromises that constitute international law and would jeopardize the baseline that states have established for resolving issues of common concern. In the area of international humanitarian law in particular, rejection or misinterpretation of the rules cannot be limited to one side only, as armed conflict by definition involves at

least two parties. If one of them changes the goal posts in the middle of an armed conflict, the other may do so as well, with immediate and tragic consequences for those whom IHL was designed to protect. Differently put, it should be borne in mind that hasty legal responses to new challenges often generate more, not less, complexity.

An approach to international law, including IHL, based on vision means that there is a capacity and willingness to recognize and analyze what is new, and a readiness to effect change if necessary. In the area of international law, change is possible, and is most easily achieved, where states come together for the common good and are prepared to accommodate different views in the process of finding solutions. Resolving some of the challenges in the area of international humanitarian law that I have outlined above will undoubtedly require vision. The ICRC stands ready to assist states in this regard, based on the mandate entrusted to it by the parties to the treaties of international humanitarian law and the Statutes of the International Red Cross and Red Crescent Movement.

As for humanity, it is a broad concept that can be applied to many areas of human endeavour, including the law. It is the foundation stone of the entire edifice of IHL and must continue to permeate both the application of existing rules and the crafting of new ones, if deemed necessary. And, even though the principle defies precise legal definition, its observance in armed conflict always has immediate results: it helps save lives, protect the vulnerable, and prevent suffering. It is in fact necessary that the principle of humanity should remain just that, an overarching principle that informs the application, interpretation, and development of IHL. It is by its very nature an evolving concept that is given specific content in accordance with the values of the times. Our common challenge is to ensure that this complex notion keeps expanding.

I thank you for your attention.