

International Institute of Humanitarian Law  
Institut International de Droit Humanitaire  
Istituto Internazionale di Diritto Umanitario

# **Global Violence: Consequences and Responses**

Forty years of excellence in Humanitarian Dialogue:  
the 40<sup>th</sup> Anniversary of the International Institute  
of Humanitarian Law

33<sup>rd</sup> Round Table on Current Issues  
of International Humanitarian Law  
(Sanremo, 9-11 September 2010)

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 **FrancoAngeli**

The International Institute of Humanitarian Law would like to thank Mrs Shirley Morren,  
librarian of the Institute, who was involved in the painstaking task of proof reading.

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Ristampa							Anno						
0	1	2	3	4	5	6	2011	2012	2013	2014	2015	2016	2017

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Stampa: Tipomnza, via Merano 18, Milano.

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## Acknowledgements

L'Istituto Internazionale di Diritto Umanitario ringrazia vivamente i Governi e gli Enti che hanno concesso un contributo finanziario o il patrocinio per la Tavola Rotonda.

The International Institute of Humanitarian Law warmly thanks those Governments and Organizations that have given either a financial contribution or their patronage on the occasion of this Round Table.

L'Institut International de Droit Humanitaire tient à remercier les Gouvernements et les Organisations qui ont donné leur appui financier ou leur patronage lors de cette Table Ronde.

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## Preface

In 2010 the International Institute of Humanitarian Law celebrated its 40<sup>th</sup> anniversary. Forty years dedicated to the promotion of humanitarian dialogue thanks to the generous commitment and the active support of several eminent personalities from all over the world renowned for their expertise in International Humanitarian Law and related issues.

More than 300 participants – high representatives of Governments and International Organizations, prominent members of the academic community, senior military commanders – attended the Official Ceremony and the International Round Table organized in Sanremo on this occasion.

The discussion focused on “Global Violence”, a topic of increasing relevance which calls for urgent responses in the framework of the international community’s efforts to shape a peaceful and stable world.

This volume includes the addresses, messages and contributions presented at the 2010 Sanremo meeting, to be considered an important landmark in the history of the Institute.

In commending the reading of this publication, I thank all those who, over the years, have contributed to our activities.

*Maurizio Moreno*  
President, International Institute  
of Humanitarian Law

## Prefazione

Nel 2010 l'Istituto Internazionale di Diritto Umanitario ha celebrato il 40° anniversario.

Quarant'anni dedicati alla promozione del dialogo umanitario grazie all'attivo impegno e al generoso contributo di eminenti personalità provenienti da tutto il mondo, note per la loro competenza nel campo del diritto internazionale umanitario e delle tematiche ad esso correlate.

Oltre 300 sono stati i partecipanti – alti rappresentanti di Governi ed Organizzazioni Internazionali, autorevoli esponenti del mondo accademico, ufficiali delle forze armate provenienti da diversi Paesi – alla cerimonia ufficiale ed alla Tavola Rotonda internazionale organizzate a Sanremo in questa occasione.

Al centro del dibattito il tema della “Globalizzazione della violenza”, problematica di crescente rilevanza cui la Comunità internazionale è chiamata a dare urgenti risposte nel quadro degli sforzi diretti a costruire un mondo fondato sulla pace e stabilità.

Il volume comprende gli indirizzi, i messaggi ed i contributi presentati nel corso dell'incontro di Sanremo, che sarà ricordato come una tappa fondamentale nella storia dell'Istituto.

Nel raccomandarne la lettura, ringrazio tutti coloro che nel corso degli anni hanno contribuito alle attività dell'Istituto stesso.

*Maurizio Moreno*  
Presidente, Istituto Internazionale  
di Diritto Umanitario

*Forty Years of Humanitarian Dialogue:  
the 40<sup>th</sup> Anniversary of the International  
Institute of Humanitarian Law*



## **Addresses and messages**



## *Maurizio Moreno*

Presidente, Istituto Internazionale di Diritto Umanitario, Sanremo

Vorrei limitarmi a poche parole per dare innanzitutto un caloroso benvenuto e porgere un vivo ringraziamento alle numerose personalità, ai membri e agli amici dell'Istituto Internazionale di Diritto Umanitario provenienti da tutto il mondo che hanno voluto essere oggi qui a Sanremo per festeggiarne il 40° anniversario.

Sono grato al Signor Presidente della Repubblica On.le Giorgio Napolitano per aver concesso il suo Alto Patronato a questo evento.

Sono particolarmente sensibile alla presenza di SAS il Principe di Monaco e di un folto gruppo di Alti Rappresentanti delle Organizzazioni Internazionali e dei Governi, a cominciare da quello italiano, che assicurano alle nostre attività il loro generoso sostegno.

La storia ed i successi di ogni Organizzazione sono la storia ed i successi di uomini e di luoghi. Un doveroso omaggio vorrei pertanto *in primis* tributare – senza far nomi per evitare ogni rischio di dimenticanze – a quelli che furono, nel lontano 1970, i Padri fondatori.

L'Istituto è nato dall'incontro e dal disegno di un piccolo nucleo di insigni giuristi originari di tredici Paesi che – in piena guerra fredda, nel delicato periodo che precedette la convocazione della Conferenza Diplomatica di Ginevra – ebbero il felice intuito di dar vita ad un centro di eccellenza per la promozione, lo sviluppo ed il rispetto del diritto internazionale umanitario, quella specifica branca del diritto internazionale che mira a tutelare i diritti fondamentali e la dignità stessa della persona umana nelle situazioni di conflitto e di emergenza, mettendola al riparo da inutili sofferenze.

A questo gruppo di pionieri si aggiunsero presto cultori del diritto, diplomatici, militari, docenti universitari provenienti da tutto il mondo, aprendo una strada, tracciando con lungimiranza un solco. Lungo questa strada, attraverso questo solco, l'Istituto, non sempre senza difficoltà, si è mosso con sagacia e successo, è cresciuto, ha saputo affermarsi a livello

internazionale come centro di formazione, polo di ricerca, foro di costruttivo dibattito.

Con l'evolversi della situazione internazionale, il campo di azione è andato negli anni ampliandosi, estendendosi dal diritto dei conflitti armati, al diritto dei rifugiati e dei migranti, ai diritti umani. L'Istituto ha beneficiato e continua ad avvantaggiarsi della collaborazione di un corpo di docenti di diversa estrazione, civili e militari, tutti di elevatissima professionalità. Dodicimila sono le persone che hanno frequentato i corsi di Sanremo. Alcune di esse sono diventate nei rispettivi Paesi Primi Ministri, Ministri, Capi di Stato Maggiore della Difesa, luminari dell'insegnamento. Domani si riunirà per la prima volta a margine di questo incontro, la neo-costituita Associazione Internazionale degli ex-Alunni.

Storia di uomini dicevo, cui molto dobbiamo, sulle cui orme l'Istituto ha continuato a muoversi, tra alti e bassi, fedele alla sua missione.

Ma al tempo stesso storia e contributo determinante dei luoghi. L'Istituto non sarebbe infatti mai stato quello che è (e da sanremasco lo dico con fierezza) se la Città di Sanremo – tradizionale crocevia di incontri internazionali – non gli avesse aperto le porte e offerto sostegno e ospitalità. Prima sede quel luogo altamente evocativo che è la Villa Nobel. Poi la Villa Zirio, ove nel 1870 aveva dimorato Federico III, futuro Imperatore di Germania. Oggi la prestigiosa Villa Ormond, legata al nome di un grande industriale e di un famoso architetto elvetici (la Svizzera, vorrei ricordare, è sempre stata particolarmente vicina all'Istituto), una prestigiosa e funzionale dimora che il Comune di Sanremo ci ha graziosamente concesso in comodato.

Oggi, nei cinque continenti, l'Istituto Internazionale di Diritto Umanitario è noto per quello che Alexandre Hay, Presidente del Comitato Internazionale della Croce Rossa, battezzò trent'anni fa "lo spirito di Sanremo": un approccio ai problemi più spinosi che affliggono l'umanità basato sul dialogo, sul rigetto del pregiudizio e del preconconcetto, sul confronto discreto e l'abboccamento diretto, anche tra avversari. Un approccio pragmatico, inclusivo, mosso da afflato etico e da spirito di servizio verso la comunità internazionale.

L'Istituto ha sempre trovato nella Città di Sanremo un insostituibile appoggio. Per questo motivo mi sarà tra poco gradito consegnare al Sindaco Maurizio Zoccarato il Premio 2010 per la diffusione e la promozione del Diritto Internazionale Umanitario, un ambito riconoscimento attribuito negli anni a illustri personalità e importanti organizzazioni internazionali, a cominciare dal Comitato Internazionale della Croce Rossa.



Your Highness, Excellences, Ladies and Gentlemen,

I shall be brief. Other speakers – and we have in front of us a rich list of very distinguished speakers – will address the topic on our agenda, “global violence”, with much more competence than me.

Global violence is a universal scourge which threatens the lives of an increasing number of people around the world.

For each individual who dies and suffers as a result of an armed conflict, many more are the victims of a broad range of other patterns of political and moral collective violence.

Since the end of the Cold War the overall improvement of the international security scenario has led to a substantive decline in battlefield deaths. Violence continues, however, to dramatically affect the existence of millions of people in multiple forms: armed conflicts, political oppression, economic and social exploitation, forced displacement of populations, environmental destruction, human rights abuses, organized crime, ethnic cleansing, terrorism.

No country, no community is immune from a phenomenon which finds fertile ground in the absence of democracy and good governance, in the denial of fundamental rights and freedoms.

The Sanremo Institute is an independent, non-profit, humanitarian organization. The aim of our meeting is to promote a new awareness of global violence paradigms and of the inextricable relationship existing between its different expressions through informal debate and open discussion, in the constructive spirit which is internationally recognized as the “spirit of Sanremo”.

The multifaceted nature of global violence requires a renewed, collective effort in collecting data, in defining priorities, in developing international cooperation and internationally agreed responses, in promoting and monitoring adherence to international treaties and other legal instruments having direct relevance to its prevention and repression.

I am confident that, as is the tradition, the Sanremo Round Table, jointly organized with ICRC, through an accurate review of legal and practical challenges posed by contemporary armed conflicts and other situations of violence, will make a constructive contribution to the debate on a subject of increasing concern for the international community.

Monseigneur, Mesdames, Messieurs,

J’ai commencé en rendant hommage aux Pères fondateurs de l’Institut.

Je crois toutefois ne pas pouvoir passer sous silence l’action passionnée, l’engagement et le dévouement inconditionnels de tous ceux et de toutes

celles qui ont poursuivi leur œuvre, en conduisant l'Institut de Sanremo jusqu'ici. Mes prédécesseurs et leurs proches collaborateurs, les membres actuels du Conseil, le personnel de l'Institut.

Notre travail est aujourd'hui un travail d'équipe. Je voudrais remercier ici tout particulièrement mes Vice-présidents, Michel Veuthey, Baldwin de Vidts et Fausto Pocar, qui recevra d'ici peu, avec la Ville de Sanremo, le Prix du Droit International Humanitaire décerné annuellement par l'Institut. C'est à eux et au concours précieux de Stéphane Ojeda et Philippe Spoerri du CICR que nous devons la préparation compétente et attentive de la Table Ronde qui suivra cet après-midi.

Ma gratitude va aussi aux partenaires de l'Institut. Dans une société globalisée, il est difficile de faire cavalier seul. L'Institut a beaucoup à apprendre et a trouvé plus récemment dans les accords signés avec un certain nombre d'organisations internationales et institutions de recherche de renom, une raison de plus pour mieux faire et faire davantage.

La crise économique internationale ne nous a pas épargnés. L'Institut a su toutefois, même en 2010, faire face à ses obligations et mettre en œuvre tous les programmes d'activités prévus. Nos cours sont désormais dispensés en différentes langues: en anglais, en français, en italien, en espagnol, en chinois, en russe, en arabe. Un certain nombre de séminaires et tables rondes sur des sujets de grande actualité a significativement contribué à accroître la visibilité et la crédibilité de l'Organisation sur le plan international.

Quelques événements importants ultérieurs sont inscrits au calendrier des prochains mois. Permettez-moi de citer notamment la conférence, qui aura lieu à Rome au siège de la Farnesina, sur la protection des civils dans les nouvelles situations de conflictualité, en collaboration avec *l'Istituto Affari Internazionali* (IAI); la conférence prévue à Turin, en collaboration avec *l'Istituto per gli Studi di Politica Internazionale* (ISPI), sur terrorisme et démocratie; le séminaire sur les boucliers humains en programme à Sanremo avec l'appui du Ministère italien des Affaires Etrangères; la conférence sur le régime des migrations en provenance de l'Amérique Latine que l'Institut organisera avec la collaboration de l'Organisation Internationale pour les Migrations (OIM), de *l'Istituto Italo-Latino Americano* (IILA) et du Gouvernement italien.

Dans les années à venir, l'Institut est engagé à poursuivre sa mission, en cernant de près les priorités dans le cadre d'une stratégie d'ensemble, qui lui permette de faire face à ses tâches d'une manière cohérente et efficace et avec une vision de longue haleine.

## *Jacob Kellenberger*

President, International Committee of the Red Cross, Geneva

I wish to express my best wishes to the International Institute of Humanitarian Law for its 40<sup>th</sup> anniversary, and my sincere appreciation to all of its members for their important work in the promotion of International Humanitarian Law. The Institute's activity undoubtedly contributes to this promotion and thereby to the better respect of human dignity in times of violence. The ICRC has been cooperating with the Institute for four decades, by granting financial, intellectual and personal support to the Institute's regular courses and other training activities. In particular, the ICRC is the traditional co-organizer of the annual Sanremo roundtable, and it welcomes the opportunity to spend the next days with you for this 33<sup>rd</sup> roundtable which will focus on the issue of the consequences and responses of global violence.

"Global violence" is a big issue. We have individual and organized forms of violence, armed and unarmed violence. I shall focus, as you would expect me to do, on organized armed violence, one of its forms being armed conflicts. It is widely admitted that the humanitarian consequences of other forms of organized armed violence other than armed conflicts have considerably increased over recent years. The humanitarian consequences of armed conflicts remain, however, huge. It is sufficient to think of the different ways the civilian population is affected by them, being obliged to leave their home for example. The number of internally displaced people as a consequence of armed conflicts has, in fact, increased.

The international community has never stopped developing responses to prevent or mitigate the consequences of situations of armed violence, particularly through international law. For instance, by adopting and signing the Convention on cluster munitions, which entered into force last month, States have taken a major step towards ending the death, injury and

suffering caused by these weapons. It is also an example of the adaptability of international law to the realities on the ground.

When looking at today's world, my questions are: do the current provisions of international law adequately address the contemporary humanitarian challenges? Should we aim for further clarifications and developments of the law? Allow me to provide some elements of responses by focusing first on contemporary armed conflicts, before turning to other situations of armed violence.

Last year, we celebrated the 60<sup>th</sup> anniversary of the Geneva Conventions of 1949, which represent the core of International Humanitarian Law and which still reflect the firmly-held belief around the world that even in times of armed conflict there are limits on what humans may inflict upon each other. However, the 1949 Geneva Conventions include only one provision – namely common article 3 – dealing with non-international armed conflicts, which represent the vast majority of contemporary armed conflicts. Even though common article 3 was later reinforced by further treaties, in particular the second Additional Protocol of 1977, the extent of protection afforded by international humanitarian treaty law to persons affected by non-international conflicts remains much less developed than what can be found for international armed conflicts.

To a certain extent, customary International Humanitarian Law fills the gap in legal protection that is due to the relative paucity of treaty rules governing this type of conflict. Last month, as a follow-up to the ICRC study of 2005, the ICRC launched its new customary International Humanitarian Law database which features 50 per cent more content than the original 2005 study. As the formation of customary International Humanitarian Law is an on-going process, regular updates, including those concerning national practice, will be provided. Even though some rules are challenged by some States as not reflecting their practice, the ICRC study on customary International Humanitarian Law has been used as a legal reference in connection with various international and non-international armed conflicts. The ICRC uses the study in its dialogue with parties to conflict in order to remind them of the rules by which parties must abide. An issue we have no time to deal with here is the reference to some of these rules in legal proceedings, and the extent to which they are litigable. I will just mention that the study has been used by the United Nations, international and mixed criminal courts and tribunals, national courts and non-governmental organizations. For example, on the basis of practice collected by the study, the Special Court for Sierra Leone concluded that the recruitment of child soldiers is a war crime in non-international armed

conflicts, thus enhancing the protection for children against being recruited and used as child soldiers.

In addition, the ICRC has been engaged for the past three years in a comprehensive internal research study, which aims to identify the humanitarian concerns arising in today's non-international armed conflicts, with a view to identifying possible gaps or weaknesses in current treaty and customary law protection. Overall, the study concludes that, with respect to many of the questions examined, International Humanitarian Law remains an appropriate framework for regulating the behaviour of parties to armed conflicts. If International Humanitarian Law were properly respected by the parties concerned, most current humanitarian issues would undeniably not exist.

However, the study also showed that International Humanitarian Law, in its current state, does not always offer fully satisfying solutions to all specific humanitarian needs observed on the ground, for instance to the needs of persons deprived of liberty in non-international armed conflicts. Lack of precise rules on various aspects of treatment and conditions of detention may have immediate and grave humanitarian consequences on the health and dignity of persons detained. Another issue is related to the mechanisms of implementation of International Humanitarian Law. The principal cause of suffering in armed conflicts is the insufficient respect for applicable rules. Whereas special emphasis has been placed in the last few years on developing criminal law procedures to prosecute and punish the perpetrators of serious violations of International Humanitarian Law, appropriate means for halting and redressing violations when they occur are still needed.

In order to provide concrete and effective solutions in practice to the humanitarian challenges of contemporary armed conflicts, the ICRC will engage in a dialogue with States and other stakeholders on the conclusions of its study and possible follow-up.

As mentioned earlier, contemporary forms of violence are not limited to armed conflicts but also include other situations of armed violence, which can be chronic, recurrent, expected or unforeseen. They involve one or more armed actors participating in the violence; they can be the remnants of a party to a former armed conflict, groups organizing violent demonstrations, or organized gangs in an urban setting. While the phenomenon of armed violence is not new, we must admit that its intensity and impact on the civilian population have taken new proportions. The countering of urban violence in some major cities especially in Latin America is just one relevant illustration, and the ICRC is already carrying out humanitarian

activities in numerous situations of armed violence other than armed conflicts.

We need to remain clear on the legal framework governing such situations; even if extremely violent they are not governed by International Humanitarian Law but by human rights law and domestic law as long as they do not reach the threshold of armed conflicts. Even though there might be difficulties in making a clear distinction between non-international armed conflict and other forms of organized armed violence, it is crucial we do whatever we can to delineate both types of situations as such blurring of lines may potentially be dangerous. For example, certain situations may inaccurately or prematurely be described as an armed conflict, to trigger the applicability of International Humanitarian Law and its more permissive standards regarding the use of force or detention as compared to the standards set by human rights law. This delineation has become more difficult because of the increasing complexity of armed violence and for political reasons. Moreover, as we are all aware, the lack of a universally accepted definition of non-international armed conflict has never been helpful.

As far as non-state actors involved in organized armed violence not reaching the threshold of armed conflicts are concerned, they are not operating in a legal vacuum. Even if International Humanitarian Law is not applicable and that the vast majority of experts consider that international human rights law is not binding upon them, their actions remain governed by domestic law.

As is well known current human rights law allows States to derogate from certain obligations in times of emergencies. Several advances in international law – or in the interpretation thereof – have addressed this issue. Among them was the UN Human Rights Committee's General Comment on States of Emergency which expanded the list of rights considered non-derogable in states of emergency. This being said, I wonder to what extent these advances actually ensure an optimized legal protection on the ground in situations marked by a derogation of articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR). I equally wonder to what extent procedures linked to derogation are actually being examined in the light of their justification. Moreover, in spite of these advances in international law, it might happen that an issue is clearly identified as suffering from a lack of legal clarity. In such situation the international community should not hesitate to propose responses. For instance, in 2005 the ICRC submitted standards of reference based on international humanitarian and human rights law as well as on policy, governing internment or administra-

tive detention and reflecting what the ICRC believes should be adhered to by States in times of armed conflict and other situations of violence.

This being said, the lack of respect of existing international law remains the main challenge more than the absence of rules. For impunity not to prevail we must pursue efforts to improve justice, including the way investigations and trials are carried out. It is not sufficient just to be pleased with an announcement that an investigation will take place and those presumed to have committed a crime will go before trial.

Increasing attention on the nature of contemporary forms of armed conflict and other situations of organized armed violence, ensuring compliance with international law, and, clarifying and developing international law whenever necessary, are crucial when dealing with today's legal and humanitarian challenges. Furthermore, the way armed violence and its humanitarian consequences are developing, there is no doubt for me that the so called "other situations of organized armed violence" deserve a closer look, also from a legal perspective. We cannot stop addressing them, not with so many displaced women, men and children, not with so many people deprived of liberty to protect and assist, not with so many wounded and sick to care for.





## *Prince Albert II of Monaco*

Président, Croix-Rouge de Monaco

C'est avec grand plaisir que je suis parmi vous aujourd'hui à Sanremo, en ma qualité de Président de la Croix-Rouge monégasque, à l'invitation de l'Institut International de Droit Humanitaire dont vous avez bien voulu me confier le titre de membre d'honneur.

Je tiens à vous remercier pour cette invitation et pour votre accueil chaleureux.

Les liens qui unissent la Croix-Rouge à l'Institut, pour être anciens, demeurent solides.

A travers ces organismes, la Principauté et Sanremo, séparés par une frontière et quelques kilomètres de rivages ligures, dialoguent et coopèrent depuis des années non seulement à la faveur de leur voisinage mais aussi autour de thèmes d'importance du droit international humanitaire.

Aujourd'hui le sujet qui sera au cœur des préoccupations de chacun de vous sera celui de la «violence globale».

Parmi les participants à la Table Ronde 2010 qui marque le 40<sup>ème</sup> anniversaire de l'Institut, le mouvement Croix-Rouge – par ses distingués représentants que je salue très cordialement ici – montre l'importance qu'il porte à cette branche du Droit qui fonde son action dans le monde.

Le Droit International Humanitaire, que les Etats et le Mouvement international de la Croix-Rouge et du Croissant-Rouge ont l'obligation de promouvoir, doit sans cesse être amélioré pour s'adapter aux évolutions des situations et répondre du mieux possible aux impératifs de protection qu'il s'est assigné dans un monde où la guerre et les troubles civils sont une réalité quotidienne pour des millions d'êtres humains.

Le temps est révolu où les frontières étaient nettes entre guerre et paix.

Aujourd'hui la violence internationale ne recouvre plus seulement des situations d'affrontements entre Etats. Des formes nouvelles de conflits ou de violences armées se développent, des tensions internes et des

troubles jusque-là non observés prennent forme et imposent des réponses adaptées.

Ces réponses doivent s'inscrire à la fois dans des programmes de prévention, lorsque celle-ci est possible, mais également dans des programmes d'actions visant à assurer la protection des personnes confrontées – en tant que victimes impuissantes – à des situations de violence polymorphe. Ces violences peuvent en effet revêtir des apparences diverses qu'il s'agisse de violence armée, de terrorisme, de contraintes particulières comme l'enrôlement d'enfants soldats, mais aussi, outre l'éventail des crimes liés à la criminalité organisée, de trafic d'armes, de stupéfiants ou d'êtres humains.

A cet égard, le système de droit des Droits de l'Homme et le Droit International Humanitaire se complètent en cherchant tous deux à protéger les individus et à préserver la dignité humaine face à des circonstances différentes. Mais ces régimes de protection ne parviennent pas toujours à couvrir l'ensemble des situations de violence, notamment lorsque leur dimension demeure interne.

L'accroissement de la violence mondiale justifie que des mesures globales soient prises à l'intention de tous les acteurs des situations de violence.

C'est précisément l'enjeu de vos travaux, qui devraient aboutir à identifier des voies permettant de faire prévaloir, en toutes circonstances et sans dérogation possible, des droits humains fondamentaux et intangibles propres à assurer une protection effective de la personne et à épargner des vies.

C'est un devoir, que rappelait déjà Grotius, en ces termes voilà plus de trois siècles: «La violence, qui domine surtout dans la guerre, a quelque chose qui tient de la bête féroce; il faut mettre d'autant plus de soin à la tempérer par l'Humanité de peur qu'en imitant trop les bêtes féroces, nous ne désapprenions l'Homme».

## *Massimo Barra*

President, Standing Commission of the Red Cross  
and Red Crescent Movement, Geneva

I would like to congratulate the Institute for devoting this traditional September Round Table to the theme of global violence. Violence is part of both human nature and human fate. A world without violence exists only in the Kingdom of Utopia, where all the people are wise: unfortunately this is not our world.

Let me take advantage of such a distinguished audience to focus on a particular aspect of violence which – if duly treated at the humanitarian level by the international community – could result in immediate benefits to the quality of life of millions.

All over the world it is evident that urban violence is strictly linked to drug matters, be it consumption (which globally affects more than 200 million people) or related illicit trafficking.

Within the international community there is a general agreement on a prohibitionist approach to such issues: for the time being, it seems that there are no alternatives to this strategy, set out by specific treaties.

The best argument against anti-prohibitionist thesis is represented by the fact that licit drugs, such as alcohol and tobacco, kill more than illicit ones. Prohibition actually limits consumption and everybody agrees that drugs are not good for individuals and mankind.

But in too many parts of the world politicians and policy makers have set out violent and repressive strategies, declaring war on drugs; this attitude suddenly resulted in a war against drug users, triggering a perverse circuit of growing violence. Drug users are seen either as criminals or, in the best case scenario, as sinners to be redeemed at any cost, even by neglecting their fundamental rights.

Prisons all over the world are filled with drug users and many rehabilitation centres look more like concentration camps than places where society takes care of its weakest, sick sons.

The United Nations themselves have finally become concerned about the terrible “collateral damages” of prohibitionist strategies; the World Drug Report 2009 issued by the UN Office on Drugs and Crime notes that “the system of international drug control has produced several unintended consequences, the most formidable of which is the creation of a lucrative black market for drugs and the violence and corruption it generates”.

What has happened in the last 40 years – in which, according to a recent article in the New York Times, the war on drugs has burned 1 trillion dollars in the United States alone – shows that this war has been lost and that it is essential to use less harmful strategies.

With the harsh and violent prohibition approach on the one hand and the illusory anti-prohibitionist thesis on the other, there is a third way that we can define as “humanitarian policy toward drug users”. Humanitarian policy considers helping drug users as a priority for governments and society, by adopting pragmatic and realistic strategies, without preconceived ideas about idea intake and therapy.

All of us should be aware that a world without drugs is an unrealistic and illusory idea that drug users are sick and not to be treated as criminals, that we need a pragmatic, evidence-based approach towards public health measures to adopt.

The International Red Cross and Red Crescent Movement has often dealt with drug and violence related themes since 1922, when a resolution on opium consumption was approved by the Asian Conference in Bangkok.

More recently, other Movement’s contexts such as the International Conference, the General Assembly, the Governing Board and the Federation Health Commission have raised concerns about these issues, as did 120 National Societies which promoted the Rome Consensus calling for a humanitarian approach in this field.

At this solemn event I, therefore, ask you to support, as human rights defenders, this new approach. If necessary, a new international regulation should be promoted in order to both make licit and disseminate therapies able to improve the quality of life of drug users, reducing damages to individuals and society. This could have a substantial and immediate impact on the effort to reduce violence in our cities.

## *Francesco Belsito*

Sottosegretario di Stato, Presidenza del Consiglio dei Ministri, Roma

È per me motivo di soddisfazione ed orgoglio portare il saluto del Governo italiano ai numerosi, autorevoli partecipanti a questo importante incontro internazionale organizzato – nella ricorrenza del suo 40° anniversario – dall'Istituto di Sanremo.

L'Istituto Internazionale di Diritto Umanitario, che l'Italia è lieta di ospitare e sostenere, svolge a livello internazionale, sin dalla sua costituzione, un insostituibile ruolo non soltanto come centro di insegnamento e di ricerca, ma altresì come foro di riflessione e dibattito sulle grandi tematiche inerenti al rispetto del diritto nelle situazioni di conflittualità, alla protezione dei rifugiati, alla tutela dei migranti, alla difesa dei valori essenziali della dignità umana nella loro più vasta accezione.

Il tema scelto per questo incontro – organizzato con la preziosa collaborazione del Comitato Internazionale della Croce Rossa di Ginevra – è, guardando agli scenari internazionali, di grandissima attualità e rilevanza. E non è senza significato che per approfondirlo siano qui convenuti i rappresentanti di Governi e Organizzazioni Internazionali a vocazione universale e regionale quali l'Organizzazione delle Nazioni Unite (ONU), l'Unione Europea (UE), il Comitato Internazionale della Croce Rossa (CICR), l'Organizzazione Internazionale per le Migrazioni (OIM), la NATO, nonché eminenti studiosi ed esperti provenienti dal mondo intero che a vario titolo collaborano ed interagiscono con l'Istituto di Sanremo.

Con la fine della guerra fredda si era accarezzato il sogno di una nuova era, si era dischiusa la speranza che potesse affermarsi un nuovo ordine internazionale caratterizzato dal superamento dei contrasti ideologici, dal venir meno della conflittualità armata, dall'armonioso sviluppo dei liberi commerci. In larga misura si è trattato di un'illusione e di un miraggio.

Nell'odierna realtà internazionale continuiamo ad assistere ad inquietanti rigurgiti dei nazionalismi; la mescolanza delle culture non ha sopito le

tradizionali rivalità tra i popoli: nuovi attori – il terrorismo, la pirateria, l'estremismo religioso – alimentano la contrapposizione e lo scontro anche in regioni a noi vicine. Guerre fratricide, anche se localizzate, e nuove, perverse forme di violenza, minacciano la nostra sicurezza, sottraggono preziose risorse alla crescita economica e insidiano la stessa sopravvivenza delle fasce più vulnerabili della popolazione del pianeta.

In una società globalizzata anche la violenza ha una dimensione ormai globale. Non c'è soltanto la violenza dei conflitti e delle armi. Il mondo è oggi messo a dura prova da altre forme di oppressione e sopruso non meno inquietanti – la distruzione dell'ambiente naturale, la criminalità organizzata, l'illecito traffico di esseri umani – che meritano di essere affrontate con una visione d'insieme.

Il caso di Sakineh, l'iraniana condannata alla lapidazione da parte di un tribunale speciale, ha proprio in questi giorni drammaticamente riproposto all'attenzione dell'opinione pubblica internazionale il problema della violazione dei diritti fondamentali della persona umana e di orrende punizioni offensive della nostra civiltà.

Occorrono strategie nuove ed ambiziose per prevenire i conflitti, ma al tempo stesso per difendere i principi morali e democratici su cui poggiano la civiltà e la dignità dell'uomo, per garantire la protezione dell'ambiente, assicurare la sicurezza degli approvvigionamenti energetici, gestire i flussi di immigrazione, tutelare la solidarietà sociale.

I timori di una globalizzazione che cancelli singole identità e metta in pericolo il posto di lavoro vanno dissipati, prevenendo ogni forma di abuso e inammissibile violenza, offrendo nuovi spazi allo slancio ideale della società civile, spronando i giovani a partecipare più attivamente alla costruzione di una società fondata sulla giustizia, la libertà, il rispetto del diritto.

Occasioni di dibattito come questa sono importanti per meglio comprendere le molteplici sfaccettature del fenomeno della violenza globale, per individuare percorsi innovativi che permettano di affrontare il fenomeno alle radici prima che sia troppo tardi. Complimenti all'Istituto di Sanremo per questa felice iniziativa.

## *Claudio Bisogniero*

Deputy Secretary General, NATO, Brussels

Over the years, NATO and the International Institute of Humanitarian Law have developed an excellent and profound working relationship and I take great pleasure in congratulating the Institute and its President on their outstanding achievements.

A 40<sup>th</sup> birthday is an ambivalent and somewhat bittersweet moment. One has achieved much of what one had aimed to achieve and one worries that the next four decades might see fewer highlights than the first 40 years.

Well, the International Institute of Humanitarian Law does not face such worries. At the age of 40, the Institute is not only in great health but also in great demand. The need for International Humanitarian Law (IHL) – the need for rules to address the conduct of armed conflict and limit its effects – is undiminished because our world, sadly, remains a world of conflict.

Nothing could illustrate this better than the fact that, in two days' time, we will commemorate the 9<sup>th</sup> anniversary of the “9/11” attacks. To prevent such attacks from ever occurring again, thousands of soldiers and personnel from all 28 NATO member countries and more than a dozen other nations from across the globe are putting their lives on the line in Afghanistan, in the UN-mandated ISAF mission. They fight against an enemy who has absolutely no respect for humanitarian law, or even human life. An enemy who uses force and violence indiscriminately, and who even deliberately targets civilian population, schools, markets, aid workers and Red Cross vehicles.

The situation in Afghanistan is just an example, but it clearly underlines the magnitude of the challenge of promoting International Humanitarian Law. After all, humanitarian law is trying to regulate the conduct of war, the most extreme situation that can arise between human beings. Humanitarian law is about introducing rationality into situations that are

fraught with the irrational and it seeks to protect human dignity in the most inhuman of circumstances.

This is a daunting task, a task which the Alliance supports fully. We need to ensure that principles agreed at the conference table are not brushed aside, in the brutal reality of conflict.

Indeed, there has been progress. Slowly, but surely, we do see greater acceptance of key principles of International Humanitarian Law. As the nature of armed conflict continues to change, these principles are gradually becoming embedded as a fundamental element of war-fighting doctrine.

For these positive trends to continue humanitarian international law needs champions who are strong and persistent – but it also needs a solid institutional home. The International Institute for Humanitarian Law in Sanremo has provided such a home. Its mandate, its work programme, its premises have made it a unique place for research and reflection. Over a period of 40 years, this Institute has evolved into one of the strongest pillars of humanitarian law, and – unlike some of us in this room – it shows no signs of aging.

The British scholar, Edmund Burke, once said that, and I quote: “all that is necessary for the triumph of evil, is that good men do nothing”. The positive change instilled by International Humanitarian Law is an encouraging sign that we are not prepared to sit idle and to allow evil to triumph through our inaction. Moreover, it should serve as an encouragement for institutions like the International Institute of Humanitarian Law to continue their invaluable work.

Once again, congratulations for a job well done and the best of luck with your future endeavours.



## *Vincenzo Camporini*

Capo di Stato Maggiore della Difesa, Roma

Onorato di partecipare ad un consesso così autorevole, rivolgo innanzitutto un cordiale saluto all'Ambasciatore Moreno, alle Autorità intervenute, a tutti i prestigiosi ospiti e ringrazio per avermi dato l'opportunità di intervenire su argomenti di grande interesse e, allo stesso tempo, di estrema attualità per le Forze Armate.

Il contributo che mi riprometto di offrire all'interessante dibattito che seguirà, incentrato sulla "globalizzazione della violenza", con particolare riguardo ai rapporti tra diritti umani e diritto internazionale umanitario ed ai delicati profili relativi alla privazione della libertà in situazione di conflitto armato, può riassumersi nella risposta da dare ad una domanda solo apparentemente scontata: "Quale apporto possono dare le Forze Armate per affrontare e risolvere problematiche così complesse ed articolate?"

Proverò a raggiungere l'obiettivo che mi sono prefisso analizzando preliminarmente il concetto di "sicurezza globale" come emerge dall'esame dell'attuale scenario internazionale. Un concetto, questo, che si è indubbiamente evoluto rispetto alla connotazione classica di difesa delle frontiere e di protezione "dell'incolumità fisica" della popolazione. In primo luogo, ciò è avvenuto sotto il profilo della tipologia delle minacce da affrontare, apparentemente eterogenee ma strettamente interconnesse, quali ad esempio terrorismo, criminalità organizzata, pirateria marittima ed informatica, instabilità economica, cambiamento climatico (desertificazione e movimenti di popolazione), pandemie, contrasti religiosi. In secondo luogo, a causa dell'estensione spaziale dei fenomeni che ha travalicato i confini dei singoli stati, richiedendo una azione di contrasto coordinata a livello internazionale e caratterizzata da un approccio multifattoriale.

In terzo luogo, perché ciò che occorre difendere non è più (in effetti, non lo è mai stato, ma solo oggi nei siamo consapevoli), non è più, dicevo, un fatto fisico – territorio, vie di comunicazione, infrastrutture – ma è, soprat-

tutto, un modo di essere della nostra società, basata su principi come democrazia, rispetto della legge, solidarietà. In una parola, la nostra cultura.

In altri termini, oggi, la sicurezza non può più essere intesa in funzione esclusivamente stato-centrica ed in termini di difesa militare e territoriale dei confini (*Homeland Security*) ma – influenzata da aspetti politici, economici, sociali e culturali – lascia intravedere sfide inedite e ben più impegnative.

Ciò premesso, è ora possibile illustrare brevemente come i mutamenti appena citati abbiano inciso sulle operazioni militari. Innanzitutto è la natura stessa delle missioni che risulta significativamente cambiata negli ultimi anni. La caratteristica principale è data dalla dinamicità delle situazioni da affrontare che richiede un processo di continuo adeguamento delle forze, della dottrina e delle capacità, coerente con i corrispondenti Paesi in ambito NATO, UE e con le Nazioni con cui l'Italia ha sviluppato attività di cooperazione. Il tutto finalizzato ad assicurare una capacità di risposta tempestiva ed efficace.

La formula classica che prevedeva sostanzialmente fasi sequenziali che vanno da un primo periodo ad alta intensità, ove la componente militare è predominante, sino ad una fase a bassa intensità, ovvero di *nation building*, non rispecchia più la realtà degli odierni scenari. Il conflitto, la stabilizzazione e la ricostruzione sono ormai interconnessi e vanno affrontati in maniera innovativa e coordinata. L'approccio deve essere "comprensivo", che tenga anche conto delle realtà sociali, culturali, economiche del Paese, già dalla fase di "pianificazione" dell'intervento. Intervento, quindi, che non ha più una connotazione seriale bensì deve essere concepito e gestito in parallelo.

Altro elemento di novità è dato dall'evoluzione del modo di concepire il "fattore umano" che ha riconquistato terreno rispetto al "fattore tecnologico". La tolleranza, l'empatia ed il rispetto dovrebbero costituire le fondamenta del rapporto con la popolazione interessata dall'intervento. È essenziale, oggi, che si faccia un uso minimo della forza, per ottenere risultati positivi nell'azione di contrasto e, allo stesso tempo, sostenere il progresso sociale delle popolazioni.

Lo sviluppo di un nuovo approccio nelle operazioni "fuori area" considera il militare non più come semplice "combattente" ma anche come "edificatore nazionale", proiettato a conseguire una migliore integrazione della componente militare in un più ampio processo cui sarà chiamata a contribuire una pluralità di soggetti istituzionali e non.

In questa prospettiva, l'esigenza è quella di un sforzo sincrono che, sulla base del concetto di "interagency", coinvolga lo strumento militare insieme ad altre componenti della struttura sociale.

Sono fermamente convinto, infatti, che questa sarà la nuova frontiera delle operazioni militari all'estero: in futuro si dimostrerà vincente prevedere l'intervento di una "task force composita", che includa militari, diplomatici, tecnici, esperti della formazione, personale operante nel campo del "law enforcement", medici ed altre figure professionali, tutti impegnati verso il raggiungimento di un unico obiettivo, ciascuno consapevole degli indispensabili contributi degli altri e della inderogabile necessità di uno stretto coordinamento delle rispettive azioni.

A mio giudizio, quest'ultima sfida racchiude una varietà di aspetti nuovi e diversificati, alcuni dei quali non di diretta responsabilità militare, ma tuttavia cruciali per il buon esito delle missioni. Un approccio a più livelli ed una migliore integrazione tra diverse expertise deve diventare il mezzo per giungere al successo nel contrasto di una minaccia così sfaccettata.

Anche per ciò che riguarda gli aspetti più squisitamente giuridici, siamo di fronte ad elementi di novità di particolare rilievo.

A tal proposito, è all'esame del Parlamento italiano un disegno di legge per il conferimento della delega al Governo all'emanazione del "Codice penale delle missioni militari all'estero".

Il provvedimento costituisce il primo rilevante tassello per la revisione della attuale legislazione penale militare e risponde all'esigenza di disporre di una disciplina organica per la partecipazione dei militari italiani alle missioni internazionali, eliminando la necessità di prevedere una specifica normativa nei periodici decreti legge autorizzativi. Si semplificherà, così, la regolamentazione di settore riunendo in un unico testo tutte le disposizioni in materia.

Inoltre, per quanto ha specifica attinenza con il tema dell'odierno convegno, il disegno di legge ha tra le finalità principali la piena tutela dei cosiddetti soggetti deboli coinvolti nelle operazioni militari (infermi, feriti, popolazione civile, prigionieri o persone comunque detenute a qualsiasi titolo), la coesione interna della Forze Armate e la necessaria salvaguardia del personale, nel quadro dell'imprescindibile rispetto dei diritti umani e del diritto internazionale umanitario.

Si tratta di un passo importante che si propone di adeguare alla realtà odierna un quadro normativo che, per quanto lungimirante, risente fortemente del passare del tempo. Ciò consentirà all'ordinamento nazionale di essere pienamente rispondente al diritto internazionale umanitario e di regolare organicamente una funzione tra le più importanti del mondo militare moderno, mettendo il Paese in condizione di svolgere, coerentemente, un importante ruolo nel processo di stabilizzazione e mantenimento della pace.

Con riguardo alla tematica della detenzione, è nota la posizione della Corte internazionale di giustizia nell'affermare la necessità del rispetto, da parte dei contingenti militari nei territori da essi controllati, dei diritti dell'uomo. Ai prigionieri deve essere garantito un trattamento che, in osservanza del diritto internazionale vigente, preservi la dignità della persona ed eviti che gli stessi possano essere oggetto di trattamenti inumani e degradanti.

Nel definire i principi relativi al trattamento delle persone detenute in zona di operazioni alla luce del diritto internazionale e del diritto interno, lo Stato Maggiore della Difesa italiano ha elaborato un *Joint Integrating Concept* con cui sono state poste le basi per consolidare una cultura, giuridica ed umanitaria allo stesso tempo, in grado di contemperare al meglio le esigenze di sicurezza con quelle relative ai diritti fondamentali dell'uomo.

In particolare, definite preliminarmente le diverse categorie di persone assoggettabili a detenzione, si è proceduto ad individuare le linee guida per lo sviluppo di un modello organizzativo nazionale. Un modello che, già storicamente presente nelle tradizioni del nostro Paese, assicura un trattamento rispettoso del principio costituzionale della inviolabilità della libertà personale, limitabile solo in esecuzione di precisi istituti giuridici e fondato sulla consapevolezza della illiceità di ogni forma di violenza fisica e morale sui soggetti sottoposti a restrizioni.

Partendo, dunque, dal dato di fatto incontrovertibile che le operazioni militari rappresentano uno dei segni più tangibili dell'azione di contrasto alle attuali minacce, sono convinto che l'enfatizzazione del "fattore umano", l'impiego del "comprehensive approach" nell'affrontare i problemi della sicurezza collettiva e la disciplina organica del quadro giuridico di riferimento, costituiscano un contributo essenziale alle risposte che la comunità internazionale deve dare alle sfide poste dalla "globalizzazione della violenza".

Ringrazio per l'attenzione e formulo un augurio particolare a questo prestigioso Istituto, di cui quest'anno ricorre il 40° anniversario della fondazione, con l'auspicio che possa continuare e, se possibile, rafforzare l'insostituibile opera svolta per il sostegno e la diffusione della cultura dei diritti umani nel mondo.

## *Stefano Dambruoso*

Magistrato, Capo Ufficio Coordinamento Affari Internazionali,  
Ministero della Giustizia, Roma

I would like to express my deep gratitude and thanks to the President of the International Institute of Humanitarian Law, Ambassador Maurizio Moreno, for this invitation and congratulate him on the successful organization of such a high-level event on the fight against global violence.

My sincere thanks also go to the numerous like-minded State parties which, together with Italy, have supported this meeting aimed at pushing forward the fight against global violence.

We are all acutely aware today that the post-Cold War world has proved to be a less friendly one than expected. If we were to ask ourselves whether we are more secure today than we were twenty years ago, I believe that very few of us could answer yes. We witness today many areas of instability as well as rising transnational and non-conventional threats, with technological, economic, financial and criminal power centres having spread out widely over the past fifteen years. We are confronted with a diffusion of power. New regional, sub-regional and non-state actors have emerged and claim a role.

Today, we are challenged by creative criminals using powerful and elusive means. Our answer, therefore, must be a highly creative one. Furthermore, we are facing a global challenge that requires global analysis, global commitment and a global response. Its sophistication is unprecedented since it combines a growing number of strategic, economic, social, and even climatic factors. Accordingly, we need to keep perennially up to date with our policies. Given the rapid change in the geopolitical scene, where the local dimension becomes an increasingly global dimension and vice-versa, international cooperation inevitably has to cover all the areas of social life. Our vision is to promote effective multilateralism, conceived not as an alternative but as an additional means to promote both bilateral and regional partnership.

Over the past decades, Italy has consistently supported the various UN bodies engaged in promoting common international approaches to prevent and combat all sources of violence. The UN Conventions against Organized Crime (UNTOC) and against Corruption, as well as the other instruments related to the fight against terrorism, are key elements which cannot be ignored.

The UNTOC was opened for signature in December 2000, in Palermo. It draws on the work and ideas of Judge Falcone, horribly murdered by the Mafia in 1992, together with his wife and body guards, while performing his duties. Fighting the financial activities of international criminal associations anywhere in the world, through judicial and police cooperation, regardless of the different types of trafficking they are involved in, is one of the basic aims of this Convention.

The basic idea is simple: arrest is often less effective than a large scale action to seize and recover the illicit assets of the Mafia. Giovanni Falcone had gained a deep understanding of the Mafia psychology and he had understood, before everybody else, that the *Mafiosi* can tolerate arrest and put up with it, considering it as a sort of “business risk”, but they will be really defeated only when justice takes away the illegal economic proceeds of their criminal activity from them and their family circle.

Over the last two years, Italy decided to adopt, and thus follow, this approach to fight organized crime by:

- extending the power to seize the illegal assets of Mafia members, including heirs and family members;
- issuing provisions on value confiscation, in order to minimize the possibility to conceal Mafia assets;
- establishing responsibility of legal persons in cases of money laundering activities.

Thanks to these new provisions, which drew the interest of our international partners, Italy set up a Fund for the Justice Sector which gathers the money and assets recovered from the Mafia. The Fund is proving to be a practical success since it allows us to directly use the resources seized from the Mafia to strengthen the fight against organized crime. In this case, figures explain better than words the effectiveness of this strategy.

Terrorism is another threat to world peace and security and therefore constitutes a problem affecting the whole of humanity. Personal security is an inalienable, fundamental human right. It is also the first guarantee for the survival and the sound development of a democratic society where freedom and the rule of law ensure the purposeful and successful life together of a community.

If personal security and freedom is curtailed and attacked by violence and terrorism, it is the very foundations of democracy which are at stake. This is why Italy, with its painful yet successful experience in the fight against homeground terrorism, stands side by side with all the countries hit by the curse of terrorism and has consistently acted in the international arena to strengthen the common front against terrorism.

In this regard, there is one fundamental moral and functional teaching that should never be overlooked. Our answer to terrorist threats against the Rule of Law should be the promotion and the enforcement of the Rule of Law itself, including the observance of the whole set of guarantees that must be universally applied, in any trial and procedure, to ensure full respect of fundamental human rights.

Italy has also been playing a very pro-active role in the creation of a common Freedom, Justice and Security area at the European Union level by supporting Europol and Eurojust, the network of the European Judicial Procurators; by joining hands with like-minded partners in protecting critical infrastructures; and by regional and international level, as demonstrated by the current EU negotiations on data exchanges with USA, Canada and Australia (so called Society for Worldwide Interbank Financial Telecommunications (SWIFT) and Passenger Name Record (PNR) agreements).

We need to constantly update our policies and enhance the exchanges at all levels with the anti-terrorism community. For these reasons, in line with UN and EU policies on illicit trafficking of chemical, biological, radiological and nuclear (CBRN) material and CBRN terrorism, the Italian Government is supporting the European Commission in the creation of Centres of Excellence (COE) for CBRN risk mitigation.

The main objectives of the initiative are to:

- promote and support the development of national CBRN Policy in participating countries;
- optimize the sharing and use of accumulated international and national experience in the area of the CBRN risk mitigation;
- develop a cooperation process among network members to identify problems and possible solutions from information available to the network.

Let me conclude with one main point. Our society's inner strength lies in its openness and in its genuine respect for freedom that we intend always to defend. As we fight crime and other global threats, we should be comforted by one inner certainty: the principles and values, upon which our democratic societies are built, represent an essential moral compass, as well as clear signposts on our future roadmap.

Rather than limiting our action, they greatly enhance the effectiveness and long-term credibility of our fight against today's most pressing challenges, among which all sources of violence.

This year marks the 40<sup>th</sup> anniversary of the creation of this Institute. I take this opportunity to express my sincere thanks, on behalf of the Italian Government, for the work carried out by this international Institute which was, and still is an essential instrument for the policy of the Italian Ministry of Foreign Affairs and for all the international organizations actively engaged in preventing any source of violence.

I strongly believe that the best way to celebrate this 40<sup>th</sup> anniversary is to join our efforts in coping with the challenges of transnational crime, through effective global strategies so that justice may prevail over crime within a freer, safer and more equitable world.



## *Donato Di Ponziano*

Presidente, Casinò Municipale di Sanremo

Un caloroso benvenuto a tutti, a Sua Altezza il Principe Alberto II di Monaco, al Dottor Jacob Kellenberger, Presidente del Comitato Internazionale della Croce Rossa (CICR), a tutte le autorità politiche, militari e religiose presenti in questa sala.

Quello dei quarant'anni è un anniversario speciale. Un anniversario che sentiamo in maniera particolare, perché anche noi, intesi come il Casinò di Sanremo, abbiamo raggiunto e superato i 105 anni di attività. Ci sentiamo vicini all'Istituto Internazionale di Diritto Umanitario, con cui abbiamo sempre collaborato, che abbiamo visto nascere qui a Sanremo e che, come ha giustamente ricordato il Sindaco Zoccarato, è il fiore all'occhiello di questa città.

Proprio pochi minuti prima dell'inizio della conferenza ho condiviso con il Generale Borghini una riflessione: l'Istituto si può ben considerare come espressione fondamentale nel contesto internazionale che stiamo vivendo. Sono oggi qui rappresentati tutti e cinque i continenti rendendo il convegno stesso un momento di scambio importantissimo, in questa città che ha sempre promosso le iniziative internazionali e che è portatrice di un'internazionalità di cui siamo tutti orgogliosi e fieri.

Il Casinò di Sanremo, con la sua storia e la sua tradizione, ha sempre cercato di contribuire alla divulgazione di momenti culturali e istituzionali, che per noi sono un elemento fondamentale per la condivisione di valori e di esperienze che fanno crescere le comunità.

Un particolare ringraziamento va all'Ambasciatore, amico, Maurizio Moreno, Presidente dell'Istituto. Il lavoro che sta portando avanti è importante, meritevole di sostegno e di particolare encomio. Vogliamo assicurare all'Istituto Internazionale di Diritto Umanitario che il Casinò di Sanremo sarà sempre vicino e continuerà a supportare, per quanto sarà possibile, le numerose attività svolte.

Concludo con una riflessione che scaturisce da un pensiero di Jean-Jacques Rousseau, studioso ginevrino, pensatore, filosofo, precursore del diritto umanitario che tanto si è occupato dei rapporti umani. Jean-Jacques Rousseau diceva che la guerra non è un rapporto tra un uomo e un altro uomo, bensì un rapporto tra Stati, in cui gli individui, gli uomini, sono nemici solo per caso, sono nemici poiché soldati che fanno il loro dovere. L'obiettivo principale è sempre aiutare chi ha bisogno, soprattutto chi ha bisogno di pace, di solidarietà e di veder rispettati i diritti fondamentali.

## *Antonio Gutierrez*

United Nations High Commissioner for Refugees, Geneva

UNHCR has cooperated with the International Institute of Humanitarian Law to promote and develop international refugee law for many years, and it is our firm intention to continue to collaborate on these issues going forward, as the challenges to, and the inter-linkages between International Humanitarian Law, international human rights law and international refugee law become more and more apparent. I regret that I was unable to attend the very meaningful ceremony marking the Institute's 40<sup>th</sup> Anniversary, but hope through this message to convey both UNHCR's continuing support for the Institute and my personal congratulations to the Institute and its members on reaching this important milestone.

It is important to recall that in the same year that the International Institute of Humanitarian Law celebrates 40 years of its existence, UNHCR for its part commemorates its 60<sup>th</sup> anniversary, and that in the coming year two of the international instruments of which UNHCR is the guardian, the 1951 Refugee Convention and the 1961 Convention on the Reduction of Statelessness, will attain 60 and 50 years of existence respectively.

In the same way that the Institute and its partners are marking this 40<sup>th</sup> Anniversary by exploring contemporary challenges to International Humanitarian Law due to global violence and its consequences, UNHCR will commemorate its milestones by embarking on a series of discussions with stakeholders, many of whom are also partners with the Institute, on the protection gaps and challenges increasingly facing refugees, stateless people and those affected by forced displacement.

I am becoming increasingly concerned that, whether displacement is caused by violence and conflict or by persecutory situations in a country of origin – the “traditional” reasons why UNHCR would be involved in responding to the plight of the displaced – or whether it is due to other complex and emerging reasons, such as natural disaster, slow-onset climate

change or severe deprivation, the needs of those who are displaced or deprived of the ability to exercise their rights are strikingly similar, and demand a more robust and predictable response from the international community.

In these circumstances, it is my intention to use the occasion of the forthcoming anniversaries to explore this in more detail, through a number of events and consultations with key stakeholders, including refugees, stateless people and the displaced themselves, concerned governments, other international organizations, non-governmental organizations and experts, and to understand more comprehensively new and emerging displacement challenges, to raise public awareness and build solidarity with the displaced and stateless, and ultimately to strengthen the existing protection regime and promote a new protection dynamic.

I very much hope that the Institute and many of its partners will join UNHCR next year in exploring these complex contemporary challenges and try, creatively and proactively, to find common understandings regarding the standards and responses which should be adopted by the international community in that regard.

On the occasion of celebrating 40 years of progress in the development of international law accomplished by the Institute since its inception, and building on that progress, I urge all of us to look forward to improving the international protection regime already in existence, and to responding more effectively to the needs of the displaced and the stateless.

Again, congratulations on this significant occasion and all my best wishes for the continued success of the Institute in the future.

## *Christophe Keckeis*

President, Geneva Centre for the Democratic Control of Armed Forces;  
Former Chief of Swiss Armed Forces, Bern

It is an honour and a privilege to address this distinguished audience and to forward the compliments of the Chief of the Swiss Armed Forces.

The International Institute of Humanitarian Law (IIHL) is celebrating its 40<sup>th</sup> Anniversary. This is an excellent opportunity to pause for a moment and to look back on what the Institute has achieved. Forty years of dedication to International Humanitarian Law (IHL) with heart and mind and a lot of individual effort and voluntary work.

The result is impressive. The Institute offers a unique world class and neutral platform for dissemination, reaffirmation and development of IHL, with training and education as its core business. The Institute has no hidden agenda - participants from all over the globe come to Sanremo, irrespective of ideology, religion and defence alliances. The Institute is internationally accepted as an excellent training centre.

For this achievement I congratulate the IIHL and its management.

As you know, Switzerland is strongly tied to and linked with the Institute.

IHL is deeply rooted in the self-conception of Switzerland. It is, therefore, no surprise that Switzerland has been engaged with the Institute from the very beginning. The Swiss national Prof. Jovica Patronovic was not only a founding member but also president of the IIHL for 22 years.

For 33 years, the Institute has devoted its Round Table to current problems of IHL. The topic of this year is very relevant.

Armed forces are often accused of being part of the problem of global violence, but not a solution.

The fact is, only a strong State, guided by the rule of law can protect the weakest of society and provide human security. To this end, armed forces are an indispensable instrument, provided two conditions are set:

- democratic control of armed forces and
- military operations must abide with the law.

In the latter lies the reason for the support of the Institute by the Swiss Ministry of Defence, Civil Protection and Sport. It is our firm belief that the activities of the Institute are relevant and an important contribution to a world of peace.

Let me now express my thanks and please accept my apologies for not mentioning all States and persons involved with the Institute.

First of all, I would like to thank Italy for supporting the IHL. This support provides the cornerstone of the Institute.

Our thanks equally go to the city of Sanremo for granting the Institute the free and exclusive use of the beautiful Villa Ormond for a ten-year period.

I would also like to thank Ambassador Moreno for his outstanding and admirable work, efforts and dedication to the Institute.

And of course, I thank all sponsors and the staff of the Institute for their support.

Let me also include the late Col. Frédéric de Mulinen in my acknowledgments. As the ‘father’ of operationally-based instruction and as the director of the Military Department for almost twenty years, he greatly influenced an entire generation of officers and the way IHL was taught in Sanremo. Switzerland established a sponsorship programme in his honour, at the IHL.

We are all fully aware that the Institute faces many challenges. All States are confronted with financial constraints. This is also felt by the IHL.

Switzerland is confident that the Institute will take the right decisions in order to cope with the contemporary stormy waters. If the Institute continues with the same perseverance as it has done for the past forty years, there is no doubt that it will succeed.

## *Betty King*

Permanent Representative of the United States of America  
to the United Nations Office and other International Organizations, Geneva

I am delighted to be a part of this anniversary roundtable. The United States has been a supporter of the International Institute of Humanitarian Law (IIHL) and a participant in its events for many years and on the occasion of this anniversary, I would like to take a moment to honour IIHL's legacy. There are thousands of government and military officials, international organizations and civil society representatives who have learned about International Humanitarian Law and Refugee Law here. They have exchanged ideas on the application of these principles and the future of humanitarian affairs. And most importantly, they have gone on to practice what they learned, to build on their experience here and, I would venture, to better their humanitarian practices and the lives of vulnerable people around the world. This is no small achievement for which we are all grateful to IIHL.

As a representative of the current United States Administration, I am particularly pleased to be associated with this event. President Obama has made clear from his very first days in office his commitment to renewed engagement and to ensuring that the United States complies with all applicable international law, including the Geneva Conventions. Let me be clear, we are fully engaged, we are back at the table, and we want to be part of discussions such as these about the application and the effectiveness of the laws of war.

Because, let us not forget, the United States is a country engaged in conflict. In his remarks accepting the Nobel Peace Prize, President Obama spoke of war and of the changing nature of war and its combatants. He said, "There will be times when nations – acting individually or in concert – will find the use of force not only necessary but morally justified". But he also recognized that while "the instruments of war do have a role to play in preserving the peace [...] this truth must coexist with another – that no matter how justified, war promises human tragedy".

Our job, it seems to me, is to focus on reducing that human tragedy while accepting that violent conflict will not end during our lifetime and understanding the current realities of conflict. This is particularly true as we look at the laws of war. To be effective, the law must adapt to address evolving realities – the world as we know it and not the world as it was or the world as we would like it to be. This is why the themes chosen for this round table are so important in our current times. Contemporary Forms of Armed Conflict, Deprivations of Liberty in Armed Conflict, and Individual Guarantees in Detention. These are complex issues that merit serious reflection and discussion to help us move toward a common understanding of the application of existing rules in the context of current conflict. I look forward to hearing all of your views and I know that I will benefit from my time here.



## *William Lacy Swing*

Director General, International Organization for Migration, Geneva

It is a great honour and privilege to participate in the celebration of the 40<sup>th</sup> Anniversary of this distinguished Institute.

The International Organization for Migration (IOM) is proud of its long-standing cooperation with Ambassador Moreno and the Institute's talented staff. Our collaboration extends over a range of academic activities; these include a number of joint publications and of course the popular International Migration Law Course, now in its fifth year.

As part of our efforts to strengthen this partnership, I was very pleased that Ambassador Moreno and I signed, in March of this year, a Memorandum of Cooperation on behalf of our Organizations, reaffirming our partnership in the field of humanitarian law.

I have been invited to make a few remarks on global violence and human mobility.

A simple research exercise reveals innumerable incidents of violence over the past 40 years that prompted mass movements of people around the globe. From the outbreak of civil war in Jordan in September 1970 to the expulsion of Asians from Uganda in September 1972; and from the fall of Kabul in September 1996 to the outpour of refugees from Kosovo in September 1998, violence has remained one of the root causes of human mobility.

The threat of violence, however, often does not end with the flight from home. Violence lingers on migration routes. This manifests itself in psychological, social or physical violence perpetrated by criminal gangs, armed thugs, drug cartels, corrupt officials, or even by other migrants.

To put this in context, we live in the era of the greatest human mobility in recorded history. There are more than 214 million international migrants, and an estimated 740 million internal migrants. In other words, a total of nearly 1 billion persons on the move; that is to say roughly one of

every seven persons in the world is a migrant. Far too many of these persons on the move are subject to violence.

I would like to highlight three specific trends in violence against migrants; and three means of addressing the violence.

#### A. Threats from war and conflict

The first strain of violence occurs in times of war or armed conflict. Migrants and Internally Displaced Persons (IDPs) are often subject to grave human rights violations, including torture, deportation, enslavement, or direct attack.

Violence is also present after the fighting has stopped – in the form of reprisals against returnees or those who have re-settled elsewhere. In some cases, unfortunately, States themselves are party to that violence either through their own actions or passivity that allows violence to occur with impunity.

#### B. Threats from organized crime

The second strain of violence is related to migrants' vulnerability at the hands of transnational organized crime networks. These criminal rings use migrants as a mechanism of exploitation and income.

Another manifestation of this violence is human trafficking and smuggling which are two of the great crimes of the globalization era. Trafficked or smuggled migrants become a commodity. Financial profits from trafficking – estimates go as high as USD 30 billion – are second only to the illicit trade in weapons and drugs.

A tragic example of this trend is the brutal slaying last month of 72 migrants from Central and South America in northern Mexico. One of the survivors of this tragedy alleged that the killing started after migrants refused to pay ransom sums and engage in slave labour. Sadly, this is not an isolated case.

#### C. Threats from xenophobia and intolerance

The third strain of violence is associated with intolerance, discrimination, and xenophobia, and the challenge of migrant integration.

High-profile cases in recent months demonstrate a failure on the part of us all – a failure of the State to recognize and inform its public about the contribution that migrants make to our societies and the global economy – through innovation, hard work, and remittances; a failure to inform and educate about the inevitability of large-scale migration in view of the North-South push and pull factors: demographic and labour market trends; and a failure to counter harmful stereotypes.

Let me conclude with a few remarks about some of the legal instruments and options available to States to break the bond between migration and violence.

States have every right to control their borders and to safeguard the security of their citizens – but States also have a responsibility to protect the human rights of migrants, including irregular migrants, under their jurisdiction. These include the right to human dignity, physical integrity, as well as safety and freedom from racism and discrimination.

A certain degree of violence also occurs every year on state borders due to existing border policies. Our collective engagement to address this issue is required.

In addition to using the existing international migration legal framework, there are specific options available to States at the national level. Let me highlight three:

- (a) adopting legislation and implementing policies that prevent, suppress, and punish violence in all stages of the migration process. Both the International Convention on the Elimination of All forms of Racial Discrimination (CERD), and the Declaration and Plan of Action of Durban of 2001, provide for appropriate legal provisions in this regard;
- (b) providing migrants with access to legal mechanisms to seek just and adequate reparations where their rights have been violated regardless of their migration status. This is particularly relevant in cases involving trafficking and smuggling;
- (c) promoting public information and awareness about multiculturalism, diversity, and the valuable contribution of migration and migrants. In this regard, media also plays an important role as a vehicle to promote tolerant societies and to counter “wilful ignorance”.

In summary, in this age of the greatest human mobility in history, there is unprecedented violence against migrants. The three principal sources of violence are:

- (a) war and conflict;
- (b) organized crime, especially trafficking; and
- (c) xenophobia.

A State’s responsibility is three fold:

- (a) to adopt appropriate legislation;
- (b) to ensure migrant access to justice;
- (c) to highlight migrants’ contributions to society through public education and information.



## *Jean-Pierre Mazery*

Grand Chancellor and Foreign Minister,  
Sovereign Military Order of Malta, Rome

C'est une grande joie d'avoir été invité à participer au 40<sup>ème</sup> anniversaire de l'Institut, une institution encore jeune et pleine d'avenir, qui apporte une contribution essentielle à tous ceux qui s'efforcent de soulager les souffrances dans le monde, dans le plein respect de la dignité humaine.

A cet égard, je voudrais féliciter l'Institut pour sa contribution remarquable à la codification et à la formation au droit international humanitaire, et à leur mise en œuvre.

Vous avez choisi de traiter le thème de «la globalisation de la violence», qui se manifeste non seulement dans le cadre des conflits armés, mais aussi, et de plus en plus, comme des formes multiples de contestation tant de la part de groupes que d'individus pour lesquels la violence, l'agression, l'acte de détruire est une façon d'affirmer aux yeux du monde que l'on existe, alors que l'on est incapable de construire; vous avez certainement pensé à consulter des philosophes contemporains comme Michel Foucault et Augustin Girard, pour ne citer que mes concitoyens.

En réalité, il s'agit là d'une réflexion d'abord philosophique, ancienne, mais toujours d'actualité.

Cette question, la violence, pourrait bien être le grand défi de notre siècle.

Pour entrer dans le sujet – les défis que posent les conflits armés contemporains et les situations de grande violence – il est clair que sur le terrain, là où les humanitaires interviennent, le paysage stratégique a beaucoup changé, particulièrement depuis les attentats du 11 septembre 2001, laissant la place à toutes les formes de violence, criminalité, terrorisme, fanatisme.

En effet, les menaces et les enjeux ne sont plus idéologiques et concentrés sur des rapports de force entre «blocs de puissance» ou entre «Etats-Nations» comme ce fut le cas au cours des deux derniers siècles. Ils sont

d'ordre insurrectionnel, anarchique et dilués sur le terrain avec une radicalisation des questions identitaires. Le point d'entrée des crises est de plus en plus culturel, religieux, voire tribal, clanique.

Nous ne sommes plus dans une logique d'affrontements avec des fronts identifiés, des menaces bien circonscrites et stables, des confrontations avec des jeux d'acteurs lisibles et explicites.

Les cibles sont de moins en moins centrées sur les dispositifs militaires ou paramilitaires mais de plus en plus sur les populations civiles. Ces dernières sont prises en otages et servent de «béliet» pour des opérations de déstabilisation de masse.

Le terrain des crises est saturé par une masse d'acteurs internationaux souvent non coordonnés, certains incontrôlables (organisations internationales, ONG, médias, opérateurs civils, «non-state actors») qui n'ont rien à voir avec le monde militaire, parfois le méconnaissent et préfèrent souvent le contenir sur une compétence uniquement sécuritaire et logistique.

Dans ce cadre le poids des ONG est devenu considérable, tant en nombre d'opérateurs qu'en moyens financiers mis à leur disposition. Ces organisations se posent désormais comme des interlocuteurs institutionnels, médiatiques et opérationnels incontournables du fait des programmes qu'ils gèrent par délégation des Nations Unies et de ses Agences, de l'Union Européenne ou des grandes institutions financières internationales; d'autres par le seul fait qu'elles se disent une émanation de la société civile locale.

S'agissant de la gestion des crises, cet environnement asymétrique, pour utiliser ce terme à la mode, entraîne des conséquences désastreuses pour la bonne exécution des actions d'assistance humanitaire, particulièrement depuis les opérations militaires en Irak, et Afghanistan, au Darfour. L'implication d'acteurs institutionnels, politiques et militaires dans le secteur humanitaire soulève inévitablement des problèmes de cohabitation et d'image. C'est ainsi que de nombreuses organisations humanitaires subissent des prises d'otages et déplorent des victimes parce qu'elles sont perçues comme étant affiliées aux objectifs politiques et diplomatiques de l'Occident. Ces interférences dans les opérations militaires créent beaucoup de confusion sur le terrain et nuisent à l'exercice de la diplomatie humanitaire basée sur la neutralité et l'impartialité. Elles se traduisent aussi par des logiques de privatisations de la guerre en marge des actions militaires où l'humanitaire se trouve instrumentalisé de façon dangereuse.

C'est dans cet esprit que l'année dernière, en novembre 2009, l'Ordre de Malte a été invité à s'exprimer devant le Conseil de Sécurité des

Nations Unies, précisément sur la protection des civils et des travailleurs humanitaires.

We pointed out before the Security Council that there are at least four types of violence perpetrated against civilians in the course of armed conflict, which should be urgently addressed by the UN:

1. direct attack on civilians – including the use of sexual violence, suicide bombings, or assaults on facilities for refugees and displaced persons – for the purpose of destabilizing society or generating terror for military or political objectives;
2. capture of civilians as hostages to serve as “human shields”, or misuse of protected facilities such as hospitals or aid stations for the purpose of protecting combatants or combatant facilities or operations;
3. infliction of “incidental” or “collateral” damage upon civilians – including aid workers and medical personnel – as part of military operations that create a high degree of risk causing the death or injury of innocent civilians in pursuing what would otherwise be legitimate military objectives;
4. targeting of humanitarian facilities or humanitarian aid workers, such as medical personnel and volunteers, for the purpose of denying civilians food, shelter or medical care.

There can be no question that these kinds of actions violate basic principles of International Humanitarian Law, including the Fourth Geneva Convention. Equally important, those persons who violate these precepts must be accountable for their actions. This accountability must include those who personally violate the basic rules of International Humanitarian Law as well as those who are responsible for those violations in accordance with settled principles of the international law of “command responsibility”.

More than 60% of attacks on humanitarian workers have occurred in Afghanistan, Somalia and South Sudan. In Afghanistan, the Order of Malta has lost several local staff members in ambushes and shootings.

We hope the UN and international community will soon address these crucial issues – we have noted with great satisfaction that the European Union will soon discuss them.

To finish with a practical example of action against violence: in recent history some of the most brutal fighting has taken place in the Democratic Republic of Congo during and after years of civil war. In that war-torn country, sexual violence and rape as part of military strategy to create disorder and terror became widespread. Since 2007 the Order has been

working with the victims to prevent or treat sexually transmitted diseases and to provide psychological counselling especially in the Bukavu region. Basic health care centres and centres for malaria prevention are also run by the Order in Kinshasa, in South Kivu, and Ituri and Haut Uélé area. Furthermore, the Order provides food and medicine supplies to numerous hospitals as well as training courses in the health sector.

Another example of the efforts of the Order of Malta in struggling against violence is in the North-West province of Pakistan where the Order of Malta deployed medical teams in 2009 and distributed hygiene kits to more than 28.000 internally displaced persons who had fled due to military offensives. The Order of Malta now supports the returning families by providing medical assistance after their return home. It also runs hygiene campaigns to prevent the outbreak of water-borne diseases, and according to demand, it supplies primary health services at easily accessible public places such as schools.

Now I would like to conclude by forwarding, in the name of His Highness the Grand Master of the Order of Malta, Fra' Matthew Festing, best wishes for a very happy anniversary to the Sanremo International Institute of Humanitarian Law, to its president, Ambassador Moreno, as well as to the members of its Council and its very qualified Secretariat.



*Patricia O'Brien*

Under Secretary General for Legal Affairs and Legal Counsel,  
United Nations, New York

It is my pleasure to speak to you today at this auspicious gathering to celebrate the 40<sup>th</sup> anniversary of the International Institute of Humanitarian Law. The Sanremo Institute has long been a lead Institute in the field of promoting the understanding, development and dissemination of International Humanitarian Law, and one with which the United Nations Secretariat, and the Office of Legal Affairs, in particular, has had a long tradition of cooperation.

The theme for this year's round table is "Global Violence: Consequences and Responses". In light of the recent events in places as diverse as Darfur, the Democratic Republic of the Congo, Guinea, Sri Lanka, Kyrgyzstan, Afghanistan, Gaza and elsewhere, this topic has become ever more acute. In many of these places and situations the consequential and almost inevitable effects of violence have been the targeting of civilians, sexual violence, forced displacement and denial of humanitarian access – for the most part these acts are carried out with impunity.

The United Nations (UN) is uniquely placed to spearhead the international effort while the response to global violence must, of course, be the joint effort of States, non-State entities, international organizations both governmental and non-governmental and civil society at large. In crafting a response to global violence and its consequential effect on the civilian population, the question at the centre of the debate is: how to prevent the violence and to punish those responsible for its consequences. In the practice of the international community, including the United Nations, however, prevention and punishment – "two distinct yet connected obligations" in the words of the International Court of Justice (ICJ) in the Genocide case – have too often been seen as "punishment as prevention". One of the most effective ways of preventing criminal acts, according to so many great legal philosophers and jurists and according to the ICJ, is to

provide penalties and to impose them effectively on persons who committed them. But while punishment as a deterrence or a form of prevention has been the purpose of all international criminal jurisdictions – one, perhaps, among many – in reality, punishment alone seldom prevents.

Ever since its ground-breaking response to the mass atrocities in the former Yugoslavia and Rwanda in the early to mid-1990s, the United Nations has established a panoply of international and mixed tribunals, beginning with the International Criminal Tribunal for the former Yugoslavia (ICTY), and for Rwanda (ICTR), the Extraordinary Chambers for Cambodia, the Special Court for Sierra Leone and, as of late, the Special Tribunal for Lebanon. For almost two decades international criminal tribunals have contributed to the eradication of impunity, and the prosecution of those responsible at the political and military leadership for commission of serious, large-scale crimes. In so doing, these international judicial mechanisms have also contributed to the revival and development of international criminal law and jurisprudence, and will have left a legacy to guide generations of national and international jurisdictions and members of the legal profession at large. It remains questionable, however, as to how much tribunals of all kinds have done to prevent future crimes.

In the last two decades, as well, Commissions of Inquiry, established by the Secretary-General to investigate serious violations of human rights and International Humanitarian Law, have become the foremost non-judicial accountability mechanism and a tool – both legal and political – to bring a message of accountability to post-conflict societies. Throughout the years commissions of inquiry to investigate serious violations of human rights and International Humanitarian Law were established in the former Yugoslavia, Rwanda, Burundi, Ivory Coast, Darfur, Guinea and East Timor, to mention but a few. Commissions of inquiry were also established to undertake criminal investigation under the national laws of the requesting State, and notably the Commission of Inquiry into the assassination of former Prime Minister Hariri in Lebanon, the Commission to investigate organized transnational crimes in Guatemala (known by its Spanish acronym of “CICIG”), and more recently the fact-finding commission into the assassination of former prime Minister Benazir Bhutto. Some of the “traditional” commissions of inquiry have paved the way for the establishment of judicial accountability mechanisms, i.e., the ICTY and ICTR and the International Criminal Court (ICC) following a referral of the Security Council. For the many which have not, however, their reports remained a testimony, the only one perhaps, for the events.

The record of the Security Council in establishing judicial and non-judicial accountability mechanisms has, no doubt, been impressive. Yet, the “obligation to punish” applies first and foremost to the States where the crimes were committed and where, for the most part, victims and perpetrators continue to co-exist. International judicial accountability mechanisms do not substitute national mechanisms; they only complement them with respect to the most serious crimes of genocide, crimes against humanity and war crimes.

In this connection, the Kampala Declaration, adopted at the close of the ICC Review Conference this June, expressed the resolve of the States’ parties “to continue and strengthen effective domestic implementation of the Statute, to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally recognized fair trial standards, pursuant to the principle of complementarity”. The principle of complementarity has thus become the bedrock of the international criminal justice system.

In the final analysis, however, justice is a nation’s choice. In its realization, the United Nations as well as other international criminal jurisdictions can, to a certain extent, assist. But the fight against impunity will not be won at the international level. It must be fought and won inside the States, with the political will of the governments and in the hearts and minds of the citizens. Only then will we truly see the dawning of an age of accountability.

Judicial accountability mechanisms of all kinds hold the promise of “prevention by deterrence”. It is nevertheless in its efforts to *prevent* global violence that the resolve of the United Nations and the international community as a whole will ultimately be tested. In its efforts to prevent the occurrence of large scale violations of human rights and International Humanitarian Law, the UN has undertaken a variety of activities in the promotion of the rule of law, fostering development, institution building, training police and monitoring elections. All of these activities have the capacity to contribute in various different ways to the creation of more stable societies governed by the rule of law, and to preventing the outbreak of conflict. The use of “good offices” in times of crisis has also succeeded in bringing about a political resolution to a dispute before conflict breaks out.

Against the background of the 1990s and the international community’s inaction in Rwanda and Srebrenica, the doctrine of so-called “Responsibility to Protect” (R2P) emerged in 2001, to be embraced only a few years later by the entire community of States. At the 2005 World Summit, Heads of State and Government unanimously affirmed their

“responsibility to protect”, consisting of three pillars: *First*, they acknowledged that each individual State has the responsibility to protect its populations from genocide, war crimes, and crimes against humanity, as well as ethnic cleansing. *Second*, that the international community, through the UN, has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means to help States protect their populations from such crimes. *Third*, they resolved to take collective action, in a timely and decisive manner, through the Security Council and in accordance with the Charter, when peaceful means were inadequate and national authorities were manifestly failing to protect their populations.

The Responsibility to Protect doctrine does not create any new legal basis for the use of force, and is not – as popularly misconstrued – another way of conceptualizing “humanitarian intervention”. It is nonetheless an important political acknowledgment that sovereignty entails responsibility, and that the international community has a responsibility to act to assist States in protecting their populations. When this concept was debated in the General Assembly last July, most States agreed that the UN’s role should focus, at the outset, on prevention, including through long-term activities in the promotion of the rule of law, building good governance institutions and reforming the security sector. In so doing, our challenge is to work out how the UN can best assist States in protecting their populations *effectively* – and how to get the various branches of the UN system to work *quickly* and *coherently* in crisis situations when States are either unwilling or unable to protect their populations.

The strength of the R2P concept lies in the obligations that it places, both on individual States and the international community, to take action *before* atrocities on a large scale are permitted to occur. It is, however, the political will of the Security Council and the community of States, more generally, to act for the protection of the civilian population where all protection measures fail or are not resorted to, which will remain forever our greatest challenge.

In addition, while the Outcome Document concluded the legal debate over the possible use of force for humanitarian purposes outside the framework of the United Nations Charter, the moral or philosophical debate over the protection of civilian population in dire existential risk continues. In response, however indirect, to the challenge of R2P, the Security Council has, since 1999, mandated peacekeeping operations to protect, by force if necessary, civilian population under imminent threat of violence.

In the Democratic Republic of the Congo (DRC), Liberia, Ivory Coast, Darfur and Chad – to name but a few, peacekeeping operations have been

mandated to protect civilians within the limitations of their area of operation, available resources, and without prejudice to the government's responsibilities. In a strategy known as "protection by presence" they monitor the observance of human rights, patrol IDPs' camps, and escort women in their daily business as well as humanitarian convoys.

In North Kivu, DRC, UN peacekeepers have on a number of occasions been engaged in offensive operations against armed groups and in so doing provided critical protection to civilians in imminent danger. At times, however, we fall short of our ability, capability, and the expectations of the victims who trusted us and the world that observes us. Our failures, however, do not discourage us. They only strengthen our determination and resolve to protect civilians and prevent future atrocities.

Almost two decades after the first international tribunals were established and in this "era of accountability", the United Nations is determined not to let the relative success of punishment of those responsible for the so-called "R2P crimes" obscure the serious and much more difficult challenge of prevention – the only truly mature and honest response, perhaps, to global violence and its consequences.



## *Francesco Rocca*

Commissario Straordinario, Croce Rossa Italiana, Roma

La Croce Rossa Italiana è da sempre una convinta sostenitrice dell'Istituto Internazionale di Diritto Umanitario, e questo legame profondo trova oggi proprio la sua massima espressione nel celebrare insieme questi quarant'anni e nel privilegio che ci è stato concesso di essere parte sia del Consiglio Direttivo sia dell'Assemblea.

Però in particolare oggi in questa ricorrenza, vorrei veramente esprimere un grazie da parte di tutta la Croce Rossa Italiana a lei, Ambasciatore, per il vigoroso impegno che profonde nella sua attività di Presidente dell'Istituto.

Anche quest'anno la tavola rotonda si distingue per un programma che mette in luce alcune delle più rilevanti problematiche giuridiche e operative proposte dai recenti scenari. In particolare la sessione sulle forme contemporanee della violenza armata permetterà di fornire un bilancio sui diversi fenomeni che rendono ancora più complessa l'attuale regolamentazione dell'uso della forza, l'interazione fra il Diritto Internazionale Umanitario (DIU) e altri settori come i diritti umani, il diritto internazionale penale e il disarmo.

La prima sessione, incentrata sulle forme contemporanee della violenza armata, permetterà di fornire un bilancio su diversi, ma in molti casi collegati, fenomeni, che rendono ancora più complessa l'attuale regolamentazione dell'uso della forza e l'interazione fra il DIU e altri settori, come i diritti umani, il diritto internazionale penale, il disarmo.

Rispetto a questi ambiti l'attenzione del Movimento internazionale di Croce Rossa e Mezzaluna Rossa è costante, dato che l'emergere di questi fenomeni rischia, in definitiva, di compromettere e rendere ancora più complessa l'azione umanitaria che si intende perseguire.

Circa tale impegno rispetto ai temi della prima giornata basti pensare, ad esempio, al propositivo contributo offerto dal Movimento internazionale

onde giungere ad una più puntuale regolamentazione dei sistemi di armamento, rispetto alla quale si intravedono oggi significativi risultati. Nell'agosto scorso è entrata in vigore la Convenzione sulle munizioni a grappolo e, ugualmente, sono tangibili i progressi in seno alle Nazioni Unite per giungere finalmente ad una prossima negoziazione della Convenzione sul commercio di armi, grazie alle prime riunioni svolte nel luglio scorso dal Comitato preparatorio.

Come osservato dall'Assemblea Generale nella sua risoluzione 64/48 del gennaio 2010, l'assenza di chiare regolamentazioni internazionali sulla vendita e il commercio di armi convenzionali, che spesso comporta la loro confluenza verso mercati clandestini, ha un drammatico impatto rispetto ai conflitti armati. Basti pensare alla facilità di accesso degli attori non statali alle armi di piccolo calibro che, nei conflitti armati non internazionali, rappresentano sicuramente il più significativo strumento di una violenza bellica troppo spesso estranea al rispetto dei basilari principi del DIU.

Per tale motivo, da anni, il Movimento si adopera per giungere ad una regolamentazione internazionale del commercio delle armi leggere. Questi strumenti, tra l'altro, hanno una profonda incidenza anche su altri ambiti della "violenza globale", che non dovrebbero essere dimenticati seppure siano ovviamente estranei a situazioni propriamente conflittuali.

Come opportunamente ricordato nella Risoluzione "Together for Humanity", adottata nella XXX Conferenza internazionale della Croce Rossa e della Mezzaluna Rossa, gli episodi sempre più comuni di violenza, da quelli in ambito urbano connessi a fenomeni di criminalità organizzata fino alla più usuale violenza interpersonale, rappresentano ormai una drammatica minaccia per la popolazione civile. Una drammatica esemplificazione ci è fornita dall'ultimo rapporto dell'Organizzazione Mondiale della Sanità (OMS) su questo tema, dal quale si rileva che le vittime di omicidi sono oltre tre volte maggiori rispetto a quelle derivanti da conflitti armati. Per tale motivo la Federazione Internazionale ha posto questi temi al centro della sua attenzione, specie tramite la "Global Strategy on Violence, Prevention, Mitigation and Response 2010-2020", al fine di sviluppare, con le Società Nazionali, progetti e programmi operativi per incidere su questi fenomeni. Anche se questo ultimo peculiare ambito della "violenza globale" è estraneo al DIU, l'azione del Movimento può e deve svolgersi con uguale energia, onde rispondere all'esigenza primaria, fissata nel Preambolo dello Statuto del nostro Movimento, "di prevenire e alleviare le sofferenze umane ovunque si manifestino".



Ormai, situazioni extra-conflittuali di violenza verso la popolazione civile hanno raggiunto una magnitudo tale da comportare financo l'intervento delle giurisdizioni penali internazionali. Basti pensare alle violenze post-elettorali sviluppatasi in Kenya nel 2005, che hanno condotto, nel marzo 2010, la *Pre-Trial Chamber* della Corte Penale Internazionale ad approvare la richiesta del Procuratore di procedere ad indagini su fattispecie che sono qualificate, *prima facie*, quali crimini contro l'umanità.

Ugualmente rilevante per l'attività del Movimento internazionale è il secondo tema della Tavola Rotonda, ovvero la problematica della privazione della libertà personale in relazione a conflitti armati o altre situazioni di violenza. È inutile qui ricordare, per i conflitti armati internazionali, il diritto di visita ai prigionieri di guerra e agli internati civili garantito al Comitato internazionale dalle Convenzioni di Ginevra, principio la cui portata consuetudinaria ha trovato significative conferme anche nelle recenti pronunce della Commissione dei reclami Eritrea-Etiopia. Ugualmente, con i primi esempi che risalgono già alle attività svolte dal Comitato Internazionale in Russia nel 1918, questo organismo sviluppa rilevanti attività in favore dei detenuti in internamento amministrativo nell'ambito di conflitti armati non internazionali. Anche se sono note le maggiori difficoltà che questo incontra in tale ambito, dato il limitato riferimento, nell'art. 3 comune alle Convenzioni di Ginevra, alla possibilità di offrire i suoi servizi alle parti in conflitto, questo elemento non ha impedito al Comitato Internazionale di compiere una straordinaria opera di assistenza verso tali soggetti. Secondo i dati del 2009, l'attività del CICR in questo campo ha complessivamente coinvolto circa 500.000 detenuti, in oltre 70 Stati.

Purtroppo, le costanti violazioni dei basilari standard di protezione nei confronti delle persone private di libertà in contesti conflittuali o altre situazioni di violenza rendono sempre attuale problematica, che è altresì arricchita dalla difficile interazione che viene a crearsi fra regime del DIU e il settore dei diritti umani. Questo tema, inoltre, ben rappresenta l'archetipo e un primo banco di indagine rispetto al quale testare le sfide poste alla Comunità internazionale dalle forme contemporanee di violenza armata, oggetto della prima sessione. È indubbio che specie alcune delle situazioni ivi riconducibili hanno fornito, e tuttora evidenziano, momenti di tensione nella puntuale applicazione di tali garanzie fondamentali.

Basti pensare, in proposito, alle difficoltà presentatesi durante la missione Atalanta dell'Unione Europea (UE) riguardo alla detenzione dei pirati

somali, con l'alternarsi di varie soluzioni, come gli accordi dell'UE per il trasferimento di questi soggetti verso il Kenya o altri Stati limitrofi, che hanno sollevato perplessità giuridiche specie per la loro compatibilità con gli standard internazionali sui diritti umani. Queste difficoltà hanno fatto riemergere, nel rapporto presentato dal Segretario generale delle Nazioni Unite al Consiglio di Sicurezza lo scorso 26 luglio, l'opzione della creazione di corti "ibride" o di tribunali internazionali *ad hoc*, ricorrendo ai poteri conferiti al Consiglio dal Capitolo VII della Carta.

Tuttavia, anche alla luce di recenti esperienze, è evidente che le situazioni più complesse circa queste problematiche si siano sviluppate nell'ambito di conflitti armati non internazionali, specie se coinvolti contingenti multinazionali a sostegno di un governo legittimo, situazioni di occupazione bellica, lotta al terrorismo transnazionale. Sono evidenti le difficoltà giuridiche da risolvere.

Ad esempio, nell'ambito dei conflitti armati non internazionali il sistema del DIU evidenzia diverse lacune, specie sul fondamento giuridico della detenzione e sulle modalità di revisione delle misure restrittive. Ugualmente, in tali contesti, occorre comprendere l'effettiva portata degli obblighi in materia gravanti sui gruppi armati organizzati. Le caratteristiche intrinseche di questi attori non statali rendono probabilmente irrealistica una puntuale applicazione dell'intero sistema di garanzie in favore dei soggetti da loro detenuti. Occorrerà quindi forse cercare un punto di equilibrio che, in maniera pragmatica, bilanci gli obblighi giuridici esistenti rispetto alle loro capacità, anche se sono purtroppo noti i numerosi casi in cui essi non tendono a rispettare nemmeno i più basilari standard umanitari.

Su questi temi si intreccia il difficile bilanciamento e l'integrazione della normativa del DIU con i trattati internazionali in materia di diritti umani. Si può fare riferimento, ad esempio, all'eventuale necessità di operare deroghe, ove lo Stato sia impegnato in situazioni conflittuali o di emergenza nazionale, rispetto alle previsioni sulla libertà personale, quali l'art. 5 della Convenzione europea sui diritti dell'uomo, oppure alla necessità di utilizzare i più puntuali standard derivanti dalla normativa sui diritti umani onde definire, in situazioni conflittuali, le garanzie processuali delle persone detenute. Questa difficile interazione fra sistemi e le sfide operative poste ai contingenti militari sono ormai al centro del dibattito internazionale, come attestato, da ultimo, dai casi Al-Jedda e Al-Skeini attualmente pendenti dinanzi alla Grande Camera della Corte Europea dei Diritti dell'Uomo (CEDU) concernenti la possibile incompatibilità con tale trattato delle misure detentive operate dalle truppe britanniche in Iraq.

Inoltre, specie con riferimento alle “operazioni fuori area”, restano aperte le problematiche connesse al trasferimento dei soggetti detenuti verso lo Stato locale o terzi Stati. Su questi aspetti sono evidenti le tensioni che possono svilupparsi con i sempre più stringenti obblighi che derivano dalla normativa sui diritti umani, stante l’operare di un assoluto divieto di *refoulement* verso Stati in cui vi è un fondato rischio che gli individui trasferiti siano assoggettati a trattamenti inumani o a torture, come ribadito più volte dalla Corte Europea dei Diritti dell’Uomo, da ultimo nei casi Saadi e Trabelsi che, tra l’altro, avevano ad oggetto individui coinvolti nel terrorismo transnazionale. Specie per le missioni internazionali si potrebbe esplorare la strada della previsione di controlli indipendenti sui soggetti detenuti o trasferiti ad altre autorità, come preconizzato ad esempio negli accordi conclusi da diversi Stati partecipanti all’ISAF con l’Afghanistan, che formalmente prevedevano un diritto di intervento e scrutinio da parte dei rappresentanti del CICR e della Commissione nazionale dei diritti umani.

Sebbene sia difficile trovare un punto di equilibrio fra opposte esigenze e siano comprensibili le necessità di sicurezza talora avanzate per tentare di giustificare talune condotte, va fortemente ribadita la natura “vitale”, delle esigenze di tutela per le persone private della loro libertà personale in relazione a conflitti armati o altre situazioni di violenza.

Merita infine ricordare che una espressa “determination” a rispettare tali garanzie è stata solennemente ribadita da tutti gli Stati membri dell’Unione Europea nel corso della Conferenza internazionale, dove questi, con il *Pledge* n. 91, si sono impegnati ad adottare un dettagliato e coordinato insieme di misure onde migliorare il rispetto di questi fondamentali principi. La Croce Rossa Italiana, le Società nazionali e il Movimento tutto sono pronti a fornire alle competenti autorità nazionali l’ausilio necessario per sviluppare coordinate azioni concrete per l’implementazione di questo *Pledge* e degli altri impegni assunti in tale sede, in vista della Conferenza internazionale del prossimo anno in cui si dovrà effettuare un bilancio sull’effettiva realizzazione, da parte degli Stati europei, dei *Pledge* solennemente proclamati a Ginevra nel 2007.

In questo settore il Movimento può quindi fornire importanti contributi, non solo con puntuali analisi giuridiche sul tema, come il *position paper* “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence” o gli incontri di esperti già realizzati dal CICR, ma, soprattutto, tramite un effettivo ausilio nella puntuale messa in opera di questi diritti, in ragione dell’insostituibile attività realizzata dai suoi rappresentanti, come i delegati internazionali, che in molti casi rappresentano l’unico baluardo affinché i principi giu-

ridici declamati assumano un reale significato di tutela e protezione per le persone private della loro libertà personale.

In conclusione, sono quindi certo che i lavori della presente Tavola Rotonda permetteranno di approfondire le complesse tematiche in oggetto e pertanto ringrazio nuovamente l'Istituto per aver permesso la realizzazione di questo rilevante consesso.

## *Claudio Scajola*

Deputato al Parlamento; già Ministro dell'Interno,  
già Ministro dello Sviluppo Economico, Roma

Inderogabili, sopravvenuti impegni nella capitale mi impediscono, con vivo rammarico, di essere presente alla Celebrazione del 40° Anniversario delle meritorie attività dell'Istituto Internazionale di Diritto Umanitario, ospitato nella splendida ed a me molto cara Sanremo, città dei fiori, della speranza e dell'impegno civile.

Ringrazio il Presidente, l'amico Ambasciatore Moreno, ed il Consiglio tutto, per il cortese invito.

Riflettendo in questi giorni sull'Istituto, ripensavo ai quarant'anni trascorsi dalla sua fondazione. Nel 1970 il mondo era molto diverso dall'attuale. Il passo incerto della decolonizzazione; la guerra fredda al suo apice; l'incubo dell'olocausto nucleare; la globalizzazione di là da venire; Paesi e continenti divisi in campi di alleanze.

Oggi, il panorama internazionale sotto i nostri occhi è completamente mutato. In meglio, mi affretto a dire, nella maggioranza dei casi. La guerra fredda è finita e la democrazia e il libero mercato hanno preso piede ovunque, in modo irreversibile; non sono scomparse divisioni e iniquità, ma il concetto stesso di "sud del mondo" ha subito un'impetuosa evoluzione, basti vedere il ruolo ormai ricoperto da importanti Stati africani, asiatici, latinoamericani.

Tuttavia, per quanto velocemente sia proceduta l'integrazione economica e, per molti versi culturale del mondo, si sono affermate nuove e condivise sensibilità – basti pensare a quella della limitatezza delle risorse e della salvaguardia ambientale – sono emerse pericolose faglie di divisioni, che hanno spinto autorevoli studiosi a teorizzare "scontri di civiltà", fondamentalismi religiosi, rigurgiti ideologi. E, soprattutto, una diffusa violenza di matrice terroristica, di cui sono divenuti triste simbolo, all'alba del nuovo secolo, gli attentati alle Torri Gemelle di New York. Le stragi che insanguinano quasi quotidianamente l'Iraq, l'Afghanistan, il Pakistan, e

quelle che purtroppo ricevono minore attenzione in altre regioni, ce lo ricordano.

Pertanto, rischi ed opportunità procedono fianco a fianco, e lo faranno per un lungo periodo, in questo nostro mondo del XXI secolo.

Dobbiamo prenderne atto ed agire di conseguenza, nella consapevolezza però, che ci aiuta a trarre speranza e determinazione, del fatto che l'opinione pubblica internazionale, la coscienza civile, senza distinzione di razza e di affiliazione religiosa, hanno ormai preso coscienza della necessità di lavorare ad un mondo sempre più economicamente equilibrato, socialmente equo, aperto ed interagente, anzi, interdipendente in tutti i sensi.

Di tale esigenza l'Istituto di Sanremo è parte integrante, forza propulsiva, centro di eccellenza, di elaborazione di pensiero e di proposta concreta.

La scommessa lanciata quarant'anni or sono da un piccolo ma insigne gruppo di giuristi di diversi Paesi, insieme all'allora Sindaco di Sanremo Francesco Viale, è stata vinta. Si è trasformata in una realtà che intrattiene rapporti fecondi con tutte le Agenzie a vocazione umanitaria delle Nazioni Unite, con l'Unione Europea, la NATO, la Croce Rossa Internazionale e la Mezzaluna Rossa.

Nel periodo trascorso dalla sua fondazione, non è cambiata la vocazione dell'Istituto a sostegno e protezione delle persone fisiche e della dignità delle vittime dei conflitti armati. È però cresciuto il suo prestigio: in altre parole, è divenuta più forte, autorevole ed ascoltata la sua voce su temi di scottante attualità, quali la proliferazione di attori non statali, di terrorismo e la pirateria, di bambini soldato.

La Tavola Rotonda odierna – “La globalizzazione della violenza: conseguenze e risposte” – ben sintetizza la situazione con la quale ci troviamo confrontati. Ne ho avuta personale esperienza nelle mie mansioni di Ministro dell'Interno e poi, due volte, di Ministro dello Sviluppo Economico del Governo italiano. Nelle decine di missioni compiute intorno al mondo, ho avuto precisa testimonianza sia dei fenomeni degenerativi di cui ho già fatto cenno, ma anche della volontà concreta di collaborazione di Governi, associazioni di volontariato, singoli individui. Si pensi all'impegno che, in proposito, il G8 – anche quello sotto presidenza italiana, lo scorso anno – il G20, l'Unione Europea ed, in crescente ed incoraggiante misura, altre organizzazioni regionali, sotto la comune egida delle Nazioni Unite, stanno ponendo in essere.

Concludo con un pensiero grato al lavoro di tutti i membri del Consiglio dell'Istituto, e del Presidente Ambasciatore Moreno, apprezzato artefice ed animatore di quello che ormai si suole definire “il dialogo umanitario nello spirito di Sanremo”.

## *Peter K.A. Cardinale Turkson*

Presidente, Pontificium Consilium de Iustitia et Pace, Roma

Giunga ad Ella, Signor Presidente Ambasciatore Moreno, agli Illustri Rappresentanti delle Istituzioni civili e militari e agli esperti convenuti alla cerimonia di celebrazione del 40° Anniversario dell'Istituto Internazionale di Diritto Umanitario e alla Tavola Rotonda sul tema "La globalizzazione della violenza: conseguenze e risposte" il mio più sincero e cordiale saluto.

Questo è un anno assai speciale per l'Istituto di Sanremo e con esso per tutti cultori del diritto umanitario, per gli operatori e tutti gli appassionati di questa nobile disciplina nella quale si esprime e concretizza l'alta aspirazione di affermare la dignità della persona umana in ogni circostanza, compresa quella estrema di un conflitto armato. Un'ambizione questa affatto ingenua, ma coraggiosa nel rifiutare l'idea dell'*homo homini lupus*, e nell'affermare la possibilità di superare i conflitti tra le persone e i popoli sulla base della comune dignità umana.

In tale prospettiva l'Istituto di Sanremo, nei suoi primi 40 anni di attività ha costituito un luogo per l'approfondimento dei valori, dei principi e delle norme del diritto umanitario, e un prezioso spazio per il dialogo nello "spirito di Sanremo", svolgendo un servizio non soltanto alla comunità scientifica, agli operatori civili militari e umanitari impegnati nei teatri e negli scenari di tensione e di conflitto, ma in qualche misura all'intera comunità internazionale e a tutti i "veri amici della pace"<sup>1</sup>.

L'Istituto di Sanremo si è trovato a svolgere la propria intensa attività in fasi storiche assai differenti, dall'orizzonte della Guerra Fredda e della contrapposizione dei Blocchi, sino a quello attuale della frammentazione geopolitica e dei conflitti asimmetrici. Impresa non semplice ma che l'Istituto di Sanremo ha saputo affrontare con competenza, risultando un punto

1. Paolo VI, *Messaggio per la Giornata Mondiale della Pace*, 1968.

di riferimento nell'analisi dei problemi e nell'individuazione delle possibili soluzioni.

Il tema scelto per la Tavola Rotonda risulta particolarmente attuale. La *Globalizzazione della violenza* infatti sembra quasi mettere in ombra gli aspetti positivi del processo di globalizzazione, che possiamo e dobbiamo interpretare come un passo nel non facile cammino verso un ordine sociale e internazionale coerente alla dignità e ai diritti fondamentali della persona umana.

Potremmo limitarci a riflettere sulle cause esteriori della violenza (di natura sociale, politica, economica ecc.) che oggi dispiega i suoi effetti negativi a livello planetario. Il tema scelto dall'Istituto di Sanremo ci offre tuttavia la preziosa opportunità per ampliare il nostro orizzonte e riflettere sulle cause interiori della violenza (di natura etica), ancora più profonde e in quanto radicate nelle menti e nei cuori degli esseri umani, dove cioè nascono i propositi di inimicizia, di sopraffazione, di violenza anche armata. È quindi nelle menti e nei cuori degli esseri umani che bisogna coltivare i valori etici universali della dignità umana, della giustizia e della pace.

Senza questa purificazione etica, gli stessi rimedi esteriori sarebbero purtroppo parziali e poco efficaci. Anche in quest'ottica il diritto umanitario rappresenta un veicolo di valori universali che non possono lasciare indifferenti le persone autenticamente desiderose e impegnate per la giustizia e la pace nel mondo.

Grande plauso quindi all'Istituto di Sanremo, in particolare ad Ella Presidente Ambasciatore Moreno, al quale va riconosciuto anche il merito di aver saputo raccogliere con energia e slancio l'eredità dell'indimenticato Presidente Prof. Jovan Patnagic. Una cordiale menzione vorrei inoltre indirizzare al Vice-Presidente Prof. Michel Veuthey, al Segretario Generale Dott.ssa Stefania Baldini e a tutto l'operoso staff civile e militare. La Celebrazione del 40° anniversario non rappresenta soltanto un esercizio della memoria ma l'occasione per guardare al futuro nella consapevolezza della propria tradizione e grande potenzialità.

Auguro all'Istituto di Sanremo di proseguire con la stessa meritoria intensità, assicurando la più alta considerazione del Pontificio Consiglio della Giustizia e della Pace, che guarda all'Istituto di Sanremo con fiducia e come autentico promotore di valori e principi umanitari necessari a rendere meno inumana la guerra e a realizzare una pace duratura fondata nella dignità umana e orientata al bene comune dei popoli.



## *Sonia Viale*

Sottosegretario di Stato all'Economia e le Finanze, Roma

Sono particolarmente onorata e felice di rappresentare il Governo italiano in questo importante incontro internazionale che si svolge sotto l'alto patronato del Presidente della Repubblica italiana.

Vorrei porgere un cordiale saluto di benvenuto a tutti gli Illustri Ospiti: a Sua Altezza Serenissima il Principe Alberto di Monaco, agli alti Rappresentanti dei Governi e delle Organizzazioni Internazionali, a tutte le Autorità religiose, civili e militari ed agli stimati Studiosi riunitisi oggi a Sanremo, città alla quale sono profondamente legata, per discutere su di una tematica quanto mai attuale e prioritaria nell'agenda internazionale di tutti gli Stati.

L'argomento scelto per celebrare il 40° anniversario dell'Istituto Internazionale di Diritto Umanitario, "La globalizzazione della violenza: conseguenze e risposte", pone l'accento sulle sfide che l'intera Comunità Internazionale è chiamata ad affrontare per la costruzione di un mondo "globale" in cui il rispetto del diritto e la tutela della dignità umana siano, non solo dei principi sanciti nei vari strumenti internazionali a cui tutti devono conformarsi, ma una tangibile e attuale realtà.

In un società sempre più internazionalizzata e globalizzata, in cui i conflitti e le violenze continuano ad infliggere sofferenze soprattutto alle persone più vulnerabili, l'impegno per il rispetto del diritto internazionale umanitario e dei diritti umani diviene prioritario.

È innegabile che l'obiettivo primario della globalizzazione non può che essere rappresentato dal rispetto e dall'attuazione dei diritti umani. La persona umana, il rispetto della sua dignità, deve essere collocato al centro di tale processo.

Parlare di diritti umani fondamentali all'inizio del terzo millennio, vuol dire innanzitutto segnalare una contraddizione paradossale: mai in passato

si è discusso così tanto di diritti umani e si è nel contempo assistito a violazioni di essi.

Il rapporto tra economia e guerra è di particolare complessità. Le situazioni di conflitto, così come i focolai di violenza armata che affliggono il pianeta, affondano spesso le loro radici anche nelle diseguaglianze economiche dei popoli.

Se le leggi dell'economia e del mercato hanno, di fatto, caratterizzato lunghi periodi della storia ispirando e concretizzando le opportunità dello sviluppo umano, anche attraverso l'utilizzo di mezzi non pacifici, è mia premura sottolineare come tale progresso umano abbia beneficiato anche di una insostituibile e tenace opera all'insegna dell'affermazione dei diritti umani fondamentali.

Un'efficace azione volta alla promozione ed al rispetto dei diritti *di* natura economica, sociale e culturale – i cosiddetti “diritti di seconda generazione” – e dell'intero *corpus* di norme di diritto umanitario, rappresenta uno strumento di fondamentale importanza per la realizzazione di una società internazionale fondata sulla tolleranza e la civile convivenza.

L'Istituto di Sanremo svolge da quarant'anni un'opera unica e di rimarchevole importanza nel campo della promozione del diritto internazionale umanitario, dei diritti dei migranti, dei rifugiati e dei diritti umani.

La sua quarantennale attività nel campo della formazione e della ricerca ne fa portavoce del dialogo umanitario, nel segno di quello “Spirito di Sanremo” riconosciuto in tutto il mondo, rivolto alla promozione di una pace duratura nel pieno rispetto della persona umana.

Un particolare grazie all'Ambasciatore Maurizio Moreno per avermi concesso la preziosa opportunità di tornare nella mia città natale in questa importante occasione.

## *Maurizio Zoccarato*

Sindaco di Sanremo

Per la città di Sanremo è un grande onore accogliere questo importante incontro internazionale posto sotto l'alto patronato del Presidente della Repubblica.

A nome dell'Amministrazione Comunale vorrei porgere un caloroso benvenuto a tutti, a Sua Altezza Serenissima il Principe Alberto di Monaco, ai rappresentanti del Governo, alle autorità civili, religiose e militari.

Sanremo è da sempre per vocazione, oltre che per la sua posizione geografica, crocevia di scambi internazionali, luogo di dialogo nel segno dell'avvicinamento tra i popoli, della valorizzazione della dignità umana, della promozione di una cultura della pace. Non è un caso che in questa città Alfred Nobel abbia concepito, oltre un secolo fa, quello che oggi è il più famoso premio del mondo. E non è senza significato che Sanremo abbia dato i natali all'Istituto Internazionale di Diritto Umanitario, che in quarant'anni di intensa attività ha saputo accreditarsi a livello internazionale come vero e proprio centro di eccellenza nel campo della ricerca e della formazione. Ospitato oggi nella prestigiosa Villa Ormond, di proprietà del Comune, l'Istituto ebbe la sua prima sede nella Villa Nobel, dimora dello scienziato svedese.

L'Istituto Internazionale di Diritto Umanitario costituisce per la nostra città, per la Liguria, per l'Italia intera, un'importante risorsa, un insostituibile polo di riflessione per quanti, nei cinque continenti, hanno a cuore la diffusione e il rispetto del diritto internazionale umanitario, dei diritti dei migranti, dei rifugiati e dei diritti dell'uomo nella loro più ampia accezione.

Vorrei ringraziare l'Ambasciatore Maurizio Moreno per il nuovo impulso dato alle attività dell'Istituto in questi ultimi tre anni. Ai suoi sforzi il Comune ha inteso rendere omaggio nominandolo di recente "Cittadino Benemerito".

E vorrei anche, a nome della cittadinanza tutta, esprimere a lui ed al Consiglio Direttivo dell'Istituto la più viva gratitudine per il prestigioso premio internazionale che l'Istituto ha ritenuto di assegnare quest'anno alla città di Sanremo. L'amministrazione comunale è particolarmente sensibile a tale riconoscimento nel quale intravede un importante contributo al sostegno che Sanremo dà all'Istituto Internazionale di Diritto Umanitario da ormai quarant'anni, sostegno che cercheremo di non far venire mai meno.

*Round Table on  
“Global Violence: Consequences  
and Responses”\**

\* The scientific co-ordination of the Round Table has been assured by Baldwin De Vidts, Vice-President of the International Institute of Humanitarian Law; Fausto Pocar, Judge at International Tribunal for the former Yugoslavia, Vice-President, International Institute of Humanitarian Law; Michel Veuthey, Associate Professor, University of Nice Sophia-Antipolis, Vice-President, International Institute of Humanitarian Law, and Stéphane Ojeda, Legal Advisor, International Committee of the Red Cross.



**I. Contemporary forms of armed violence:  
International Humanitarian Law  
and human rights law at a crossroad**





# Asymmetrical warfare and challenges to International Humanitarian Law

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## 1. Characteristics of Asymmetric Warfare

The various efforts to define asymmetric warfare have not been all too helpful in identifying the underlying problems. For instance, asymmetric warfare used to be defined as “a conflict involving two states with unequal overall military and economic resources”. In reaction to the attacks of 9/11 the definition has been modified. Accordingly, ‘asymmetric warfare’ is defined as “leveraging inferior tactical or operational strength against the vulnerabilities of a superior opponent to achieve disproportionate effect with the aim of undermining the opponent’s will in order to achieve the asymmetric actor’s strategic objectives”.

While the latter definition has the advantage of not being limited to inter-State armed conflicts it has not added much insofar as almost all armed conflicts have been asymmetric. Asymmetries in warfare include asymmetry of power, means, methods, organization, values and time. Asymmetry can be participatory, technological, normative, doctrinal, or moral. In that sense, wars have always been characterized by at least one form of asymmetry. For instance, any armed conflict involving the US will by definition be asymmetric because of the technological superiority of the US armed forces. The same holds true for any armed conflict involving non-State actors – be they partisans, resistance fighters, rebels or terrorists. Moreover, it may not be forgotten that in any war or armed conflict there is a considerable element of surprise making it impossible to predict its course or outcome. The enemy may employ methods, strategies or tactics not envisaged and aim at the opponent’s vulnerabilities. This is not a novel phenomenon but an intrinsic characteristic of any war<sup>1</sup>.

1. On the element of surprise see Clausewitz, *On War*, Book 3 Ch. 9, on Ruses Ch. 10.

It, therefore, seems that the term ‘asymmetric warfare’ – by no means a legal term of art – is nothing but a description of a fact of life. In this context, it is, however, important to remember that warfare, especially in Western societies, is perceived from a post-Westphalia perspective, i.e. as armed hostilities predominantly under State control and between combatants in which civilians and civilian objects are largely spared from violence and destruction. From the outset of its development in the middle of the 19<sup>th</sup> century the modern law of armed conflict has been based on that approach. It must be added that, to a certain extent, the law of armed conflict recognizes, or implicitly accepts, the different forms of asymmetry. Still, its underlying concept is that of symmetric warfare insofar as the use of force is limited to lawful targets and that the parties to the conflict will abide by its rules, be it only because they expect their opponent to act accordingly (“Reciprocity”).

The development of the law of armed conflict has resulted in abolishing the prevalence of military necessity over considerations of humanity (*Kriegsräson geht vor Kriegsmanier*) by establishing an operable balance between the two, without making warfare impossible.

This approach has been, still is, and will be, challenged by the conduct of hostilities in contemporary armed conflicts that are characterized by an increasingly structured and systematic deviation from the law governing the conduct of hostilities. There is a growing “tendency for the violence to spread and permeate all domains of social life. This is because the weaker side uses the community as a cover and a logistical base to conduct attacks against a superior military apparatus”. Hence, in ‘asymmetric warfare’ “the weaker party, recognizing the military superiority of its opponent, will avoid open confrontation that is bound to lead to the annihilation of its troops and to defeat. Instead it will tend to compensate its inadequate arsenal by employing unconventional means and methods and prolonging the conflict through an undercover war of attrition against its well equipped enemy”.

In sum, the term ‘asymmetric warfare’ is to be understood as applying to armed hostilities in which one actor/party endeavours to compensate its military, economic or other deficiencies by resorting to the use of methods or means of warfare that is not in accordance with the law of armed conflict (or with other rules of public international law). It is important to stress that the motives or strategic goals of asymmetric warfare, while important to understand, are irrelevant from a legal point of view.

## 2. Necessity for New Rules?

Many of the atrocities committed during the Second World War were justified as legitimate responses to the conduct of asymmetric warfare by the respective opponent. For instance, partisan attacks lead to the killing of hostages and other innocent civilians or to the wanton destruction of villages in territory occupied or under the control of the German *Wehrmacht*. The law of armed conflict has been progressively developed in order to eliminate such conduct in future armed conflicts. However, the law of armed conflict has almost never been modified with a view to compensate technological dissimilarities between the parties to the conflict. For example, the United Kingdom continuously endeavoured to outlaw the submarine as a means of naval warfare because it posed a considerable threat to its superior surface forces. Those efforts were in vain.

Hence, the law of armed conflict accepts asymmetries in warfare, be they technological or doctrinal, and it reacts to such asymmetries only if there is a necessity of preserving minimum standards of humanity or of “alleviating as much as possible the calamities of war”<sup>2</sup>. Moreover, the law of international armed conflict aims at maintaining the public character of warfare by indirectly reserving the right to harm the enemy to a limited group of actors.

### 2.1. Actors

It is one of the characteristics of asymmetric warfare that the “dividing line between combatants and civilians is consciously blurred and at times erased”. This inevitably results in attacks against the civilian population and individual civilians or even in conduct amounting to – prohibited – perfidy. Such conduct is far from new. The existing law of armed conflict is based on the experience of past armed conflicts and it has, in principle, preserved the general distinction between protected civilians on the one hand and persons who, either as combatants or as members of organized armed groups or as civilians, take a direct part in hostilities on the other hand.

2. 1868 St. Petersburg Declaration.

### 2.1.1. International Armed Conflict

Art. 43 (2) of Additional Protocol I (AP I) provides: “Members of the armed forces of a Party to the conflict (other than medical personnel and chaplains) are combatants, that is to say, they have the right to participate directly in hostilities”. This provision may not be misunderstood as being constitutive for the right of taking belligerent measures. Rather, it emphasizes the special legal status combatants enjoy under the law of international armed conflict. As a consequence, combatants may not be prosecuted and punished for their conduct (unless it amounts to a war crime) and they are entitled to prisoner of war status when captured by the enemy. This presupposes that they have distinguished themselves properly (by a fixed distinctive sign or a uniform) and carried their arms openly.

Under the law of international armed conflict, there is no prohibition of making use of persons other than members of the regular armed forces. However, such persons only enjoy combatant immunity and prisoner of war status if they are members of militias or volunteer corps forming part of the regular armed forces or if they are members of other militias or voluntary corps, including organized resistance movements, that belong to a party to the conflict and that fulfil the conditions laid down in Art. 4A (2) of the 1949 Third Geneva Convention. These provisions are a consequence of the experience of the Second World War. However, in view of the strict conditions, prisoner of war status and combatant immunity continue to be limited to a rather small group of actors in international armed conflict.

Art. 44 (3) AP I as well is to be considered an adaptation of the law of armed conflict to the changed realities of war (ICRC [Commentary] para. 1697 *et seq*). While Art. 44 (3) AP I does not reflect customary international law, it needs to be stressed that the scope of applicability of this provision is limited to situations dealt with in Art. 1 (4) AP I (internationalized armed conflicts). Still, it extends a certain degree of protection to members of organized armed groups who deliberately decide to disregard the minimum requirements set out in this provision.

It follows that persons directly participating in the hostilities who neither qualify as combatants nor as members of any of the other privileged groups do not enjoy combatant immunity or, when captured by the enemy, prisoner of war status. As far as civilians are concerned, this has been expressly recognized by Art. 51 (3) AP I: “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities”. The exact meaning and scope of the concept of

direct participation in hostilities is far from settled (ICRC [Interpretive Guidance] 41 *et seq*). The same holds true with regard to the legal status of a civilian directly participating in hostilities. Some continue to consider them as civilians protected under Geneva Convention IV who may, however, be attacked (for such time they are directly participating in hostilities) and punished for their conduct (ICRC [Interpretive Guidance] 65 *et seq*). Others consider them unlawful combatants who are not protected by either Geneva Convention IV or Geneva Convention III.

Accordingly, the law of international armed conflict provides a rather elaborated set of rules responding to participatory asymmetry, offering an operable solution to most of the problems encountered in recent international armed conflicts. While there is no prohibition of entrusting other than combatants with the commitment of acts harmful to the enemy, persons not enjoying combatant immunity but directly participating in hostilities must be aware that they enjoy no protection under the law of armed conflict beyond the minimum standards laid down in Art. 75 AP I and in common Art. 3 of the Four 1949 Geneva Conventions. Hence, members of organized armed groups who do not belong to a party to the conflict but who directly participate in the armed hostilities do not pose an insurmountable problem. Either they are to be considered civilians directly taking part in the hostilities who, for the duration of their direct participation, are liable to attack and who may be prosecuted after capture. Or the organized armed group they belong to is a party to a non-international armed conflict that exists side by side with the international armed conflict. Then, the members of such a group, at least if and as long as they perform a “continuous combat function” within the organized armed group (ICRC [Interpretive Guidance] 16, 33 *et seq*), are legitimate targets who neither enjoy combatant immunity nor prisoner of war status after capture.

### 2.1.2. Non-international Armed Conflict

Non-international armed conflicts are asymmetric by nature, especially if regular armed forces are engaged in hostilities against organized armed groups. Since, however, the concept of ‘combatant’ does not apply to non-international armed conflicts the applicable law is not built on the legal status of the actors. It is important to note in this context that the very existence of a non-international armed conflict presupposes that there exists at least one organized armed group engaging in armed hostilities against the government or against another organized armed group. Hence,

members of an organized armed group do not qualify as civilians. This is widely accepted. However, there is one unresolved issue relating to those members of an organized armed group who do not perform a continuous combat function. While some prefer to consider them civilians (ICRC [Interpretive Guidance] 20 *et seq*) others are unwilling to differentiate according to an individual's function within the group. The least common denominator is that members of an organized armed group performing a continuous combat function in a non-international armed conflict do not enjoy general protection but are liable to attack. Of course, the State party to a non-international armed conflict is not prevented from prosecuting them after capture under its domestic criminal law.

In non-international armed conflict civilians enjoy general protection. However, they may lose that protection if they deliberately decide to take a direct part in the hostilities. Accordingly, Art. 13 (3) of the 1977 Additional Protocol II provides: "Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities". This is declaratory for customary international law.

## 2.2. *Basic Principles*

### 2.2.1. Principle of Distinction

Asymmetric actors in armed conflict either deliberately disregard the principle of distinction or they endeavour to incite their opponent to act in violation of that "intransgressible" ([1996] ICJ Rep para. 79) principle of the law of armed conflict.

The law of armed conflict provides a rather clear response to any form of asymmetric warfare that aims at blurring the principle of distinction – be it by way of disguising as civilians, be it by abusing civilian objects for military purposes, be it by direct attacks against the civilian population or individual civilians. In this context it may be recalled that a civilian object becomes a lawful target if, by its use, location or purpose, it makes an effective contribution to the enemy's military action and if its destruction or neutralization offers a definite military advantage. Still, the problems in practice subsist. If it is not feasible to identify enemy combatants or members of enemy organized armed groups because they appear to be civilians a decision not to attack may result either in suicide or, even worse, in – prohibited – direct attacks against the civilian population. Of course, combatants who do not distinguish themselves properly when

engaged in hostilities do not enjoy combatant immunity or prisoner of war status when captured. While they may be prosecuted for their conduct this is by many operators considered an insufficient response to their practical problems.

### 2.2.2. Proportionality

The law of armed conflict does not prohibit attacks that result in the incidental loss of civilian life, injury to civilians or damage to civilian objects. Such ‘collateral damage’ is in violation of the law of armed conflict only if it is excessive (in contrast to: ‘extensive’) in relation to the concrete and direct military advantage anticipated, Art. 51 (5) (b) AP I. In view of that prohibition and in view of the media’s attention to any civilian losses in armed conflict an asymmetric actor will either seek to prompt the opponent to cause excessive collateral damage or to make the public believe that an attack has been disproportionate. Especially systematic violations of the principle of distinction entail the considerable risk that the opponent applies different standards for the assessment of proportionality. “If such tactics are systematically employed for a strategic purpose, the enemy may feel a compelling and overriding necessity to attack irrespective of the anticipated civilian casualties and damage”.

Still, the prohibition of excessive collateral damage is clear. Considerations of military necessity do, of course, play an important part, especially with regard to the determination of the anticipated military advantage. However, military necessity as such does not justify a deviation from well-established humanitarian standards of the law of armed conflict.

### 2.2.3. Precautions

Asymmetric actors will in many cases deliberately act contrary to their obligation to take feasible precautions in attack, especially by abusing civilians or civilian objects as shields or by transferring military objectives into densely populated areas. Despite the obvious illegality of such conduct the opponent will be prevented from attack if the attack is to be expected to result in excessive collateral damage. Here the law of armed conflict itself introduces an element of asymmetry by privileging illegal conduct.

Another problem exists with regard to the obligation of the attacker to do everything feasible to limit attacks to lawful targets and to avoid, and in any event to minimize, excessive collateral damage, Art. 57 (2) AP I. It would go too far to conclude that parties to a conflict disposing of advanced weapons systems are under an absolute obligation to only make use of sophisticated and highly discriminating weapons. The fact that such weaponry is available does not necessarily mean that less sophisticated weapons may not be employed any longer. Sophisticated and advanced weapons are considerably expensive and they may, therefore, be reserved for attacks on more important targets. It may not be ignored, however, that “advanced militaries are held to a higher standard – as a matter of law – because more precautions are feasible. As the gap between ‘haves’ and ‘have-nots’ widens in the 21<sup>st</sup> century warfare, this normative relativism will grow. In a sense, we are witnessing the birth of a capabilities-based IHL regime”. The consequence is that the standard of feasibility to a certain extent privileges the weaker side of an armed conflict and thus adds another form of normative asymmetry in armed conflict.

### *2.3. Methods and Means of Warfare*

#### *2.3.1. Means of Warfare*

The law of armed conflict and arms control law (both increasingly merging to a single regime) provide a well-established set of rules that either prohibit the use of certain weapons or that restrict their use in certain circumstances. In asymmetric warfare the weaker party may be inclined to disregard such prohibitions or restrictions and to justify a deviation with the superiority of the respective opponent. Moreover, as pointed out by the ICRC, “it is evident that if one Party, in violation of definite rules, employs weapons or other methods of warfare which give it an immediate, greater military advantage, the adversary may, in its own defence, be induced to retort at once with similar measures” (ICRC [Report] 83). In other words, the misuse of weapons will, as a rule, invite belligerent reprisals. However, such justifications have no basis in the existing law. The fact that a party to an armed conflict is confronted with a superior enemy does not justify the use of means of warfare whose use is prohibited under the law of international or non-international armed conflict. Therefore, the threat of imminent defeat is no sufficient ground for resorting to the use of prohibited means of warfare.



Unfortunately, the International Court of Justice, in its Advisory Opinion on Nuclear Weapons, has ruled that the use of nuclear weapons “would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law”, unless the “very survival of a State would be at stake” ([1996] ICJ Rep 266). It is obvious that this ruling may be abused for justifying a violation of the rules and principles of the law of armed conflict. It needs to be emphasized, however, that the Court’s finding has no basis in the law of armed conflict. If at all, the survival argument may be of relevance for the *jus ad bellum*.

### 2.3.2. Methods of Warfare

The asymmetric character of an armed conflict does not justify the use of methods of warfare prohibited under the law of armed conflict. Therefore, starvation of civilians as a method of warfare or to order that there shall be no survivors is prohibited under all circumstances (Art. 40, 54 [1] AP I, Art. 23 [d] Hague Regulations).

One feature of asymmetric warfare are suicide bombings another is the use of ‘human shields’. With regard to the former it is important to note that the law of armed conflict does not prohibit suicide attacks unless they are conducted by resort to perfidy. This is different with regard to the use of ‘human shields’. Art. 51 (7) AP I, that reflects customary international law, prohibits the use of the “presence or movements of the civilian population or individual civilians... to render certain points or areas immune from military operations, in particular, in attempts to shield military objectives from attacks or to shield, favour or impede military operations” (see also Art. 28 GA IV). The law of armed conflict provides a possible – though not undisputed – solution for coping with the issue of ‘human shields’ by distinguishing between voluntary and involuntary human shields. Civilians, whatever their motives, voluntarily serving as human shields may be considered as taking a direct part in hostilities who, for the duration of such participation, lose their protected status under the law of armed conflict. Accordingly, voluntary human shields are targetable and they are not included in the estimation of incidental injury when assessing proportionality. Against allegations to the contrary, involuntary human shields maintain their status as civilians. Accordingly, attacks against a shielded military objective will be prohibited if the incidental losses among the involuntary human shields are excessive in relation to the

concrete and direct military advantage anticipated (Art. 51[5][b] AP I). However, “the appraisal of whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that, by dint of the large (albeit involuntary) presence of civilians at the site of the military objective, the number of civilian casualties can be expected to be higher than usual”.

Sometimes, especially if they do not act overtly, the distinction between involuntary and voluntary human shields will not provide an operable solution in practice, because it may be impossible to determine whether a person has deliberately and freely decided to serve as a human shield. Moreover, the law of armed conflict may not prohibit a proportionate attack against a shielded lawful target but it will prove a most difficult task to defend the death of a considerable number of civilians politically. In asymmetric warfare the weaker party often consciously and systematically turns to the practice of using human shields in order to exploit the political and moral dilemma the attacker will find himself in. The law may offer a solution, however, that will in most cases not assist in overcoming the said dilemmas.

Finally, some States respond to asymmetric threats by resorting to targeted killings of individuals suspected of being involved in unlawful attacks against government forces, civilians or civilian objects. It must be borne in mind that under the law of armed conflict there is no general prohibition of targeted killings. If the respective individual qualifies as a lawful military target, especially as a member of an organized armed group (performing a continuous combat function) or a civilian directly participating in hostilities, he or she may be attacked. While some authors maintain that there is an obligation to rather capture than kill the individual if that proves to be a feasible alternative, this position does not reflect the law of armed conflict as it currently stands.

#### *2.4. Conclusion*

Some doubts have been expressed as to whether asymmetric warfare “could still be grasped by and measured against the concept of military necessity, for the complexities and intangibility of such scenarios escape its traditionally narrow delimitations”. Especially non-State actors deliberately and systematically deviate from well-established standards of the law of armed conflict and, thus, induce their opponents to re-emphasize considerations of military necessity that may result in either a more liberal

interpretation of the law of armed conflict or in its irrelevance because it is considered an unfair obstacle to the success of military operations in armed conflict.

Of course, reciprocity is an important factor for the continuing effectiveness of the law of armed conflict. If one party to an armed conflict deliberately and systematically disregards rules and principles in order to achieve a military or political advantage, the opponent's readiness to continue to comply with the law may steadily decrease. There are, however, solutions to the problem. On the one hand, the law of armed conflict is flexible enough to respond to an asymmetric actor's conduct. While it is true that such responses put a heavier burden on the law-abiding party to the conflict, the values underlying the law of armed conflict and the achievements of the past 150 years should not be given up too easily. Moreover, the emergence of criminal international law has added a further and powerful enforcement mechanism for ensuring compliance with the law of armed conflict. On the other hand, it is well perceivable that non-State actors will understand that, despite their inferiority in arms and military technology, they will ultimately profit from compliance with the law of armed conflict unless they deliberately choose to be considered ordinary or war criminals. Nevertheless, there is no doubt that the growing asymmetries in warfare have the potential of shaking the very bases of the law of armed conflict. This, however, does not mean that there is a need for an adaptation of the law to the 'new realities' of armed conflict.

It is true that, at present, we are witnessing a privatization and demilitarization of war. Moreover, so-called 'transnational wars' often do not fulfil the rather strict criteria for the applicability of the law of armed conflict. Therefore, the law of armed conflict is inapplicable to those situations of asymmetric warfare, e.g. transnational terrorism and the 'Global War on Terror', not amounting to an international or non-international armed conflict. Terrorists employ methods and means that have so far been reserved to regular armed forces and governments increasingly make use of their armed forces in order to counter the terrorist threat. By policy, not by law, some governments instruct their armed forces to apply the law of armed conflict in counter-terrorism operations. This practice by its very nature has not resulted in widening the scope of applicability of the law of armed conflict. Only at a first glance does this practice seem to be guided by prudence. Of course, armed forces are trained in the application of the law of armed conflict. Moreover, it is quite convincing to argue that in case of doubt compliance with the law of armed conflict puts the armed forces on the safe side, especially when it comes to the use of methods and means

of warfare. However, the law of armed conflict will never be applied in its entirety and considerations of military necessity that may be justified in counter-terrorism operations could all too easily have negative repercussions on the law of armed conflict when applied in situations of armed conflict proper. At the same time, most States, whose armed forces are engaged in counter-terrorism operations, reject an application of the law of armed conflict and either rely on the right to self-defence or additionally accept the application of human rights to such operations. This, however, does not contribute to legal clarity either. The right of self-defence is far too vague than to provide operable solutions to the problem of the legality of the use of force or of other measures taken against terrorists. Human rights, of course, limit the exercise of jurisdiction *vis-à-vis* individuals. However, their unmodified application to counter-terrorism operations rather than providing the necessary answers privileges the terrorists who are not deterred by the threat of criminal prosecution. It is, therefore, necessary for States to agree on international standards and criteria that specifically apply to counter-terrorism operations. Such standards and criteria absent in the armed forces entrusted with countering the terrorist threat will in most cases operate in a legal vacuum, at least in an intolerable legal grey area.

### **3. Investigation and Enforcement**

One feature of asymmetric conflicts is the use – or rather abuse – of the media and of public opinion. It is, therefore, crucial to provide prompt and reliable information. The German armed forces, after the attack on Taliban and two tanker trucks in September 2009, had to learn in a quite painful manner that a time-consuming and unstructured investigation would further speculation and would only assist the enemy, although the attack had been in accordance with the law of armed conflict. Therefore, governments – whether AP I formally applies or not – should be encouraged to make use of the International Fact-Finding Commission under Article 90 AP I.

The issue of enforcement is the most problematic. Since asymmetric actors are determined to violate the law because they are profiting from such violations operationally and politically, the proposal to offer incentives to non-State actors will in most cases prove futile. How can a determined law breaker be convinced that complying with the law will be to his/her advantage? Therefore, the only enforcement mechanism available and promising to deter from future violations of the law of armed conflict is criminal law – whether domestic or international.

#### 4. Concluding Remarks

Asymmetric warfare clearly constitutes a challenge to the international legal order and to its underlying values. While it does not justify a deviation from well-established rules and principles of the law of armed conflict it is necessary to strengthen that law by offering incentives, especially to non-State actors, to comply with that law if it is applicable *ratione materiae*. Since, however, such incentives will very often prove futile, because asymmetric actors will not abandon the options opened by a deliberate violation of the law of armed conflict, a thorough investigation/fact-finding by a neutral and respected international commission will be the first step that could contribute to repressing such conduct. A second step is criminal prosecution – either under domestic or under international criminal law. While some may object to the latter it must be borne in mind that this is the only promising approach. Amnesties or reconciliation efforts may have proven successful in some instances. It is, however, doubtful they have had or will have a lasting effect. Rather, they may prove an incentive for asymmetric actors to continue to pursue or even increase their unlawful conduct.

However, these findings do not relieve States from their obligation *vis-à-vis* their armed forces to clarify the applicable law for situations not amounting to an international or non-international armed conflict. Moreover, governments ought to thoroughly scrutinize and evaluate the challenges posed by asymmetric warfare, take the necessary measures and reduce their vulnerabilities. Vulnerabilities – whatever their nature – will always be an interesting target for asymmetric actors, be they weaker enemies, be they terrorists.



## An approach to terrorism

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The terrorist attacks of 11 September 2001 were, among other things, the source of never-ending debates on the type of responses the international community had to provide to increasingly violent acts of international terrorism. On the basis of the unquestionable assumption that international terrorism is prohibited by international law, greater credence has been lent to the notion that the array of instruments, also of legal instruments, available to states and the international community to combat international terrorism had to be expanded.

At the same time, due to the gravity of the menace that terrorism brought to the maintenance of international peace and security, the idea of “war on terror” immediately emerged especially in certain political circles and in the media. Some asserted that if we were participating in a “global war” on terrorism, any means could be used to fight this war. While the alleged existence of an armed conflict in theory implied the applicability of International Humanitarian Law, even those who supported this view had divergent opinions on the precise scope of International Humanitarian Law in this case. It was also stated that International Humanitarian Law should not be applied to individuals belonging to terrorist organizations because those organizations did not ratify the Geneva Conventions and Protocols. At the same time, but from a different perspective, the idea that some fundamental human rights could have been temporarily set aside or even “violated” by States or international organizations in connection with fighting terrorism gained some support, to the point that even torture could have been made recourse to if it would have increased our security<sup>1</sup>.

1. Dershowitz, *Understanding the Threat, Responding to the Challenge*, New Haven and London, 2002.

Thus, in the years immediately following 9/11 we have heard, in the fight against terrorism, of executive plans and authorizations to violate international law (sic!) concerning treatment and interrogations of detainees; legitimacy of secret detentions and secret renditions; unlimited periods of detention without trial; “selective” application of International Humanitarian Law. In this framework, it goes without saying that some authoritarian regimes exploited the emergency situation to label as “terrorist” many of those who dissented or criticized those regimes.

Although some warnings were voiced that the fight against terrorism should have been conducted taking into account the protection of fundamental human rights<sup>2</sup>, even at the United Nations emphasis was initially put on setting up or strengthening mechanisms and procedures aimed at targeting individual and entities allegedly linked to terrorism all over the world rather than to other aspects of this fight. Almost ten years after 9/11 the numerous criticisms to those procedures and mechanisms by scholars and independent bodies within the UN System, and the different cases in which those means were sanctioned by national, regional and international tribunals, prove that those warnings were not ill-founded.

Many scholars and practitioners have the sense that some of these problems have finally been surpassed. The purpose of my short presentation is not to make a perusal of the stances taken namely by some States or the United Nations in the first decade of this century with regard to what was permitted and what was not in the fight (or “war”) against terrorism. Others have already authoritatively made this analysis<sup>3</sup> and one of the States

2. Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, in *European Journal of International Law*, 2001, p. 903 ff.

3. The literature concerning the issue of respect for human rights in counter-terrorism is immense and cannot be reported here. However, on the specific issue and for further references see Von Schorlemer, *Human Rights: Substantive and Institutional Implications of the War Against Terrorism*, in *European Journal of International Law*, 2003, pp. 269-271; Roben, Schorkopf, Vöneky, Walter (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty*, Berlin, 2004; Flynn, *Counter-terrorism and Human Rights*, in *European Human Rights Law Review*, 2005, p. 34 ff.; Wilson, *Human Rights in the “War on Terror”*, Cambridge, 2005; Villani, *Per un’efficace lotta contro il terrorismo misure in linea con i diritti umani*, in *Guida al diritto. Diritto internazionale e comunitario*, 2007, n. 1, p. 8; Ciampi, *Sanzioni del Consiglio di sicurezza e diritti umani*, Milano, 2007; Bianchi and Keller (eds.), *Counterterrorism: Democracy’s Challenge*, Oxford, 2008; De Sena, Vitucci, *The European Courts and Security Council: Between Dédoulement fonctionnel and Balancing of Values*, in *European Journal of International Law*, 2009, p. 193 ff; Bonetalli, *Le sanzioni del Consiglio di Sicurezza delle Nazioni Unite nella lotta al terrorismo internazionale e la tutela dei diritti umani*, in *La Comunità Internazionale*, 2009, p. 401 ff.; Gargiulo e Vitucci (eds.), *La tutela dei diritti umani nella lotta e nella guerra al terrorismo internazionale*, Napoli, 2009; Di Stasio, *La lotta multilivello al*



that has more often been accused of violating human rights in fighting terrorism reviewed and rejected many methods and procedures followed in those years<sup>4</sup>. I would rather give a brief overview of how the United Nations tackled the fight against international terrorism and the role the respect for international human rights and International Humanitarian Law played in the action of the United Nations in countering terrorism. Namely, the evolution of the approach taken by the United Nations System to the protection of human rights in the fight against terrorism will give useful hints on how the inter-action between the Security Council and the General Assembly has (or has not) functioned and how the international community should (or should not) tackle global, dangerous threats that could characterize our future and require a prompt response.

The emergency phase that started on 9/11 is finally over, and it is now time to review and if necessary reshape the means at the disposal of the international community to efficiently and consistently fight terrorism in all its forms and manifestations in keeping with human rights and International Humanitarian Law.

The United Nations System was shocked by the terrorist attacks of 2001 on the United States and since those attacks constituted a serious threat to

*terrorismo internazionale. Garanzia di sicurezza versus tutela dei diritti fondamentali*, Milano, 2010; Lugato, *Sono le sanzioni individuali del Consiglio di sicurezza incompatibili con il rispetto delle garanzie procedurali?*, in Riv. Dir. Int.le, 2010, 309 ff. On the consequences deriving from the lack of attention paid by States and international organizations to the issue of human rights in countering terrorism and possible remedies see, in general, the report of the International Commission of Jurists, *Assessing Damage, Urging Action*, Geneva, 2009, at [www.un.org/en/sc/ctc/specialmeetings/2011/docs/icj/icj-2009-ejp-report.pdf](http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/icj/icj-2009-ejp-report.pdf). As regards the “responsibility” of the UN System, see the most recent Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/65/258, par. 17). For an in-depth analysis and a strong criticism of the Bush Administration positions on human rights and the “war on terror”, see J.J. Paust, *Beyond the Law. The Bush Administration’s Unlawful Responses in the “War” on Terror*, Cambridge, 2007.

4. Many declarations and statements by President Obama and Secretary of State Rodham Clinton clearly indicated the willingness of the Obama administration to distance itself from the previous one and to “reset” the relations with the international community on the issue of counter terrorism, putting emphasis on respect for international human rights and International Humanitarian Law. See, in this regard, the National Security Strategy presented in May 2010, at [www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf). While the position of the Obama Administration is quite clear as regards the principled protection of human rights in countering terrorism, in the Spring of 2011 the us administration has been obliged to review some of the assessment made during the presidential campaign, such as the issue of closing Guantanamo Bay facilities and, consequently, the issue of trials by Military Commissions.

international peace and security the Security Council took a primary role in the fight against terrorism, in conformity with the Charter, while the General Assembly took a back seat<sup>5</sup>. In this framework, Security Council resolution 1368 (2001) stated the “inherent right of individual or collective self-defense in accordance with the Charter”. Furthermore, through resolution 1373 (2001) and subsequent resolutions building on it, the Security Council, acting under Chapter VII of the Charter, established a new subsidiary body, the Counter-Terrorism Committee (CTC), composed of the fifteen members of the Security Council. The CTC was aimed, *inter alia*, at supporting the implementation by Member States of measures intended to enhance their legal and institutional ability to counter terrorist activities, such as criminalizing the financing of terrorism and other types of support to terrorism; freezing funds related to persons allegedly involved in acts of terrorism; sharing information with other States on entities involved in terrorist acts; cooperating with States in the investigation, detection, arrest, extradition and prosecution of those involved in such acts... Among the measures intended to assist and improve cooperation among countries, resolution 1373 (2001) included the adherence to international counter-terrorism instruments such as the international conventions on the topic. Member States were required to report regularly to the CTC on the measures taken to implement resolution 1373 (2001). International human rights and International Humanitarian Law were not even considered by the Security Council in this phase.

However, resolution 1373 (2001) was not the first case in which the Security Council adopted such intrusive measures in the field of counter-terrorism, establishing a subsidiary body aimed at implementing the obligations provided by the resolution. As it is well known, it was preceded by resolution 1267 (1999), of 15 October 1999, dealing at the beginning with the Taliban and then extended to Al Qaida. Although in this case the Security Council assigned a “judicial or quasi-judicial” role to the established Sanctions’ Committee, at that point in time the possible repercussions of the Committee’s activities in the field of human rights were not duly taken into account. Resolution 1269 (1999), adopted four days later, made only a generic reference to strengthen international cooperation in counter-terrorism “on the basis of the principles of the Charter of the United Nations and norms of international law, including respect for International Humanitarian Law and human rights”.

5. All the UN documents and activities we will refer to in this paper and other relevant material can be found at: [www.un.org/terrorism/cthandbook/](http://www.un.org/terrorism/cthandbook/).

After 9/11 the action of the 1267 Committee was broadened. There was a dramatic increase in individuals and entities included in the list and modifications were made to the mandate of the Committee through resolution 1390 (2002) to allow the inclusion of individuals and entities all over the world. The 1267 Committee has been supported by the Analytical Support and Sanctions Monitoring Team (better known as Monitoring Team), established by Security Council resolution 1526 (2004) and extended by resolution 1904 (2009). Since 2004 the Monitoring Team has been issuing reports that have consistently addressed, among other issues, the protection of human rights in countering terrorism; as we will recall later, it is also thanks to those reports that the Security Council has intervened several times, modifying its own resolutions especially in the field of fundamental human rights.

Going back to the CTC, more emphasis on the respect for human rights obligations by States in the fight against terrorism was included in resolution 1456 (2003), where it was stated that “States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law”. Similar provisions are contained in Security Council resolution 1535 (2004) which also established the Counter-Terrorism Executive Directorate (CTED). The CTED was assigned relevant tasks in monitoring the implementation of resolution 1373 (2001) and in assisting the CTC<sup>6</sup>.

In the light of these developments, it is clear that for a long period after 9/11 the Security Council did not consider in its deliberations and activities the issues of human rights and International Humanitarian Law in counter-terrorism, and when it did so, references were generic and vague.

The real turning point in the Security Council consideration of the respect for human rights obligations in countering terrorism took place only once the General Assembly was finally able to take a strong political stance on the issue, in September 2005. More precisely, on 14 September

6. As regards the implementation of Security Council resolution 1373 (2001), it is quite interesting to consult the “Technical Guide” compiled by CTED in 2009, available at: [www.un.org/en/sc/ctc/docs/technical\\_guide\\_2009.pdf](http://www.un.org/en/sc/ctc/docs/technical_guide_2009.pdf). In the introduction of the Guide it is specified that “The guide does not purport to impose any obligations upon States apart from those that already exist by virtue of the relevant Security Council resolutions, international treaties, customary international law, or other obligations voluntarily undertaken by States. The guide represents the consolidation of elements prepared by the technical groups that were established within CTED under the terms of Security Council resolution 1805 (2008) and the revised CTED organizational plan (S/2008/80)”.

2005 the Security Council adopted resolution 1624 (2005), devoted to the prohibition of incitement to commit terrorist acts. On that occasion reference was made not only in the preamble to the fact that “States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights law, refugee law, and humanitarian law”, but also in the operative part the Security Council stressed that “States must ensure that any measures taken to implement” the core of the resolution “comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law”.

At the same time, emphasis on respect for human rights, International Humanitarian Law and refugee law while countering terrorism was agreed by the General Assembly in the Summit Outcome Document of 2005, a resolution adopted by the Heads of State and Government of Member States<sup>7</sup>. The political influence of this part of the Summit Outcome Document on the activities of the Security Council and its subsidiary bodies in counter-terrorism is evident if one thinks that before the adoption of that document the General Assembly dealt with international terrorism mainly in the Third (Human Rights) and the Sixth (Legal) Committee: in the former, in resolutions dealing with the respect for human rights in fighting international terrorism; in the latter in the course of negotiations aimed at the adoption of International Conventions and Protocols on the issue. In the last decade, both Committees adopted resolutions on international terrorism and the Third Committee focused on singling out a series of standards that should be respected by States in their counter-terrorism activities such as the principle of legality in criminalizing acts of terrorism; due process guarantee; non-discrimination; the prohibition of torture and other cruel inhuman or degrading treatment; the obligation of “*non-refoulement*”. As regards the Sixth Committee, in recent years the focus has been mainly on the negotiations on the draft comprehensive convention on international terrorism, but notwithstanding the efforts, no agreement has been reached on such issue. The most recent attempts focused on

7. A/RES/60/1, para. 85: “We recognize that international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter and relevant international conventions and protocols. States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and International Humanitarian Law”.

the issue of definition and the scope of application of the convention. In this regard, it was recently observed that “calls by the international community for action to eliminate terrorism, in the absence of a universal and comprehensive definition of the term, can give rise to adverse consequences for human rights”, and that “the strong emphasis on counter-terrorism throughout the United Nations System risks unintentionally legitimizing conduct undertaken by oppressive regimes through delivering the message that the international community wants strong action against ‘terrorism’, however defined”<sup>8</sup>.

Although the General Assembly was not very reactive in the wake of 9/11, since 2005 both the General Assembly and the Secretary-General appeared to be in the front line in protecting human rights while countering terrorism. This attitude is confirmed by the creation of the Counter-Terrorism Implementation Task Force (CTITF), established by the Secretary-General in 2005 with the aim of ensuring coordination among the various UN entities dealing with counter-terrorism<sup>9</sup> and by the adoption (by consensus) in the General Assembly in September 2006 of the United Nations Global Counter-Terrorism Strategy, fulfilling a mandate conferred to the General Assembly itself by the 2005 Summit<sup>10</sup>.

The negotiations leading to the adoption of the Global Strategy were conducted on the basis of the Secretary-General report entitled “Uniting

8. This is the opinion expressed by Martin Scheinin, Special Rapporteur for the promotion and protection of human rights in countering terrorism, in his most recent report (A/65/258, para. 25). Moreover, according to Scheinin the draft comprehensive convention should be adopted because “only a legally precise definition of terrorism that respects the principle of legality and that is restricted to conduct that is truly terrorist in nature, will help stop the use of abusive national definitions” (para. 72). The previous reports of the Special Rapporteur can be found at: [www2.ohchr.org/english/issues/terrorism/rapporteur/reports.htm](http://www2.ohchr.org/english/issues/terrorism/rapporteur/reports.htm). On the report see: Nesi, *Nazioni Unite e rispetto dei diritti umani nella lotta al terrorismo internazionale alla luce del rapporto del Relatore speciale dell'ONU*, in *Comunità Internazionale*, 2011, p. 73 ff. For the most recent developments of the negotiations on the draft comprehensive convention see Nesi, *International Terrorism and the Law of War. Issues of qualification as a crime and exemption from criminal responsibility in the most recent phase of the UN Comprehensive Convention negotiations*, forthcoming.

9. The CTITF is today composed by more than thirty UN entities (and the INTERPOL), it has been institutionalized in 2009 and plays a crucial role in international cooperation in counter-terrorism.

10. According to the Summit Outcome Document, the Heads of State and Government “welcome the Secretary-General’s identification of elements of a counterterrorism strategy. These elements should be developed by the General Assembly without delay with a view to adopting and implementing a strategy to promote comprehensive, coordinated and consistent responses, at the national, regional and international levels, to counter terrorism, which also takes into account the conditions conducive to the spread of terrorism” (para. 82).

against Terrorism: Recommendations for a Global Counter-Terrorism Strategy”<sup>11</sup>. The Global Strategy is the first document in which the entire membership took a precise position on the strategic approach to counter-terrorism<sup>12</sup>. As it has been underlined, in the Global Strategy all Member States unequivocally stated that “the effective counter-terrorism measures and the protection of human rights are not conflicting, but complementary and mutually reinforcing goals and that human rights and the rule of law are the fundamental basis of their counter-terrorism strategies”<sup>13</sup>. One of the four pillars of the Plan of Action annexed to the Strategy is devoted to “Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism”. Among these measures States reaffirmed their obligation to ensure their full compliance with international law, in particular human rights law, refugee law and International Humanitarian Law. The reviews of the Global Strategy in 2008<sup>14</sup> and 2010<sup>15</sup> re-emphasized the importance of complying with human rights and International Humanitarian Law while countering terrorism.

Through the adoption of both the Summit Outcome Document and the UN Global Counter-terrorism Strategy the General Assembly, and thus the entire membership, counter-balanced the activities put forward by the Security Council in the fight against terrorism. As will be seen, the fact that both documents made explicit reference to the respect for human rights and humanitarian law in counter-terrorism led the Security Council and its subsidiary bodies to increase the attention they paid to human rights in counter-terrorism.

It is a fact that after 2005 the CTC and the 1267 Committee, as well as the CTED and the Monitoring Team, expanded their activities on the issue of human rights in counter-terrorism and the Security Council adopted further resolutions in which that issue was also addressed, such as resolutions 1735 (2006), 1822 (2008), 1904 (2009), dealing mainly with the issue of listing/de-listing individual and entities, and introducing “incremental improvements” in the treatment of the affected individuals and entities.

With resolution 1735 (2006) the Security Council made important modifications to the notification regime for listed individuals, while resolu-

11. A/60/825.

12. A/RES/60/288.

13. A/65/258, para. 21.

14. A/RES/62/272.

15. A/RES/64/297.

tion 1822 (2008) introduced the dissemination of statements and narrative summaries of reasons for listing and the mandatory review of all entries on the list. Resolution 1904 (2009) contained several improvements in the procedures for listing and de-listing, extended the Monitoring Team and established the Office of the Ombudsperson, with the task of receiving requests from individuals and entities seeking to be removed from the consolidated list<sup>16</sup>.

Notwithstanding the “incremental improvements” referred to above, the most recent report of the Special Rapporteur for the promotion and protection of human rights in countering terrorism is critical of the sanctions regime, and in particular of 1267 regime, since it does not guarantee “a fair and public hearing by a competent, independent and impartial tribunal established by law”. The Office of the Ombudsperson does not have any decision-making power to overturn the listing decisions of the 1267 Committee; the access to information by the Ombudsperson is still dependent on the willingness of States to disclose information; the system lacks transparency, and more in general, “the Ombudsperson cannot be regarded as a tribunal within the meaning of article 14 of the International Covenant on Civil and Political Rights”<sup>17</sup>.

Although the various attempts to reform the mechanisms and procedures set up by the Security Council in the last decade in the fight against terrorism have not been sufficient to address the concerns raised in connection with the lack of protection of fundamental rights in these circumstances, one should recognize that some aspects of the Security Council resolutions adopted in the framework of counter-terrorism have had positive repercussions in the field of human rights. For instance, the dramatic increase of the number of States parties to international counter-terrorism Conventions, such as the 1999 Convention for the Suppression of the Financing of Terrorism, whose States parties jumped from four (in 2001) to one hundred and seventy-three, or the 1997 Convention for the Suppression of Terrorism Bombings, from twenty-four to one hundred and sixty-four. Thanks to the activity of reporting and assistance by CTED, many Member States that did not have the crime of terrorism in their legal order, introduced it and thus criminalized certain conducts and specifically

16. On the establishment of the Office of the Ombudsperson, see Bonetalli, *L'Ombudsperson delle Nazioni Unite per le sanzioni individuali: un passo avanti verso la piena rispondenza della strategia anti-terrorismo ai requisiti del fair trial?*, in *La Comunità Internazionale*, 2010, p. 231 ff.; Ciampi, *Un Ombudsperson per gestire le richieste al Comitato 1267 per la cancellazione dalle liste*, in *Riv. Dir. Int.le*, 2010, p. 106 ff.

17. A/65/258, para. 56.

laid down the elements of the crime, with obvious positive consequences on human rights in national legal orders.

More recently, resolution 1963 (2010) was adopted, that extended the mandate of the CTED and at the same time reaffirmed a series of obligations upon States in the fight against terrorism, among which that of ensuring that “any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law”. In the same resolution the Security Council recognized “that terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone, and [underlined] the need to address the conditions conducive to the spread of terrorism, as outlined in Pillar I of the UN Global Counter-Terrorism Strategy (A/RES/60/288) including, but not limited to, the need to strengthen efforts for the successful prevention and peaceful resolution of prolonged conflict, and the need to promote the rule of law, the protection of human rights and fundamental freedoms, good governance, tolerance, inclusiveness to offer a viable alternative to those who could be susceptible to terrorist recruitment and to radicalization leading to violence”.

Leaving aside the exceptionality of the reference in a Security Council resolution to a General Assembly resolution, it is worth noting that it took more than nine years from 9/11 for the Security Council to single out the means to be developed in order to defeat international terrorism. And when it did so, it made reference, word by word, to a General Assembly resolution.

To sum up, immediately after 9/11 the emergency situation “broke” some of the institutional balances provided for by the Charter of San Francisco. Since international peace and security were at stake, the Security Council (in line with the will of some of its most powerful members) prevailed. This is how the Council not only adopted resolutions “under Chapter VII” through which Member States were obliged to conduct themselves, with effects similar to those deriving to the adhesion to international instruments (thus granting the Security Council a sort of “legislative or quasi-legislative” power); through the same resolutions subsidiary organs of the Council were established with the mandate either of listing those allegedly suspects of terrorism worldwide, as was the case for the regime established by resolution 1267 (1999) and successive modifications, thus granting those bodies “judicial or quasi-judicial” power; or monitoring the implementation by States of the obligations aimed at countering terrorism, as was the case for the 1373 regime. In this



“emergency” phase there was an “overstretching” of the powers conferred to the Security Council by the Charter while the General Assembly was passive.

In a subsequent phase, that began around 2005, the General Assembly (with the support of the Secretary-General) reacted through the adoption of the Summit Outcome Document, the establishment (by the Secretary-General) of the CTITF and the adoption of the UN Global Counter-Terrorism Strategy. Thereafter, maybe also because of the new attitude by the General Assembly and the first issues raised in national and international courts, the Security Council started to factor in a more concrete manner human rights issues in counter-terrorism. Thus, it adopted a series of resolutions through which it attempted to address the major concerns regarding human rights in counter-terrorism.

However, those resolutions seem to be insufficient since they do not offer any effective remedy to the addressees of decisions by the Security Council that impinge upon due process and fair trial principles. Furthermore, although resolution 1904 (2009) introduced important modifications to the sanctions’ regime provided by resolution 1267 (1999) and established the Office of the Ombudsperson, it seems that the Security Council lost a historical opportunity to provide effective remedies for de-listing. One could wonder whether it is realistic to think about conferring “judicial” powers to the Office of the Ombudsperson since this could have undermined the credibility of the Security Council and its subsidiary bodies. However, the establishment by the Security Council of an organ which is supposed to scrutinize the activities of one of its subsidiary bodies without providing that organ with the necessary powers to accomplish its duties does not increase the Security Council’s credibility either<sup>18</sup>.

In order to overcome the inconsistencies of the procedures and mechanisms created by the Security Council in counter-terrorism a systemic reform of those procedures and mechanisms has been recently proposed<sup>19</sup>. According to such proposal, the Security Council should, *inter alia*, “replace resolutions 1373 (2001), 1624 (2005) and 1267 (1999) (as amended) with a single resolution, not adopted under Chapter VII of the

18. The first report of the Office of the Ombudsperson (the Canadian Judge Kimberly Prost, appointed in June 2010), presented on 24 January 2011, describes the activity of the Ombudsperson in the first six months of her mandate and contains very constructive observations and recommendations as regards cooperation of States, de-listing procedures (follow-up, notifications, reasons for de-listing), non-disclosure of the identity of designating States, resources (S/2011/29).

19. This is the proposal presented by Martin Scheinin in his final Report (A/65/258, para. 75 ff.).

Charter, in order to systematize the counter-terrorism measures and reporting duties of States under one framework” and “replace the sanctions regime pursuant to resolution 1267 (1999) with advice and assistance to Member States in maintaining their national terrorist lists and in reporting on them, and on available due process guarantees”; “ensure that counter-terrorism action by the Security Council and its subsidiary bodies systematically reflects the double role of the promotion and protection of human rights in the United Nations Global Counter-Terrorism Strategy, as one of pillar of the strategy and a component in all other pillars”.

This proposal would allow the Security Council to complete, in a more “systemic” manner, the review of the sanctions system it set up in recent years. The reform of the sanctions regime could also be based on some of the suggestions reported above, except for the idea of not adopting a resolution under Chapter VII of the Charter. Actually, it is hard to understand how a system created by the Security Council acting under Chapter VII can be dismantled (or modified) by a resolution adopted according to different legal force. Moreover, what would be the role of the CTED and the Monitoring Team whose activities in the fight against terrorism (and especially in factoring human rights in this fight) have surely been crucial? More generally, what would be the repercussions of this review of mechanisms and procedures on other sanctions committees set up by the Security Council (not to speak about bodies pertaining to different international organizations, such as the Council of the European Union), committees that present some of the features of 1267 Committee and CTC in respect of fair trial and due process principles?

Further interesting elements on the future of the UN system of repression of international terrorism could emerge also from the cases in which national and regional jurisdictions are now dealing with alleged violations of fundamental human rights in connection with the implementation of the UN sanctions regimes set up by resolutions 1267 (1999) and 1373 (2001). Finally, negotiations are in progress (in May 2011) on the renewal of the sanctions regime concerning Al Qaida and Taliban, and several proposals and suggestions have been made on listing, de-listing and the Office of the Ombudsperson. The Security Council should take action in June 2011. One could hope that the time is ripe for the Security Council to find the ways to confirm its assessment made in resolution 1963 (2010) and turn the page on the emergency showing re-thinking in human rights in counter-terrorism.

## New forms of violence before the ICC

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It is a great honour for me to speak at this Conference, although, as a judge, I am much more limited in what I can say than I was in my previous life as an academic. This is true, even if I start this talk by saying that I am speaking in a private capacity, and that I, obviously, cannot bind the International Criminal Court (ICC). I will therefore limit myself to raising a number of questions, rather than taking positions.

I will address the topic “new forms of violence before the ICC”. As the ICC is only starting its first cases, there is, as yet, not very much to be said. The cases that are currently pending before the ICC, the Lubanga and the Katanga cases, arise from an allegedly international armed conflict that is said to have occurred in Eastern Congo, at the time when it was occupied by Uganda. Amongst the charges in Katanga are some of the newly codified gender crimes that have been explicitly included in the Rome Statute (rape, sexual slavery), which undoubtedly qualify as forms of violence that are, unfortunately, very present in the conflict in Eastern Congo. A prominent feature in both the Lubanga and the Katanga cases is the use of child soldiers, a new crime that has been tested already before the Special Court for Sierra Leone (SCSL) but that is now the focus of the Lubanga case.

Looking at the factual allegations, what is “new” in those cases is the large participation of civilians in the hostilities. Not only children, but also women allegedly took part in the pillages and in the destruction of civilian property. An interesting element that appears from the dossier is the role of witch doctors (*feticheurs*) who are said not only to have administered substances to the fighters but also to have given combat instructions. Since these cases are *sub judice*, I can only mention these features without further discussing them.

There is one particular point on which I can safely concentrate, and that is, the aspect “plundering and looting of natural resources”. This

phenomenon is typical for some of the recent conflicts in Africa. It has, I believe, not been given the attention it deserves. I can safely discuss this problem because in none of the cases before the ICC, charges have been brought which relate to this phenomenon. The question that I want to examine briefly is the state of international criminal law when it comes to dealing with plundering and looting of natural resources. Is this a crime in its own right and, if not, should it be one?

Let me, for a moment shift my attention from the ICC to a sister court that has been sharing our premises in The Hague, the SCSL. I am thinking of a recent *fait divers* that was highly publicized in the media, namely the testimony of Naomi Campbell. You may remember that Ms Campbell was called to The Hague to answer the question whether she had received “blood diamonds” from Charles Taylor, former president of Liberia accused of war crimes and crimes against humanity in Sierra Leone. The media reported that the trial revolved around the use of blood diamonds that fuelled civil wars in Angola, Sierra Leone and Liberia. While this is not untrue, you will nowhere find blood diamonds in the indictment against Charles Taylor. Even more so: whereas the original indictment (7 March 2003) charged Charles Taylor for being a member of a JCE (joint criminal enterprise) aiming at obtaining access to the mineral wealth of Sierra Leone, in particular its diamond wealth, the amended indictment (29 May 2007) does not at all specify the criminal purpose. Why is this, one may wonder?

In the same vein, it can be noted that, in the cases before the ICC, no charges relating to mineral resources in Ituri have been brought. Yet, the ICC Prosecutor, in a policy statement in 2003, announced that he was going to investigate the financial aspects of the atrocities. Is it that he did not find evidence for such charges or is there another reason? In later policy statements, the ICC prosecutor no longer refers to such financial investigations.

The explanation may be very simple: plundering of natural resources may not, as yet, be a crime under international criminal law, which explains why no charges have been brought thus far. This, I believe, is in sharp contrast with the factual element that many of the recent conflicts in Africa and elsewhere revolve around minerals and other natural resources. If this analysis is correct, the question arises whether this is a legal loophole that should be filled.

There is a host of UN resolutions and declarations linking the illegal exploitation of natural resources to armed conflict. A number of specific resolutions were adopted in respect of Sierra Leone (Resolutions 1306

(2000) and 1856 (2008) and of the Democratic Republic of Congo (DRC) (Resolution 1625 (2005)). Several UN Panels of Experts have addressed the problem and have come up with evidence pointing at various actors who participated in these activities, including the territorial State, third States, rebel groups and multinational corporations. Many initiatives were taken to curb this curse, including the Kimberley process certification scheme and voluntary guidelines for multinationals.

The question is whether this is enough. Should these practices not, in addition, be countered with more severe instruments including international criminal law? Looking at the cases that are actually pending before the courts in The Hague, notably the Charles Taylor case, one gets the impression that international criminal law is not equipped for this. How otherwise can one explain that a case, which seems to revolve around blood diamonds, does not contain any specific charges in this respect?

The only international court that has so far considered the issue of illegal exploitation of natural resources is the International Court of Justice in the *DRC v. Uganda* case of 2005. In this case the Court considered the issue under International Humanitarian Law (IHL), notably Uganda's obligations as an Occupying Power under The Hague Regulations and the Fourth Geneva Convention. The ICC found that Uganda was internationally responsible for the looting, plundering and exploitation of the DRC's natural resources committed by the members of its army, the Uganda People's Defence Force (UPDF), on the territory of the DRC. As an occupying power, it was in violation of its duty of vigilance in regard to these acts and for failing to comply with its obligations under article 43 of The Hague Regulations of 1907.

But what crimes, if any, were committed by the UPDF soldiers and the rebels in the DRC in relation to these minerals? Other charges could probably be brought, pointing to horrible crimes that were committed in the process (extermination, killing, torture, cruel treatment, rape and other gender crimes, etc.), but what about the core activity that, if one follows the UN Resolutions and the conclusions of the Expert's panels referred to above, is the aim to appropriate the riches of a region, be it for private or for official motives?

Charges that could possibly be formulated under the Rome Statute do not really seem to fit the behaviour. For example, there are a number of property crimes in the Rome Statute under which this behaviour could be subsumed. One example is pillaging ((art. 8(2)b(xvi) and 8(2)e(v)). The problem with this crime is that it requires the appropriation to have occurred "for private or personal use" (Elements of crime, 2). Would the appropriation of natural resources for the purposes of funding armed

conflict qualify for this article? What about government officials engaging in the pillaging of natural resources? They will only qualify for the crime if they committed it “for private or personal use”. What about concessions given to private companies by governments or by rebels? There are many other potential problems which I cannot discuss here. For example, what about the “ownership” of natural resources? Can a State “appropriate” its own natural resources?<sup>1</sup> Even more problematic, for the purposes of punishing this kind of behaviour, are other provisions of the Statute, including “extensive destruction or appropriation of property” (article 8(2)iv). Plundering of natural resources would, under this article, only be punishable in international armed conflicts (IACS) not in non-international armed conflicts (NIACS). Another crime one could think of, but which would not really fit the behaviour, is the crime of “destroying or seizing the enemy’s property” (art. 8(2)b(xiii) and art. 8(2)e(xii)).

I said at the outset of this presentation that I would limit myself to asking questions, rather than giving answers. I think that it is appropriate to raise questions of this nature at a forum like this one. As you know, the ICC is much less than the International Criminal Tribunal for the former Yugoslavia (ICTY), equipped to fill legal loopholes or to take into account the formation of new rules of customary international law. Under article 21 of its Statute, the Court is bound to apply the Statute. International law, including customary international law, only comes as a secondary source. As a result, loopholes, if they exist, will have to be filled by the States parties, not by the court itself.

On the subject of the illegal exploitation of natural resources, I have the uneasy feeling that the law, as it stands now, does not allow prosecutors to deal with the fuelling activity behind a number of recent armed conflicts: the pursuit of natural resources, and the new forms of armed violence that go with them (use of child soldiers, attacks against civilians, massive sexual violence).

In addition, there is the question of the responsibility of private actors, including multinational corporations. Whereas corporations cannot, as such, be prosecuted before the ICC, individuals within corporations and private businessmen could, in theory, be prosecuted.

Here, the question is rather one of policy: do private businessmen qualify among the “highest responsible” in the sense of the policy guide-

1. Larissa Van der Herik and Daniella Dam-de-Jong, “Corporate involvement in the exploitation of natural resources during armed conflict” (manuscript).

lines of international prosecutors? Judging from the policy statements of the ICC prosecutor, notably that of February 2010, going after businessmen is not on his list. One could perhaps argue that, in view of the complementarity principle, these prosecutions should rather be brought before national courts, such as the recent prosecutions of Dutch businessmen with close links to Saddam Hussein (Van Anraat) and Charles Taylor (Gus Kouwenhoven), or the (unsuccessful) civil case against Talisman in the US under the Alien Tort Claims Act (ATCA). This supposes, of course, that one is in agreement with the premise according to which businessmen normally are not to be considered as the “highest responsible”.

One cannot avoid remembering the fate of the economic pillar in the war efforts of the Nazi regime during the Second World War. Whereas (individuals within) Farben and Krupp were, in the end, prosecuted at Nuremberg, the feeling is that the economic pillar was not prosecuted with the same enthusiasm as the political and military pillars of the Third Reich<sup>2</sup>. Does the same apply to international criminal courts and national prosecutions for international core crimes? The future will tell.

2. Florian Jessberger, ICLJ.





## **International humanitarian law, new forms of armed violence and the use of force**

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Allow me to start by indicating what a privilege it is to be here with this audience, and to express my gratitude to Ambassador Moreno and the Institute for this opportunity. I must also commence with the caveat that as a government lawyer, I need to place on notice that what follows are my own thoughts and do not necessarily represent those of my Government.

My subject today is one example of how International Humanitarian Law (IHL) is manifesting in new ways within the context of use of force in relation to non-international armed conflict. To this end, my topic centres upon a recent amendment to the 1988 Rome Statute of the International Criminal Court. On 11 June this year, the Rome Statute was amended to incorporate a new provision within Article 8 which makes it an offence, within the jurisdiction of the International Criminal Court (ICC), to employ in non-international armed conflicts bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not totally cover the core or is pierced with incisions<sup>1</sup>.

What was old and settled in IHL is new and novel again. This is one example of an issue which has a substantial impact at the very sharp edge of IHL, and clearly illustrates the complexities of the relationship between IHL and human rights law. This is particularly evident in the fact that the prohibition exists in one context, but does not apply in the other.

1. See Resolution RC/Res.5, adopted at the 12<sup>th</sup> plenary meeting, 10 June 2010, at the ICC Review Conference in Kampala, at [www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.5-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf). The amendment – now Art 8(2)(e)(xv) – creates an offence, within a non-international armed conflict, of ‘[E]mploying bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions’.

## 1. Background

A flattening or expanding round is a round (or bullet) that deforms inside the body to inflict a greater wound, and thus achieve greater stopping power. It does so because the hard outer casing of the bullet is not complete and allows the softer metals inside to protrude through the casing and spread, or the casing itself to spread apart. In essence, this means that the diameter of the bullet is increased from its nominal diameter, thus generating a more significant wound signature. The comparison point is a full metal jacketed round, which can often pass through the human body with minimal deformation and a smaller wound signature. It is, therefore, very important to recognize at the outset that the effect of a flattening or expanding round is also its utility, because such rounds can assist, in some situations, in achieving two outcomes: Stopping people in situations where they may not be stopped by a standard round; and reducing some incidental injury in that the round is less likely to pass through the body of the target (or to ricochet) so as to also injure or kill people behind or beside the target<sup>2</sup>.

## 2. The existing prohibition – international armed conflict

In 1898, Germany lodged a protest with the British Government to the effect that the use of the Mark IV dum-dum bullet was unnecessary and inhumane, because of the injuries it inflicted. The ultimate result was the 1899 Hague Declaration 3 Concerning Expanding Bullets<sup>3</sup>. However, the sentiments which inspired this important treaty had found earlier, most eloquent expression in the 1868 St. Petersburg Declaration, which renounced the use of explosive projectiles under 400 grams weight, during war. These sentiments, to which the 1899 Hague Declaration 3 explicitly referred, were:

1. that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

2. See generally, Robin Coupland and Dominique Loyer, 'The 1899 Hague Declaration concerning Expanding Bullets: A treaty effective for more than 100 years faces complex contemporary issues' at [www.icrc.org/eng/assets/files/other/irrc\\_849\\_coupland\\_et\\_loye.pdf](http://www.icrc.org/eng/assets/files/other/irrc_849_coupland_et_loye.pdf).

3. 1899 Hague Declaration 3 Concerning Expanding Bullets, in Adam Roberts and Richard Guelff, *Documents on the Laws of War (Third Edition)*, Oxford University Press, Oxford, 2003; pp. 63-66.

2. that for this purpose it is sufficient to disable the greatest possible number of men;
3. that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
4. that the employment of such arms would, therefore, be contrary to the laws of humanity.<sup>4</sup>

### 3. Why is this an issue today?

There are a number of reasons that the matter of flattening or expanding rounds is once again arising as a conscious issue in IHL, and in the links between IHL and human rights law. I shall focus briefly on five. The first is the plain fact that technological advances have made flattening and expanding ammunition an attractive option in certain use of force situations. For example, these types of rounds can have a high utility in use of force in the vicinity of crowds, in Counter-Terrorism operations involving imminent threats of force (such as hostage recovery and imminent bomb detonation), and extremely high utility in counter-terrorism (CT) operations in aircrafts.

The second reason is that many Police forces use flattening or expanding rounds as their standard round – precisely because of the technical qualities and situational utilities noted just now. Such rounds can enhance a Police force’s ability to reduce incidental injury whilst also achieving stopping power on the target<sup>5</sup>.

The third reason is that some military forces which engage in domestic or national CT operations may also use such rounds. Some may also take such rounds as part of their inventory when deployed on operations overseas – perhaps where analogous CT roles may be envisaged. There has also been a recent report, for example, that the US Marine Corps is shifting to an open tip round (noting that some open tip rounds are definable, *prima facie*, as a flattening or expanding round) as its standard round<sup>6</sup>. It is

4. 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, in Roberts and Guelff, *Documents on the Laws of War*; pp. 53-57. 1899 Hague Declaration 3 explicitly incorporates these sentiments: ‘The undersigned... inspired by the sentiments which found expression in the Declaration of St. Petersburg of the 29<sup>th</sup> November (11<sup>th</sup> December), 1868’.

5. See, for example, Coupland and Loye, ‘The 1899 Hague Declaration’ at 140-141.

6. See, for example, Dan Lamothe, ‘Corps to use more lethal ammo in Afghanistan’, *Marine Corps Times*, 16 February 2010 at [www.marinecorpstimes.com/news/2010/02/marine\\_](http://www.marinecorpstimes.com/news/2010/02/marine_)

important to add, of course, that the US is reported to have legally cleared this round for use in armed conflict scenarios in January 2010. The point, however, is that this clearance process would have been in relation to the application of the prohibition in relation to a non-international armed conflict (Afghanistan), and would have involved an assessment of either the general applicability of the prohibition in that context, and/or the nature of this particular open tip round in relation to ‘flattening or expanding’ technical criteria.

The fourth reason resides in the drive to harmonize IHL-based law (and particularly prohibitions) as between international armed conflict and non-international armed conflict.

Finally, for those States which take compliance with IHL seriously, the newly re-emergent issue of which parts of IHL as applicable to international armed conflict are equally applicable in non-international armed conflict, has brought this issue (and many others) into focus once again.

#### 4. What are the issues?

As noted earlier, an amendment to the Rome Statute of the ICC, adopted by consensus at the Review Conference in Kampala in June this year, creates a new offence relating to the use of flattening or expanding rounds in non-international armed conflict. This new offence effectively replicates the elements of the same offence in international armed conflict, already incorporated within Article 8(2)(b)(xix) of the Rome Statute<sup>7</sup>. There are five elements to the offence<sup>8</sup>, but it is a brief assessment of elements two, three and four which is most significant for current purposes:

SOST\_amm0\_021510w/. The round is described as ‘*open-tipped*’, comprised of ‘*a typical lead core with a solid copper shank*’. The report cites a US Navy document which explains that these rounds ‘*stay on target longer in open air and have increased stopping power through “consistent, rapid fragmentation which shortens the time required to cause incapacitation of enemy combatants”...*’.

7. 1998 Rome Statute of the International Criminal Court at [www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf).

8. The elements of the war crime of employing prohibited bullets in a non-international armed conflict – now Art. 8(2)(e)(xv) of the Statute – are: (1) The perpetrator employed certain bullets. (2) The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body. (3) The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect. (4) The conduct took place in the context of and was associated with an armed conflict not of an international character. (5) The perpetrator was aware of factual circumstances that established the existence of an armed conflict. See Resolution RC/Res.5 Amendments to article 8 of the Rome Statute, Annex II – Elements of Crimes.

1. The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.
2. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

These three elements encapsulate the nub of two core issues: The substance of the prohibition in non-international armed conflict; and the law enforcement 'carve out' from the prohibition.

#### 4.1. *The substance of the prohibition*

The first point we must recognize is that IHL evidences different sources, as between international and non-international armed conflict, for their separate and discrete prohibitions as they apply over the same weapon. In international armed conflict there exists a 111 year-old treaty based prohibition (1899 Hague Declaration 3), which itself refers back to an even earlier instrument (1868 St. Petersburg Declaration), where that prohibition has been further refined and activated in an international jurisdictional context within the 1998 Rome Statute. In non-international armed conflict there is no treaty-based prohibition. Thus if the prohibition exists, it has to be recognized as customary international law, as indeed the ICRC has in its Customary International Humanitarian Law study<sup>9</sup>. Whilst there may be a degree of agreement that there is a customary prohibition applicable in non-international armed conflict, there was previously perhaps less agreement as to the substance of the prohibition – the actual criteria to be applied when assessing a round against this prohibition.

There are two approaches to determining the actual criteria imposed by the prohibition on flattening and expanding ammunition in non-international armed conflict.

The first I will label the *per se* prohibition. This approach emphasizes the technical aspects of the criteria encapsulated in element two - that is, if it flattens and expands, then it is prohibited. This is the view that Amnesty International (amongst others) took at the Kampala Conference.

9. See Rule 77 in the ICRC Customary International Humanitarian Law database at [www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter25\\_rule77](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter25_rule77).

The second approach I will label the “two-limbed” test approach. This approach requires that – in addition to the technical matters encompassed by the *per se* approach (that is, in relation to flattening or expanding) – there is an additional second requirement to the test (encapsulated in element three), which is that the effect of the rounds must be to cause unnecessary suffering.

In my opinion, this tension has clearly been resolved in favour of the two-limbed approach. The elements, noted just before, confirm this: Element two covers the technical specifications (the bullets are such that their use violates the international law of armed conflict because they expand or flatten easily in the human body); but element three (the perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect) also expressly requires that unnecessary suffering be a further cumulative requirement. In Kampala, many States indicated their assessment that it is the two-limbed approach that is most coherent with their practice and views. This was most clearly signalled in the Implementing Resolution by which the amendment was adopted into the Rome Statute, which is explicit in this regard:

*Considering* that the crime referred to in article 8, paragraph 2 (e) (xv) (employing bullets which flatten or expand easily in the human body), is also a serious violation of the laws and customs applicable in armed conflict not of an international character, and *understanding* that the crime is committed only if the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law.<sup>10</sup>

This outcome, in my view, is the correct outcome, but it must be recognized that it brings three consequential legal problems in to play. The first is that it raises the spectre, once again, of a broader and arguably unresolved legal issue in IHL – the fact that IHL still exhibits significant difficulty in defining what, precisely, constitutes unnecessary suffering. It is reasonably clear that we ought to define unnecessary suffering by effect. But by which set of ‘effects’? If we define by medical effect, is this achieved primarily by wound signature comparisons – analysing the wound signature of the flattening or expanding round in comparison to that of a full metal jacketed round of the same nominal calibre? Or is the

10. See Resolution RC/Res.5 Amendments to article 8 of the Rome Statute, preamble, para. 9.

assessment to be made by reference to more practical and immediately observable effects such as what is considered to be sufficient – in a general or generic sense – to take the ‘reasonable combatant’ out of the fight (or, indeed to kill them quickly), but not to inflict wounds or suffering beyond either of those outcomes? Or is the assessment by comparison of effects which takes as its baseline or ‘control group’ what was actually banned at the time in 1899, for it was dum-dum bullets of that particular calibre – larger but slower than most battlefield rifle ammunition types today – that were specifically characterized as causing unnecessary suffering?

The second problem this outcome creates is that this particular prohibition is one of the few that can create situations where two norms of IHL, which are generally mutually reinforcing and in complete accord, are actually placed in opposition to each other. This is the case in situations where combatants and civilians are closely mixed, forcing the user of force to choose, in some cases, which norm it would be the lesser evil to breach. Should the user of force breach the prohibition on unnecessary suffering to the target, which the flattening or expanding round may cause (but at the cost of perhaps not stopping the target from continuing to shoot civilians or to proceed to detonate a bomb, whilst only moderately injured by a full metal jacketed round as opposed to taken out of the fight immediately)? Or should the user of force breach the prohibition on causing excessive incidental injury (which in such situations might suggest that using a type of round which stops inside its intended target and takes them out of the fight immediately would be preferable to using a round which can cause incidental injury either by ricochet or by passing through the target into proximate civilians)? In the context of the ‘three block war’, this is not a hypothetical conundrum.

The third issue that arises from this outcome is that if this is how States have decided to understand the substance, the scope, and the effect of the prohibition of flattening and expanding ammunition in non-international armed conflict, should we not also apply the same level of interpretive fidelity to the equivalent prohibition in international armed conflict? I think this is a rare case where a concept has now achieved greater fidelity in the law applicable to non-international armed conflict and could very properly seep back into the manner in which the equivalent concept is understood in international armed conflict.

#### 4.2. Law enforcement contexts

The second major issue is what might be called ‘the law enforcement carve out’, as reflected both in element four (the conduct took place in the context of and was associated with an armed conflict not of an international character) and in the Implementing Resolution:

*Considering that the above-mentioned relevant elements of the crimes can also help in their interpretation and application in armed conflict not of an international character, in that inter alia they specify that the conduct took place in the context of and was associated with an armed conflict, which consequently confirm the exclusion from the Court’s jurisdiction of law enforcement situations.<sup>11</sup>*

Once again, the intention of States to specify and protect the law enforcement carve out is quite clear and comprehensive. But – again – it is not necessarily straight forward. The clear legal implication and actuality is that it is lawful for State agents to use flattening or expanding rounds against their own populace for law enforcement purposes, but it is not lawful for the very same rounds to be used by those same State agents against enemy combatants in an armed conflict.

This is a real issue for non-international armed conflict, as the threshold between when an internal situation crosses the line between disturbance and riot (governed by the law enforcement paradigm and its human rights law underpinnings), and non-international armed conflict (governed by the armed conflict paradigm), is quite ambiguous. Furthermore, it is equally clear in the often confused and multifaceted context of non-international armed conflict that military forces can be as engaged in law enforcement operations as they are in combat operations, within the same territory. The Implementing Resolution clearly recognizes that military forces (for example, a special forces element) who are trained for domestic law enforcement operations such as hostage recovery from terrorists, could be also called upon to conduct a similar operation against a criminal gang which is not an organized armed group for the purposes of IHL, but which is (for example) exploiting the chaos attendant on the non-international armed conflict to take aid-workers hostage for profit. Were the Special Forces (SF) element to undertake this mission, it would clearly be a law enforcement mission, and thus the prohibition against use of flattening or

11. See Resolution RC/Res.5 Amendments to article 8 of the Rome Statute, preambular paragraph 7.



expanding bullets would not apply to that mission. The prohibition would however once again apply the next day, when the same SF element proceeded on an insurgent leader capture or kill mission.

However, the complexity is broader than purely military contexts. How, for example, does the prohibition work in situations where UN Civilian Police (CIVPOL) who are not traditionally characterized as combatants, are deployed into a non-international armed conflict context to assist with Rule of Law operations? Envisage a police detachment on a combined patrol, passing through a village with attendant military forces providing security and transport. The patrol is attacked by rebel fighters. Is the legal situation that the police officer can shoot the rebel with a flattening or expanding round in self-defence, whereas the soldier standing next to the police officer, who picks up the police officer's weapon and shoots the combatant rebel in response to an attack, governed by the Law of Armed Conflict (LOAC), has committed a serious war crime? Arguably yes.

## **5. Conclusion**

The prohibition on flattening and expanding rounds in non-international armed conflict is a rare example of where the drive to harmonize and humanize IHL has actually been forced to choose which universalizing project to pursue – harmonize or humanize. In this case, the drive to harmonize as between international armed conflict and non-international armed conflict has arguably over-ridden what the logical outcome of the drive to humanize would likely have aimed for. I think this outcome is a strong indication of the continuing vibrancy and relevance of the IHL project. The fact that a 111 year-old treaty-based prohibition is still considered unsettled enough with respect to some of its consequences that it has required, essentially, a formal statement of clarification by States – which is what happened in Kampala – is a most positive indication that IHL continues to evolve, and to matter. It is a sound illustration of the capacity of IHL to face, rather than ignore, new issues and new contexts relating to use of force within the IHL paradigm.



## **Thirty years of the 1980 CCW Convention. Where do we go from here?**

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The Convention on the Use of Certain Conventional Weapons (ccw) was adopted with three annexed Protocols 30 years ago. The Convention itself is an umbrella text with general provisions. The first protocol introduced a prohibition on the use of any weapon the primary effect of which is to injure by non-detectable fragments, the second protocol introduced restrictions on the use of land-mines and booby-traps, and the third protocol introduced restrictions on the use of incendiary weapons. The focus on use, and not production, of certain weapons means that we are dealing with International Humanitarian Law (IHL) provisions and not disarmament.

In a sense, the ccw system has been a diplomatic and humanitarian success story. The umbrella Convention has manifested itself as a living document of international law, with a capacity for adaptation to new circumstances. New protocols covering other types of weapons have been negotiated and adopted. In diplomatic circles the ccw system has created a lively activity with evaluations and reassessments. A review conference has extended the scope of provisions to cover also internal conflicts, the Protocol on Land-Mines has been amended to create a more ambitious regime, new protocols on blinding lasers and explosive remnants of war have been added. Follow up discussions are continuously going on, with informal meetings of experts and regular Conferences of High Contracting Parties.

Today the ccw regime is taken for granted but, thirty years ago, the whole project was very close to collapsing in the midst of a sudden crisis. At a certain point, in the last week of the UN Conference, there was an imminent risk that the international community would see years of negotiated results go down the drain.

I remember vividly those days of October 1980. I was present as a member of the Swedish delegation. Delegates knew that the most important Protocol of the negotiations, namely the one regarding incendiary weapons, was dependent on a change of the US position. The view of the United States was that only the narrow category of “flame weapons” should be restricted. This was considered totally insufficient by most delegations, and without a Protocol on Incendiaries there would be no Convention. It was not considered worthwhile. But the head of the US delegation had indicated that new instructions were possible. During the final session words actually came from Washington and the administration of President Jimmy Carter that a broader regulation was OK. Conference participants rejoiced. But – too early.

All of a sudden the Soviet delegation had problems. It could only accept restrictions on flame weapons. This was a total surprise to everyone outside the Eastern bloc. Earlier the Soviets had criticized the USA and NATO for not being humanitarian enough and now it was clear that they had hidden behind the back of NATO countries, hoping that the West would protect their own military interests. From a public relations point of view this revelation of false humanitarianism was a catastrophe. But the media still didn't know about it. The Soviet Head of Delegation asked for new instructions. In the nick of time a message was received from Moscow that it was OK to go ahead with the broad category of incendiary weapons. The Conference was saved. The CCW came about.

The full title of the Convention is somewhat long and awkward. It goes “United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects”. The references to “Excessively Injurious” and “Indiscriminate Effects” reflect criteria of customary law, implying that any text under the umbrella Convention that the parties have agreed upon will arguably, although not automatically, be seen as required by customary law.

This is important for assessing the value of Protocol I on non-detectable fragments. Although it could be argued that the Protocol is meaningless since no plastic bullets which in the human body escape detection by X-rays have ever been produced, it could also be said that the humanitarian message the Protocol conveys could be turned into a useful customary law argument in future discussions on other weapons with similar effects. So Protocol I has the capacity to serve as a watchdog for the future.

Protocol II on Land-Mines exists in two versions, the original one of 1980 and the more ambitious one, the Amended Protocol II of 1996. A

discussion has already started on whether it would be possible to terminate the 1980 Protocol and achieve universality of the Amended Protocol. This discussion will continue. Of the 12 countries which are parties to the original Protocol II but not to the Amended Protocol, 10 are said to be willing to adhere to the latter. A further transfer of parties is necessary if the original Protocol is to be terminated.

The existing Expert Group on Amended Protocol II (AP II) discusses these things continuously. It also discusses the matter of Improvised Explosive Devices (IEDs). They are improvised in the sense that remnants of war are used as ingredients in home made weapons, and this very often in situations linked to terrorism. The IED discussions will not necessarily result in proposals for new rules; it is basically a matter of implementation of some articles in AP II on protection of civilians.

The matter of naval mines is not covered by CCW but was discussed during the “tanker war” of the late 1980s. It could – and should – be discussed again in the future.

Protocol III on Incendiary Weapons has given rise to some different views and interpretations. It is important to analyse statements and arguments being put forward in this context. Parties to CCW should monitor the discussion and object to reservations on future options of use that deviate from the object and purpose of the Protocol.

Protocol IV on blinding laser weapons was adopted in 1995 during the initial phase of the Review Conference in Vienna. It is prohibited to employ laser weapons that are specifically designed to cause permanent blindness. The parties shall not transfer such weapons to any State or non-State entity. The latter provision goes beyond IHL and enters into the field of arms control. When the basic provision on non-use was adopted it could certainly not be said to be part of customary law. But when the ICRC published its study on rules in customary IHL ten years later (2005), it listed the anti-eye laser prohibition as customary law in Rule 86. The official Swedish IHL Committee has recently accepted and confirmed the ICRC position. The CCW, it turned out, through its Protocol IV, launched a rapid legal development.

After two years of intense negotiations the CCW parties managed in 2005 to adopt a Protocol V on Explosive Remnants of War (ERW). Some States had tried to limit the text to a political non-binding document, but the majority wanted to employ the by now traditional CCW method of adding one legally binding protocol to another. Protocol V is on the forefront of IHL, since it goes beyond the armed conflict situation and regulates post-conflict problems. The Expert Group on Protocol V will in

the future continue its discussion on how best to implement the different articles of the Protocol. This will be done under *inter alia* the following headings: Clearance, removal and destruction of ERWS, Victim Assistance, Cooperation and Assistance, and Recording, Retaining and Transmission of Information. The Expert Group will also address the issue of Improvised Explosive Devices (IEDs) to the extent they would fall under Protocol V.

The on-going Expert Group process with regard to Amended Protocol II and Protocol V shows that the CCW is a living and important instrument of International Humanitarian Law. The Convention has today 113 parties. Universality is constantly encouraged. Discussions are also progressing on a draft Protocol on cluster munitions, as a perhaps less ambitious parallel to the Dublin/Oslo Convention, in the same way as Amended Protocol II is a less ambitious parallel to the Ottawa Convention on anti-personnel landmines. Many States will not adhere to the Dublin/Oslo Convention since they feel it is too far-reaching in certain respects. A less ambitious CCW Protocol on cluster munitions would make it possible for such States to be part of an important IHL process, the successive outlawing of cluster weapons.

Are there any other issues that should be discussed in the future? During the 1979 session of the UN CCW Conference a resolution on small-calibre weapons was adopted. The resolution of 23 September 1979 should not be forgotten. The Conference invited Governments to carry out further research, and appealed to all Governments to exercise the utmost care in the development of small-calibre weapon systems, so as to avoid an unnecessary escalation of the injurious effects of such systems. Further research has been conducted in Switzerland. Time may soon be ripe for a Protocol VI or VII on small calibre systems. Time will tell. The next Review Conference will be held in 2011.

## **Arms control and International Humanitarian Law**

*Carlo Trezza*

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The humanitarian factor was the original motive that prompted the international community to engage in the field of disarmament and non-proliferation. Limitations and prohibitions of weapons which cause excessive sufferings or “unacceptable harm” both to warriors and civilians go back to antiquity. Restrictions on the types of weapons permitted in armed conflicts have existed for thousands of years, ancient codes of war prohibited means and methods of warfare considered inhumane. The attention was mainly concentrated on conventional weapons since, until the 20<sup>th</sup> century; they were the only weapons available. But even today humanitarian disarmament is principally focused on these weapons since they are the ones being used in current international and domestic conflicts and cause practically all the victims and sufferings. But the casualties and sufferings caused by chemical weapons during World War I were the determining factor that led to the Geneva Protocol of 1925 prohibiting the use of chemical/biological weapons in armed conflicts, thus opening the chapter of humanitarian disarmament with regard to weapons of mass destruction.

I shall not dwell on the various types of weapons prohibited by the Convention on Certain Conventional Weapons (CCW) which, with its five protocols, is the main “corpus” of humanitarian law dedicated to humanitarian disarmament. Another speaker has been asked to deal with this issue. Let me only say that such a fundamental body of legislation, which has the advantage of having been negotiated in a genuinely multilateral framework, is being challenged and superseded by complementary and competing negotiating processes developed by countries seeking higher standards in the field of humanitarian disarmament. This is mainly the case of the Ottawa Convention of 1997 on the ban of antipersonnel land mines, the provisions of which go beyond the norm on mines contained in the

ccw Protocol 2. The main feature of the Ottawa Convention is the prohibition of the possession, use, transfer and stockpile of a whole category of weapons which kill and maim civilians and military during periods which go well beyond the duration of the conflicts in which they were used. But another peculiarity of the Convention is that it was launched by a relatively small number of countries animated by a common desire of a more ambitious norm to be finalized within a time frame which was not achievable by a genuinely multilateral process. The Ottawa process was used as the main term of reference and precedent for the latest achievement in the field of humanitarian disarmament: the Oslo Convention on the prohibition of cluster munitions which entered into force on August 1 of this year. The type of weapons object of this Convention is different but most of the features of the new agreement are similar to the Ottawa Convention. The main difference is that, unlike the landmines agreement, which provides for a total ban, the Oslo Convention allows exceptions for some very specific munitions which are considered as not causing unacceptable harm. Like the Ottawa negotiation, the Oslo process was initiated by a small number (46) of likeminded countries and in both cases the entry into force was achieved in a relatively short time if compared to the longer period which is usually necessary to finalise an agreement in a genuinely multilateral framework. The other side of the coin, however, is that many of the international major players, the main possessors, producers and in some cases users of such weapons did not participate in the negotiating process. Countries like the United States, Russia, China, India, Pakistan and others have as a common denominator, namely, the fact that they have not adhered neither to the Ottawa nor to the Oslo Conventions. This is probably the main weakness of the two processes and makes universalization one of their main goals and challenges. Nonetheless, with 133 signatures and 156 ratifications for Ottawa Convention and 107 signatures and 30 ratifications for the more recent Oslo Convention, a critical mass of participation has been reached and the very existence of these Conventions has conditioned the behaviour even of countries which have not adhered to them. They would now be much more prudent before using or even exporting weapons which have been universally stigmatized through the two Conventions. Some countries accepted to adhere to the conventions without having participated in the negotiations.

The introduction of nuclear arms into the strategic equation after World War II changed the nature and the objectives of disarmament and arms control. The very existence of weapons of mass destruction and their possession by some States had an impact on the strategic balance and



obliged the international community to extend the arms control/non-proliferation discourse beyond the humanitarian factor. Chemical, biological and nuclear arsenals became a prime element of the disarmament agenda. The prohibition of use, prompted by humanitarian reasons, was inadequate to maintain the strategic balance: prohibitions had to be extended to production and possession and to include also destruction of stocks and verification. The ban on use contained in the Geneva Protocol of 1925 was therefore strengthened by the adoption of the Biological Weapons Convention of 1972 and the Chemical Weapons Convention in 1993 which provide both for a total ban. Both Conventions, but particularly the latter, are considered “success stories” since they prohibit, in a legally binding way, whole categories of weapons of mass destruction (WMDs). In the case of chemical weapons such a commitment is verifiable and implemented by a permanent international organization: the Organisation for the Prohibition of Chemical Weapons (OPCW), based in the Hague.

There is a tendency to put chemical/biological and nuclear arms in the same basket. However, nuclear weapons are different from many angles. There is first of all a juridical difference: unlike chemical and biological weapons, nuclear weapons are not totally prohibited. Moreover, although chemical weapons have been used in recent conflicts, they are no longer considered to have significant military value: they can kill people but, unlike nuclear weapons, cannot destroy military targets: weapons of terror rather than weapons of war. Negotiations on nuclear weapons have so far taken place for strategic reasons rather than on humanitarian grounds. However, the international community addressed the humanitarian issue notably on the occasion of the advisory opinion of the International Court of Justice of 1996 on the legality of the threat or use of nuclear weapons. The question of the compatibility of the threat or use with International Humanitarian Law was addressed. The Court unanimously indicated that the threat or use of nuclear weapons should be compatible with the requirements of the international law applicable to armed conflicts and to principles of humanitarian law; the use would be generally contrary to such laws. However, the Court could not conclude definitively whether the threat or use would be lawful or unlawful “in extreme circumstances of self-defence in which the very survival of a State would be at stake”. The Court also unanimously indicated the obligation to pursue and bring to a conclusion negotiations leading to nuclear disarmament.

No major evolution took place in the following years on this question; one may recall, however, that the so called “negative security assurances”, widely debated at the Conference on Disarmament and within the non-

proliferation of nuclear weapons (NPT) process embody the concept, which has humanitarian implications, that nuclear weapons should not be used against non-nuclear- weapons States. One may also recall the historic speech made by US President Barak Obama in Prague in April 2009 where the moral implications of the use of nuclear weapons were mentioned. The pro-active role of the UN Secretary General in promoting nuclear disarmament also deserves to be acknowledged. The International Committee of the Red Cross has consistently stigmatized the use of weapons of mass destruction in general and on April of this year, on the eve of the NPT Review Conference, the President of the ICRC, Dr. Jakob Kellenberger made a major public statement to the Geneva Diplomatic Corps, solely dedicated to nuclear weapons. He concluded with an appeal to seize “the unique opportunities now at hand to bring the era of nuclear weapons to an end”.

The objective, more and more widely shared by the international community, of a world without nuclear weapons, has humanitarian implications. Such an objective was consensually recognized in the Action Plan agreed last May at the NPT Review Conference in New York. The Conference also expressed, for the first time, deep concern “at the catastrophic humanitarian consequences of any use of nuclear weapons” and reaffirmed the need for all States at all times “to comply with applicable international law, including International Humanitarian Law”. The humanitarian dimension has thus been affirmed as an issue susceptible to further discussion. Its presence in the consensual part of NPT final document of last May is one of the significant conclusions of that Conference.

## **II. Deprivation of liberty in armed conflict and other situations of violence**



## **Current detention challenges faced by NATO**

*Sheila Archer*

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The topic I am speaking on today is current detention challenges in NATO operations. I will confine my comments to current NATO operations and will also limit my comments, for the most part, to the International Security Assistance Force (ISAF) mission and will not address other missions in any detail.

As a Canadian government lawyer it is important for me to provide the disclaimer that I am here to speak about NATO operations only; I am not speaking in a national capacity as a Canadian Officer of the Office of the Judge Advocate General and I am also not speaking as an official NATO spokesperson. I am here speaking in my own capacity only and the opinions that I offer are solely my own.

What I propose to do is to offer an overview to give you some context, so that the discussions of this afternoon with respect to the law that applies will actually have a background to be placed against. I will talk about the nature of NATO and how NATO's nature ensures that it is the NATO member nations, rather than NATO as an institution, that control what operations are undertaken, as well as how those operations are carried out. This national control is especially evident with respect to certain aspects and, particularly relevant for today's discussions, in the area of detention.

I realize that discussing the nature of NATO, how it comes to its decisions and how it carries out its operations may be very well known to some of you here, but there may be others who are not aware of how these processes take place. I believe that it is important for you to understand how those decisions are actually reached in order to appreciate the impact of that process, in particular, on NATO operations. You will then have a fact situation to place into the legal context that will be discussed this afternoon.

Knowing that NATO carries out its decision-making process by consensus is vital to understanding how NATO operations are actually

conducted. NATO is not a supra-national organization. Instead, it is an organization of 28 nations “flying in close formation”. It takes considerable effort to decide where and how that formation will fly. Each of the 28 nations that make up NATO has a representative that sits on the North Atlantic Council. The 28 nations in the North Atlantic Council decide if, when and how NATO operations are going to be conducted.

Each of the nations is bound by international law. They are also bound by their own national law and, furthermore, are affected by on-going court cases, judicial inquiries and other issues that often impact their national policies. They are also affected by the domestic political issues that arise in their nations while operations are on-going, including, of course, the loss of troops and other political issues, particularly the question of continuing support for on-going missions.

All 28 nations must be part of the consensus of the North Atlantic Council; any one of those 28 nations can, through breaking silence, effectively veto any decision on the operations that will be conducted by NATO. Alternatively, any one of them can suggest changes. In the end, they must all be part of the consensus.

It doesn't matter whether a particular nation will participate in a specific operation or not, they must still be part of the consensus. This is because NATO makes decisions as an Alliance and each member of that Alliance has an equal vote. So, each nation must be in agreement with what operations will be undertaken. This is understandable, since each of those nations has a responsibility to ensure that the national decisions it takes and its actions within NATO operations are in accordance with international law. In making these decisions and in participating in NATO operations, NATO nations do not lose sovereign rights or responsibilities. Rather, each nation has to be satisfied with respect to the legal under-pinning for each operation and, particularly if they are directly participating in the mission, that the details of what they will be tasked with in the operation comply with their own law and policies. As will be apparent to you from the process, NATO can only act when sufficient political will exists within the member states governments for it to do so.

The North Atlantic Council takes operational plans which have been proposed by military authorities, examines those plans and makes a decision as to whether or not NATO will conduct the operation. The North Atlantic Council will have to be satisfied that there is sufficient grounding in international law to underpin the operation before it will be approved. Changes to the operation can occur with time; changes to the operational plan also go before the North Atlantic Council for approval. Some changes

are significant and can involve fairly high intensity operations, such as the expansion into the south of Afghanistan. The North Atlantic Council also approves the NATO Rules of Engagement for each NATO mission. It is the only body that has the authority within NATO to authorize Rules of Engagement for NATO operations. Rules of Engagement are the authority, granted by the North Atlantic Council and based on international law, for NATO forces to use force in a NATO operation. Rules of Engagement dictate how much force can be used, and in what circumstances.

The result of these steps is that NATO Rules of Engagement can, in fact, be quite a bit narrower than what international law would actually permit. The basic rule is that Rules of Engagement can never be broader than the law but they are often narrower than the law.

Individual nations that are contributing forces to the operation in question will take the NATO Rules of Engagement and apply them to their forces. Those nations, having already ensured that the Rules of Engagement comply with their own interpretation of international law, will now also apply their national law and policies in the direction as to how their forces will carry out the operation. Some of these differences may be minor, while others may be more significant and may involve nations placing what are called “caveats” on the NATO Rules of Engagement. In this instance, the nation would take the Rules of Engagement that have been approved by the North Atlantic Council and then place further restrictions on what their own troops are able to do. No nation’s forces can use more force than what the North Atlantic Council has authorized but they can be further restricted.

However, despite what national differences might exist, all NATO nations participating in an operation may be painted with the same brush and may bear the brunt of controversy following an engagement, regardless of which nation actually conducted that particular tactical engagement. The outcome of that tactical engagement is often shared by all, for good or for bad.

I should also mention that NATO Rules of Engagement do not in any way infringe on any of the NATO member nations or their nationals to take action in self defence.

Now you can imagine, despite the agreement at higher levels, that it is when things are actually put into practice that the differences in national perspectives affect how missions are carried out. National interpretations of the law and also national policy limitations are respected, always staying within the bounds of what was authorized by the North Atlantic Council and complying with additional NATO standards that have been

agreed and that apply to the operation. There are differences in interpretation of self defence and there are also differences in which treaties nations are bound by and so on and so forth. But, in general, things proceed in a fairly predictable fashion, which is important since it allows NATO nations to operate effectively together. In order to do so, participants need to be able to anticipate how other participants will conduct operations.

Now the NATO decision making process may sound very disjointed. However, the fact that those decisions require consensus provides particular strength in terms of credibility and helps to ensure NATO cohesion when we do move forward. All of the NATO nations have signed up to the operation plan and to the Rules of Engagement and they are all part of that decision. They must act in accordance with their own legal requirements because they themselves, as nations, retain the responsibility to comply with international and domestic law. They are accountable for their decisions and how their troops carry out operations to both international and domestic audiences.

Most importantly, it is nations that actually have the ability to maintain international law standards through their authority to investigate and potentially punish those members of their own militaries who violate international or domestic law. Through this, nations control the action of their troops and ensure that the law is actually applied in the carrying out of the missions that their troops perform. It is not NATO which has that authority to punish, and therefore the real ability to directly control the conduct of troops. Rather, it is each nation which has the authority and the responsibility to do so.

Now I want to discuss detention in the context of ISAF in particular. I will not be dealing with detention in the context of NATO's other operations, particularly counter piracy, however. At the moment, NATO is waiting to conclude agreements that will allow transfer of suspected pirates to other states and therefore NATO is not actually detaining anyone within the counter piracy mission. Nations that participate in NATO missions, including counter piracy, may have the authority to detain individuals under their national rules, but at the moment it's ISAF where we see the predominant feature in detention in NATO operations.

In the ISAF context, NATO provides overall guidelines of how detentions are to be conducted in relation to that mission through ISAF Standing Operating Procedures. That document lays out expectations for the military units and commanders that are participating in NATO ISAF operations and does not apply to other military operations in theatre. It gives general direction on things that I don't think anyone in this room would



find controversial. Those directions pertain to standards for medical treatment, gender separation and so on and also with respect to the basic conditions in which individuals are to be kept. But the document is clear with respect to the fact that it is up to each participating nation to fulfil its responsibility to comply with international law and also, that it is the commanders of those nations that are to ensure that those legal responsibilities are met.

NATO, along with other actors in Afghanistan, communicates with the ICRC with respect to relevant information. But, although it assists nations, NATO does not take on national responsibilities and does not prevent or limit nations from fulfilling their responsibilities. The topics for today which I will deal with such as conditions, treatment and transfer are dealt with nationally in the context of the ISAF missions, albeit within certain expectations created by NATO. Again, as I said before, this process works because nations retain their responsibilities and are able to fulfill them through exercising control over their forces via disciplinary and other systems. It is nations that have the ability to ensure that standards are met by their personnel that are in Afghanistan.

Now, the aims of NATO in the ISAF mission include defending NATO states from further attack and to assist the Government of the Islamic Republic of Afghanistan to extend its control through the country. NATO also aims, of course, not to allow a safe haven to exist or to be created in Afghanistan that would imperil NATO nations.

There are many connected tasks in relation to these aims as I am sure you can imagine, and the NATO forces that are participating in the ISAF missions do have the ability to use force, significant force including deadly force in some circumstances, in order to accomplish those tasks. With respect to detention, NATO forces can detain for self defence, they can detain for force protection and they can detain in order to accomplish their mission. While there is much debate over the nature of the conflict in Afghanistan, setting the common Article 3 standard as a minimum standard for treatment is certainly something which I do not believe there is much debate about, particularly in relation to the international side of the conflict involving international troops. It is, of course, in ISAF's interest as well as nations that are participating to ensure that those standards are met. The intention is that these standards should help to facilitate the return to peace and also assist the Government of the Islamic Republic of Afghanistan in exercising control over its territory.

The responsibility sits squarely in each participating nation's basket to give direction, within the boundaries of the NATO approved Rules of

Engagement, as to how their troops will conduct detentions; it is their troops that will actually make the decisions of whether to detain an individual or not in the course of operations and who will deal directly with that individual once detained. Along with the right to detain goes the right to search and disarm those detained and to collect evidence. This situation may present some interesting legal issues in the future as the mission progresses and as the Afghan courts became more developed and Afghan authorities seek more evidence to use in prosecutions. However, soldiers are not policemen and they are not experts in collecting evidence. Furthermore, collecting evidence at the scene of a military engagement is not always an easy task. On the contrary, a post-engagement location is often a very risky place and it is not always possible to collect the evidence, assuming that there is evidence to collect. Quite apart from any other legal issues relating to what might be appropriate military tasks or not, from a practical perspective, any real assistance will require an understanding of what would be admissible and the requirements of control over the evidence so that it could actually be tendered in court would have to be developed. Evidence collection is an issue that we will have to address further; we are making efforts, but it is a challenge.

With respect to detainees themselves, nations retain the obligation to notify the ICRC. Regardless of the involvement of NATO at the in-theater level, reporting to the ICRC is a national responsibility. It is also a national responsibility to address how and where detainees are to be held, although the facilities are open to ISAF and to the ICRC. General treatment of detainees is also a national responsibility, although some general guidelines are provided in the Standard Operating Procedures on such matters as what type of food is to be provided, who is permitted to question detainees, what type of medical treatment is to be provided and so on.

Transfer of detainees is currently the most difficult issue of all matters concerning detainees. We have dealt quite effectively with most of the issues in relation to treatment; however, the issue of transfer, in circumstances like those that exist in Afghanistan, is very challenging. Some nations do have bilateral arrangements and NATO has an overarching aim with respect to how long detainees will be held before transfer. But, fundamentally, transfer is a bilateral issue and nations have the responsibility to ensure that individual detainees are going to be transferred in circumstances that actually meet the treaty requirements of the nations involved.

Existing bilateral arrangements generally provide details of access, opportunity for further interviews, where detainees might be held, what

kind of records need to be kept and what kind of notification of movements or restriction on further movements are in place, as well as a restriction on the imposition of the death penalty. By their very existence, these arrangements support and recognize the sovereignty of Afghanistan which, of course, has the jurisdiction to investigate and conduct domestic criminal processes against those in their nation who have, in effect, committed an offense within Afghanistan. This is tricky, as I say, because the individual nations who have taken a detainee must be satisfied that their legal obligations are met before they can actually transfer that individual. Any concerns that might exist with respect to potential mistreatment must be addressed before any transfer can be carried out.

There are other, underlying questions that must be considered as well. For example, the institutional capacity or willingness as well as the simple physical capacity to continue to detain someone who is to be transferred are relevant. Clearly detainees would not be transferred if the would-be gaining institution did not have the physical capacity to hold them. But, there are other issues as well, including many anecdotal tales of what we would call “catch and release”, where someone is detained on good grounds, transferred and then, despite the fact that there appears to be considerable evidence against them, is released. Certainly, the state of Afghanistan can choose not to prosecute if it believes that it is not appropriate to do so, and it would not be appropriate to question those decisions. However, there also appears to be, at least in some cases, a concern with respect to the fact that it’s not a question of the amount of evidence available, but other factors that are in play.

There are also questions with respect to pure capacity to prosecute from the perspective of Afghanistan having a sufficient number of judges and prosecutors who can actually do the job, and whether their safety is sufficiently guaranteed in order to expect them to be able to carry out those tasks in the circumstances. This brings me back to the risk of collection of evidence, given the question of whether cases are going to proceed or not, and whether there will be evidence available to support those prosecutions in any case.

Finally, there is the issue of whether or not those detained are able to be prosecuted in a timely fashion. This can be very difficult to do so, particularly if the record keeping is poor and if there is an insufficient number of judges and prosecutors. Various bilateral efforts have been and continue to be made to try to address capacity issues, in many different provinces and by many different governments and other organizations. One current approach that is particularly interesting is being conducted within a bilat-

eral arrangement between the US and Afghanistan. This ‘judicial complex’ is outside the context of ISAF. It is an overarching attempt to build physical capacity, safety for judges and prosecutors, rehabilitation of those convicted and to use certain aspects of Afghan culture to assist in the process of releasing individuals when appropriate. It takes time to build these types of institutions, of course. In the meantime, NATO operations continue to help foster security in Afghanistan, particularly through assistance in developing the Afghan National Security Forces.

In summary, NATO’s nature, which requires consensus, affects how NATO decisions are made. NATO’s nature affects how NATO operations and NATO Rules of Engagement are actually implemented in a mission. NATO operations and Rules of Engagement operate within the boundaries of the law, but are often much narrower than the law would allow. NATO’s nature puts the responsibility on nations participating in NATO operations to fulfil their responsibilities under the law and the nations put the onus on their commanders to fulfil those responsibilities. While there are some variations with respect to interpretations of international law and self-defence between NATO nations, in general, NATO operations move forward, with minor “course corrections” as required by changing circumstances. The challenge is not so much to gain a consensus on the standards that should be applied by NATO nations, but rather, how we can address the issue of capacity within Afghanistan. Specifically, how NATO and NATO nations can best assist Afghan authorities to meet existing legal obligations in the very difficult circumstances that exist, while continuing operations and helping to enhance the sovereignty of Afghanistan.

## **Current detention challenges from a national perspective**

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I have to start by saying that I am not here to represent the British Nation.

As a result of some quite high profile disagreements between senior members of the British Armed Forces and the Government, I am severely restricted in going, as it were, “off piste” from my presentation, and therefore I am somewhat confined in how I can engage in any further discussion.

I will try to analyse some concrete cases underlining some aspects concerning the power of armed forces to detain people usually for reasons connected with security. The UK courts have taken the view that the concept of this is basically antithetical to most democracies, and therefore requires very clear and strong justification, which they have usually described as requiring a threat so great to the stability of a nation that use of internment is unavoidable. Most of what I am going to talk about are allegations of failure of British Forces to get up to the correct standard of treatment required of the law. But I shall start by making just two points on the side.

First, it’s certainly my experience that most British Commanders want to avoid detention when at all possible and there is a sort of default position in the British Army in practice that they try to avoid it.

Secondly, in many respects military Commanders usually want to go further than what a law normally has as its base line. To give you one example, the Fourth Geneva Convention applicable in Iraq under Article 78, requires a six-monthly review of the decision to detain. Six months actually is a long time and although there’s a legal requirement the reality was that reviews took place a lot more frequently.

In Iraq, the main legal challenges to the British involved three main areas. First, there were aspects relating to the authority of the UK forces to

detain, apparently to support the maintenance of security. Secondly, in relation to the actual treatment of those who were detained, and lastly the transfer to Iraqi authorities for prosecution of people we detained by British forces.

In Afghanistan so far, the legal issues with which we have had to grapple concern the extent of UK obligations to ensure that those in fact transferred to Afghan criminal authorities do not face torture or inhuman treatment.

I'm not going to summarize the legal regimes that apply to Iraq at the various stages of the whole process from the initial invasion to when the departure took place. But I want to start with one of the most interesting cases that came out of the entire conflict, which was the Al-Jedda case (*Al-Jedda v Secretary of State for Defence*) which took place in the English Courts in 2007, relating to a detention in Iraq in October 2004 and which was justified by the British Government under a UN resolution. The individual concerned was suspected by the British authorities of being personally responsible for recruiting terrorists outside Iraq with a view to the commission of atrocities inside and for facilitating the travels in Iraq of identified explosive experts who were terrorists and two other conspiracies. I would emphasize that, by the very nature of the detention operation, those allegations were not tested and they were denied.

The issue that arose in the English Courts was that Article 5 of the European Convention on Human Rights (ECHR) in effect prevents detention because it provides the circumstances in which a person's liberty can be taken away obviously following a trial; in these circumstances it is not allowed detention according Article 5. The Government's position was that Article 103 of the United Nations Charter provides that, where there is a conflict between the obligations of the members of the UN under the Charter and their obligations under any other international treaty, then the obligations under the Charter prevail.

The argument on behalf of Al-Jedda was that there is no conflict between Article 103 and the ECHR because the British state was not under an obligation to detain but chose to do so, therefore, there's no conflict. The English Courts rejected that argument and decided that there was in effect a conflict between the two. The English courts took the view that Articles 2 and 25 in the UN Charter effectively require the UK, for interests of security, to enforce detention where it's necessary for those purposes. Although there was that conflict, they took a view that in effect the UN Charter did trump the ECHR to that extent only.

The most difficult case, in political terms, was the case which actually preceded the Al-Jedda case; the Al-Skeini case (*Al-Skeini and Others v the*

*United Kingdom*) which concerns aspects of the treatment of detainees and the extent to which additional requirements are impinged upon UK Forces, over and above the ordinary Law of War and under Article 2 of the ECHR. In the Al-Skeini case the Courts in England dealt with the situation of six quite separate incidents, and the issue they had to decide was whether or not the ECHR applied and what would be the effect in this case. The case concerned the deaths of six Iraqi civilians in Basra in 2003. Five of the incidents were situations where people were killed by British Forces in the course of patrol operations. The sixth was a dreadful incident concerning an individual who was detained by British Forces and died in the hands of British troops in a military base. The courts decided that the five people who were shot in incidents involving engagements with the British Army were outside the jurisdiction of the ECHR. But, as far as the Baha Mousa case was concerned, there was no issue. He was subject to the ECHR protections. Now the relevance of that is, considering the practical aspects, the compliance with the right to life according article 2 of the ECHR.

The investigation into that incident was conducted by the Military Police. The issue that was raised was that the investigation, as conducted by the Military Police, was not independent and that none of these issues would have arisen but for the application of the ECHR to that situation.

The UK responded by holding a public enquiry. Interestingly, the case went to the European Court of Human Rights, on the central question of whether or not the UK has carried out a sufficient independent investigation. Of course it will be a nightmare for the UK if it is decided, for one reason or another, that the Military Police investigation is insufficient.

There is another case, not dissimilar in principle from the previous, which shows some of the practical complexities in this field: the Al-Sweady case (*Al-Sweady & Ors, R (on the application of) v Secretary of State for the Defence*). This case arose “on the battlefield” when a Scottish unit of the British Army came under attack on 16<sup>th</sup> May 2004 from what we would call insurgents. Following the attack, it is alleged that, although the British say that all the individuals brought back to barracks were already dead, which was done for the purpose of identifying those who may have possibly been involved in other incidents, the allegation was made that no, these individuals were alive when they returned into custody (effectively being detained), and that during the period of detention were subjected to various forms of serious abuse.

The interesting point about this case is, from a practical perspective, that the English civilian police were asked, after the Military Police had conducted an investigation, to also conduct an inquiry. The point is that if

they did not there would not have been an independent investigation. The English Police refused and the number two at Scotland Yard basically said he couldn't see any basis to investigate.

However, once again we are going to have a public enquiry, and what seems to be happening at the moment, in relation to cases where we have detained in Iraq, is that because of the application of the European Convention to detention situations and where there are allegations of abuse, there will always be some form of independent investigation outside those conducted by the Military Police. You can't compel the civil police to do this if they don't want to. You are then in a position where you have a public enquiry involving the devotion of huge resources and which takes many months, if not years, to conclude. We have at the moment a disease called 'public-enquiry-itis'. We have so many public enquiries going on into Iraq that we are almost over doing it.

I mentioned that the Courts have held that, when somebody is under control in detention, the ECHR applies. In the Tarek Hassan case – a transfer case, I mentioned at the beginning that this was the third element in Iraq, the transfer to Iraqi authorities for prosecution of people detained by British forces – Hassan was transferred from the British to US Forces, having been recently detained by the British troops, and was subsequently found dead in what was alleged to have been potentially unlawful circumstances. The question was: is the UK accountable? The English Court said: "no".

Perhaps, the strangest case, from our perspective, was the *Al-Saadoon and Mufdhi v. United Kingdom case*. In this case, the applicants in Iraq faced the prospect of the death penalty if convicted of the murder of two British servicemen, and they were held for a number of years, and then transferred to the Iraqi Courts for trial. The argument was raised, first of all by the English Courts. They could face death penalty and therefore the UK was in breach of Article 2 of the European Convention on the right to life. The UK Court took the position that, in this case, UK did not really have any option but to hand them over because we are a foreign nation in someone else's country and they can compel us to do what they wish. The European Court, however, overruled the UK Courts and said that British forces were in breach of their duties. The current position is that the UK has applied for the matter to be elevated to the Grand Chamber of the European Court.

In relation to Afghanistan, I would just mention the case, which is quite an interesting case, of Maya Evans. (*Maya Evans v Secretary Of State for Defence*). A peace activist who in 2009 tortur. he was claiming



that in Afghanistan the UK Forces hold someone for no longer than 96 hours before handing that person over, as fast as possible, to the Afghans for trial.

She argued that there is evidence, which the Court accepted, that there had been instances of torture and mistreatment by the Afghan authorities of detainees in Afghan prisons and that the British Army was therefore in breach of its international obligations.

The Court, however, accepted the Secretary of State's position that there was no significant problem with the UK policy. The policy of the Secretary of State was that we would not hand over if there was a risk, and in his view there was not a risk. The Court made an assessment on a case by case basis and looked at the circumstances in which an individual was being transferred and they decided that in respect of two facilities where transfers were occurring there would not, in their view, be a breach of UK requirements, because sufficient guarantees in their opinion existed. However, the Court considered that in a third case there might be, the British authorities had suspended transfers to this facility.

From a practical point of view, I would say that the decision to impose upon the UK the ECHR has probably produced some unintended consequences for UK Forces in the development of public enquiries and the threat to the continued use of the Military Police.

Although, one issue currently being debated within the UK Forces is to make the Military Police totally independent of the chain of command, it is interesting to see whether or not that would satisfy an international tribunal.



# Legal basis of detention and determination of detainee status

*Marco Sassóli*

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## 1. Introduction

Let me first begin by thanking the organizers for their kind invitation to talk about the important issue of the legal basis for detention and determination of detainee status. In my *exposé*, I will focus on the main legal problems that this question raises, without going into detail about the specific requirements under human rights law for lawful detention, an issue that will be addressed by Oscar Solera, who will speak about the very requirement of a legal basis for detention under human rights law. Françoise Hampson will tackle more in detail the issue of detention review and Jelena Pejic will consider closely the fair trial rights in armed conflict. My presentation can, therefore, at best be an introduction to theirs.

I shall nevertheless inevitably refer to international human rights law in so far as it is the *lex specialis*, i.e. the law applicable to a specific issue in a certain situation. Indeed, my topic mainly boils down to the question of whether International Humanitarian Law or human rights law is the *lex specialis* when it comes to the legal basis of detention and the process by which the status of detainees is being determined. The answer may vary according to the nature of the conflict and categories of detainees.

## 2. Detention and determination of status in international armed conflicts

### 2.1. Prisoners of war

In international armed conflicts, prisoners of war can be detained on the sole basis of the Third Geneva Convention (CGIII)<sup>1</sup>. “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy” are prisoners of war, Article 5 CGIII requires that such persons be presumed prisoners of war “until such time as their status has been determined by a competent tribunal”. In other words, Article 5 establishes a presumption in favour of the status of prisoner of war in so far as the person has committed an act of hostility. Whenever one claims to be a prisoner of war, IHL is the *lex specialis*.

Interestingly enough, the Geneva Conventions are silent with regard to the person who claims *not* to be a prisoner of war. This silence is certainly due to the assumption, historically valid, that the prisoner-of-war status is the most advantageous one that may be afforded. Does it still stand true? It is today apparent that the status of prisoner of war goes hand in hand with the disadvantage of being detained for an indefinite period of time<sup>2</sup> and of being stripped of the right to judicial review. In the specific case that a person claims not to be a prisoner of war, the answer to the question how he or she may raise this claim may lie in human rights law. Accordingly, the one who denies being a member of the enemy armed forces could challenge the determination of his/her status before a competent tribunal, because such determination implies a decision about the legality of the detention of the person concerned. Such a right to a *habeas corpus* determination is considered as non-derogable under human rights law<sup>3</sup>. In fact, this solution would not be too unrealistic as regards the practice of states in international armed conflicts. During the conflict between Iraq and the United States (US), courts would certainly have accepted to listen to such claim whenever someone was arrested in California.

1. Art. 21 of Geneva Convention III.

2. Until the «cessation of active hostilities», Art. 118 of Geneva Convention CIII.

3. See at least for the American Convention on Human Rights *Habeas Corpus in Emergency Situations (Arts 27(2) and 7(6) of the American Convention on Human Rights*, Inter-American Court of Human Rights (1987) Series A, No. 8, and for the International Covenant on Civil and Political Rights, ‘General Comment 29’ (24 July 2001) in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (2004) UN Doc HRI/GEN/1/Rev.7, UN Doc CCPR/C/21/Rev.1/Add.11, para. 16.

## 2.2. Civilians

Under the Fourth Geneva Convention (GCIV), civilians may be detained for two reasons: first, for imperative security reasons; second, for having infringed penal legislation (domestic legislation or laws enacted by the occupying power). In what follows, I shall refer to the first category as “civilian *internees*” and to the second as “civilian *detainees*”.

Let us first consider the civilian internees. Most scholars contend that the legal basis for the internment of civilians is found in the GCIV itself. I do not share this view. Art. 78 GCIV permits to intern civilians for security reasons indeed, but it also explicitly requires that “decisions regarding such [...] internment shall be made according to a regular procedure to be prescribed by the occupying power”. Israel issued a military order in the Palestinian territories to intern or detain civilians. It follows that Israel does not hold the GCIV as an adequate legal basis in this respect. Therefore, in my view, the occupying power has a positive duty to provide a legal basis for internment of civilians in occupied territories.

The same can be said as regards the periodical review of the decision leading to the internment. Art. 78 GCIV provides that this review shall be carried out “by a competent body set up by the said Power”. The requirement of “a *competent* body” obviously refers to domestic law (or law enacted in occupied territories).

The question whether there is occupation as from the invasion phase is controversial. I would say that there is occupation as soon as invading forces arrest and detain a person for security reasons. The problem is that they would generally not be able to act according to legislation at this preliminary stage. Legislation enacted by the detaining power afterwards would not be retroactive though. Indeed, the internment of civilians is justified by future security threats, not by their past behaviour. Therefore, the military order adopted by the occupying power when consolidating its authority and control over the territory would not be considered as retroactive as regards internments of civilians during the invasion phase.

The detention of civilians facing trial – the civilian detainees – raises similar questions. In case of a breach of penal provisions enacted by the occupying power<sup>4</sup>, the accused may be detained in view of a trial and as a consequence thereof. According to Art. 66 GCIV, the accused would be tried by military courts “properly constituted” by the occupying power.

4. Under the conditions of Art. 64 GCIV.

Thus, the legal basis for the detention of civilians lies in laws enacted by the occupying power (in occupied territories). As for enemy aliens tried on the same territory of a party to the conflict) any pre-trial-detention must obviously be based upon domestic legislation. In both cases, whenever someone is detained in view of criminal prosecution and punishment, he or she must be brought before a judge. There is no such rule in International Humanitarian Law; only in human rights law, which constitutes in my view the *lex specialis* in this respect.

### **3. Detention and determination of status in armed conflicts not of an international character**

International Humanitarian Law applicable to non-international armed conflicts contains detailed rules on the treatment of the persons deprived of liberty<sup>5</sup>, but nothing on the legal basis and the permissible grounds for detention. Since the law reputedly considered as the *lex specialis* in time of armed conflict, that is, International Humanitarian Law, is silent on this point, one should consider human rights law as the *lex generalis* (or call it the *lex specialis* in this respect).

Yet, this logical conclusion contradicts the current tendency to regard international and non-international armed conflicts as similar in kind. According to the Interpretative Guidance of the ICRC on the notion of “direct participation in hostilities”, those who have a “continuous fighting function” in non-international armed conflicts are not civilians and may be targeted, as combatants are in international armed conflicts. Even though the ICRC clearly stated that this reasoning does not affect the admissibility of detention but only the conduct of hostilities, the United States argues that “who is targetable is also detainable”<sup>6</sup>. This statement is neither totally absurd nor absolutely logical. May I remind you that if a member of a police force is attacked by firearms, the criminal may be targeted in response but not detained without further proceedings. Targeting and detention do not necessarily share the same consequences.

5. Art. 3 common to GC; Arts. 4-6 Additional Protocol II.

6. See for the Obama administration See US District, Court District of Columbia, *In Re: Guantánamo Bay Detainee Litigation, Respondents' Memorandum Regarding the Government's Authority Relative to Detainees Held at Guantánamo Bay*, Misc. No. 08-442 TFH (2009), [www.usdoj.gov/opa/documents/memo-re-det-auth.pdf](http://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf) (last accessed 30 December 2010).

The real issue is whether we should make an analogy between international and non-international armed conflicts. There are reasons in favour of the analogy and, I believe, at least equally strong, if not stronger, reasons against it.

### 3.1. *In favour of the analogy*

The first argument in favour of the analogy is to consider that non-international armed conflicts are as deadly as international armed conflicts are. Indeed, certain internal conflicts were almost similar to international ones. Was there a substantive difference in security, military and humanitarian terms between the non-international armed conflict in Sri Lanka until 2009 and the international armed conflict between Ethiopia and Eritrea from 1998-2000? The analogy between both would confer as much protection to victims of non-international armed conflicts as those qualified as international.

Another argument in favour of the analogy is to think in terms of practicability. If rules were the same in international and non-international armed conflicts, the task of practitioners would be facilitated (and the law student's exams easier!). In my opinion, however, this reasoning would only be acceptable as regards targeting and not in the field of detention. Indeed, targeting is a matter for soldiers, while detention is an issue for judges. I believe that a judge should be able to distinguish between international and non-international armed conflicts, even though the classification of "mixed conflicts" can turn out to be highly complex (Lebanon in 2006 for instance).

Finally, there is an argument in favour of the analogy that specifically concerns detention. Art. 3 common to the Geneva Conventions encourages parties to non-international armed conflicts to agree to "bring into force [...] all or part of the other provisions of the Geneva Conventions". It follows that parties to a non-international armed conflict are susceptible to apply the provisions of the CGIII related to the prisoner-of-war status and treatment. Since Art. 6 CGIII forbids that special agreements concluded between the parties to the conflict be at the disadvantage of the prisoners of war, the full (or partially) application of the law of international armed conflicts cannot be considered as being to the detriment of the persons concerned.

### 3.2. *Against the analogy*

Important reasons stand nevertheless against such an analogy because non-international armed conflicts are fundamentally different from international armed conflicts.

Armed groups are less organized than members of a state's armed forces and then less able to implement and respect International Humanitarian Law. Members of armed forces are formally incorporated or dismissed into a state's army. Members of armed groups are not openly affiliated to the group, whereas members of regular armed forces would not pretend that they are not soldiers. In this context, the determination whether a person is actually a member of an armed group is a question of paramount importance. Once more, we shall distinguish between the conduct of hostilities and the treatment of the persons deprived of their liberty. Indeed, if such determination is unrealistic in the conduct of hostilities, where the decision to fire or not must be reached within seconds, it is a realistic aim with regard to the lawfulness of detention. The very fact that determination is required in non-international armed conflicts in so far as it is realistic precludes the reasoning by analogy, because it is only if the rules on prisoners of war are not applied by analogy that a judge will have his or her say.

In addition, it is not as easy as for an international armed conflict to determine when a non-international armed conflict ends. Prisoners of war have to be repatriated at the end of active hostilities. When does this moment in time arise in a non-international armed conflict? In international armed conflicts, the end of the war is often clearly known because there is a peace agreement or a cease-fire. But when does the non-international armed conflict in Colombia end up? When the last rebel in the jungle surrenders? In Afghanistan, until the last Taliban declares the he loves America and is in favour of a liberal western state?

## **4. Is human rights law as the *lex specialis* realistic in armed conflicts?**

During my *exposé*, I made reference to human rights law each time that humanitarian law did not provide a specific answer. The question remains whether this reasoning is realistic. If the *lex specialis* approach is found to be unrealistic, it is useless. Indeed, unrealistic rules do not protect anyone. Worse than that, they may have a contagious and pernicious effect on the



other rules, which are realistic, but risk to be equally disregarded as belonging to an impracticable regime.

Consider the situation in Afghanistan: except for the Italian *carabinieri* or the French *gendarmes*, soldiers are not trained to arrest someone according to the procedure prevailing in peacetime. They would not ensure that they have evidence necessary for enabling the judge to assess the lawfulness of the detention. Yet, the right to *habeas corpus* would be of no relevance if the person concerned was not to be given the opportunity to contest evidence brought against him/her. Françoise Hampson shall discuss this issue in detail.

Nevertheless, I should like to mention that the requirements of the right to *habeas corpus* are certainly different under human rights law and US domestic law. I am convinced that a human rights court would take into account the difficulties to collect evidence on the battlefield. It follows that, with a flexible interpretation of human rights law, anyone should be entitled to the right to *habeas corpus* whenever he/she contests the determination of his/her status. It is indeed essential that third persons be able to confirm whether he/she was a “bystander”, a taxi driver or a member of the Taliban.

Another way of reasoning would be to apply by analogy the *régime* related to the civilian internees whenever the determination of status is contested or controversial. This *régime* consists notably of a right of appeal and a periodical review. In line with this argument, the Inter-American Commission on Human Rights acknowledged in the Bernard Coard case that under human rights law interpreted in light of International Humanitarian Law as the *lex specialis* it is sufficient that a quasi-judicial body proceeds with such determination<sup>7</sup>.

Finally, I should like to make a few remarks as regards the application of human rights law to armed groups. First of all, in non-international armed conflicts, armed groups must be taken into consideration in order to have them comply with the rules. There is also the difficult question of whether armed groups are bound by human rights law or by humanitarian law only. The answer may not only depend on the validity of the legal argument but also on the feasibility of implementation of the rules by armed groups. Would they be able to institute *habeas corpus* proceedings or to constitute a court? If they are not, we should not interpret the law as

7. See *Coard v United States*, Case no 10.951, Report no 109/99, IACCommHR, 29 September 1999, para. 58.

requiring them to do so, otherwise we undermine the credibility of international law in their eyes.

### **5. UN Security Council resolutions are an insufficient legal basis for detention**

I shall conclude by being provocative: contrary to what has been stated by most scholars, UN Security Council resolutions do not suffice as legal basis for detention. Even though its resolutions have the authority conferred to them by Arts. 25 and 103 of the UN Charter, they simply do not state explicitly that people may be arrested and detained.

In other words, the authority to detain cannot be inferred from Security Council resolution, even from an authorization of the recourse to force. Except for prisoners of war, the detaining power must act on the ground on a legal basis, that is, domestic legislation. As for the determination of the status of the detainee, the Security Council resolutions do not provide any answer with regard to the question, which lies at the very heart of my topic: what is the *lex specialis*? This question must be asked in each and every situation in which Humanitarian Law fails to offer a clear and realistic answer.

# The crime of torture

*Manfred Nowak*

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## 1. Absolute prohibition of torture and ill-treatment

The prohibition of torture is one of the very few absolute and non-derogable rights, under both human rights law and International Humanitarian Law. It means that it applies under all circumstances, without any exceptions. The only other right that falls under this category is the prohibition of slavery. Both torture and slavery constitute a direct attack on human dignity, and their prohibition is to be found in human rights law, like in the International Covenant on Civil and Political Rights (ICCPR) and in the Convention against Torture (CAT); and also in major regional treaties. It is also present in International Humanitarian Law, under Common Article 3 and various other provisions of the Geneva Conventions concerning both international and non-international armed conflicts. Jean Pictet affirmed that humane treatment and dignity are a light motif of the Geneva Conventions; the ICTY, referring to the first Special Rapporteur on Torture, Peter Kooijmans, stated that the prohibition of torture is customary international law and *ius cogens*. Looking at all those provisions, it becomes clear, although the terminology is somewhat different, that we have to distinguish three different types of ill-treatment.

## 2. Three types of ill-treatment

### 2.1. Degrading treatment

The least severe type of ill-treatment, degrading treatment under human rights law, and degrading or humiliating treatment or outrages

upon personal dignity under International Humanitarian Law, means the infliction of pain with a particularly humiliating and insulting effect. The severity of the pain is not a criterion, but there must be a specific degrading element. The facts of being forced to perform subservient acts, forced nudity, or slapping constitute examples of degrading treatment.

In *Tyrer v. the United Kingdom*, the European Court of Human Rights considered that the decision of a juvenile court to punish a boy on the Isle of Man with three lashes, a light form of corporal punishment, was a degrading treatment. There are many other examples of cases amounting to degrading treatment, both in International Humanitarian Law and human rights law.

## 2.2. *Cruel and inhuman treatment*

Cruel and inhuman treatment is present in human rights law treaties, such as Article 7 ICCPR and Article 3 ECHR, and, although some times only referred to as inhuman treatment, it has a similar meaning under both International Humanitarian Law and human rights law; namely, the infliction of *severe* pain or suffering, a feature distinguishing it from degrading treatment, but without certain aggravating circumstances which only apply to torture. This is the case for example of excessive use of force outside detention, prolonged solitary confinement or incommunicado detention, and also harsh and inhuman prison conditions both under International Humanitarian Law and human rights law if negligence is involved. The severity of the pain or suffering is not a distinguishing criterion despite the case-law of the European Court since the Northern Ireland case.

## 2.3. *Torture*

Acts of torture require additional aggravating circumstances compared to cruel and inhuman treatment, i.e. intention, a specific purpose and the powerlessness of the victim. Torture, which is the deliberate infliction of severe pain or suffering, whether physical or mental, cannot be inflicted by negligence.

#### 2.4. *Distinction between international humanitarian and human rights law*

The main purpose of torture is to extort information or a confession, as per provisions set under both human rights law and International Humanitarian Law. In human rights law, Article 1 CAT states that the purpose is a decisive criterion, distinguishing torture from cruel, inhuman treatment. It also includes intimidation and discrimination as specific purposes. Article 1 CAT makes it clear that in any case, torture cannot be perpetrated without any purpose. In International Humanitarian Law, Article 74 of the Third Geneva Convention clearly refers to the purpose of torture, as do the ICRC Commentaries as well.

In the ICC Statute, however, the purpose element only applies for the war crime of torture, as set in Articles 8(2)(a)(ii) and 8(2)(c)(i), and not for the crimes against humanity, defined in Article 7(1), for which the purpose element has been left out. Furthermore, it is understood from the Elements of Crimes that a purpose is not required for an act of torture to qualify as such. This provides for a broader application of the crime of torture, and allows somebody to be held accountable for torture without any purpose, but it also means that the distinction between torture and inhuman treatment is blurred. The reason why the purpose element was left out in the Elements of Crimes under torture as a crime against humanity seems unclear and could perhaps be an issue for discussion later.

An additional element distinguishing an act of torture from cruel and inhuman treatment is the fact that torture can only be inflicted on a powerless person. It becomes clear from the purpose and the *Travaux Préparatoires* of Article 1 CAT that the victim has to be “in detention” or “under the direct control of” the torturer. But the custody or direct control is explicitly required under International Humanitarian Law, such as in Article 7 (2) (e) of the ICC Statute. I, therefore, conclude that the element of powerlessness (custody and other forms of direct control) is present in both International Humanitarian Law and in human rights law.

Under International Humanitarian Law, torture can be perpetrated by both state actors and non-state actors, whereas human rights law traditionally only applies to state actors. Article 1 CAT explicitly states that the involvement of a public official, at least by acquiescence, is a determining criterion, which means that non-state actors such as rebel groups are not directly held accountable under human rights law. However, there is a certain trend in international jurisprudence, as Marco Sassoli already mentioned, to hold states accountable for acts perpetrated by non-state

actors. In my function as UN Special Rapporteur on Torture, when dealing with female genital mutilation (FGM) or domestic violence, in many countries I held governments accountable by acquiescence, if they were not taking any kind of meaningful measure under the due diligence principle. This was a major issue as well when the Convention on Enforced Disappearances was drafted in the early years of the 21<sup>st</sup> century, since it was drafted on the model of the CAT. We had very long discussions on whether or not we should again define enforced disappearances only in relation to states. Finally, a compromise was found by defining such disappearances in the traditional way but adding the obligation of states also to criminalize enforced disappearances in relation to non-state actors. In fact, the situation would be very strange if states only had an obligation to criminalize disappearances by state officials, and not by private groups, terrorist groups and others.

We can therefore observe that the differences between International Humanitarian Law and human rights law regarding the definition of torture on the one hand, and CIDT on the other hand, are very minimal and do not require any further interpretation as to what type of international law applies in a situation of armed conflict.

### **3. International Criminal Law**

#### *3.1. International Human Rights Law*

The obligation to criminalize is different under human rights law where every single act of torture, but not Cruel, Inhuman and Degrading Treatment (CIDT), must be criminalized under domestic law, with a very broad jurisdiction, i.e. territorial, active and passive nationality, as well as universal jurisdiction, as per Articles 4 to 9 CAT.

#### *3.2. Crimes against humanity*

If torture (but not CIDT) is practiced as part of a widespread or systematic attack against any civilian population in times of peace or war, it amounts to a crime against humanity. The perpetrators must be brought to justice before domestic courts or international criminal tribunals.

### 3.3. *War crimes*

As mentioned above, under International Humanitarian Law every single act of torture and inhuman treatment constitutes a grave breach under the Geneva Conventions and amounts to a war crime. By comprising inhuman treatment, the scope of International Humanitarian Law is wider than human rights law. Perpetrators must be brought to justice before domestic courts, under the principle of universal jurisdiction, or before international criminal tribunals. Degrading treatment (or “outrages against human dignity”) constitutes also a serious violation of the laws and customs applicable in international and non-international armed conflicts, and is considered as war crimes in Common Article 3 of the Geneva Conventions. Perpetrators must therefore be brought to justice before domestic or international tribunals.

It results that the obligation to criminalize and also to bring perpetrators to justice before domestic courts, and also before international tribunals, is broader and more protective under International Humanitarian Law, if compared to human rights law.

## 4. **Conclusions**

In times of armed conflicts, both human rights law and humanitarian law are in principle applicable and there are no major contradictions that would require further interpretation as to which type of law is applicable. Partly, International Humanitarian Law provides more detailed rules of better protection, but in other respects human rights law provides better protection and shall be applied as ‘*lex specialis*’. First of all, humanitarian law goes beyond human rights law as it creates binding obligations for non-state actors, such as rebel groups, whereas human rights law requires at least acquiescence by a state official, although, as mentioned, there is a certain changing trend under human rights law. Also, as stated above, under International Humanitarian Law every single act of torture and CIDT is a war crime, whereas under human rights law only torture must be criminalized under domestic law and only torture constitutes a crime against humanity when practiced as part of a widespread or systematic attack. Furthermore, under the ICC Statute, torture as a crime against humanity goes beyond the definition of torture under CAT as it lacks the requirement of a specific purpose. However, this might be a rather theoretical difference, lacking relevance in practice, as it is difficult to

imagine torture as a crime against humanity perpetrated without any specific purpose.

In certain areas, humanitarian law is much more detailed than human rights law. The Third Geneva Convention in particular is very detailed on the conditions of detention of war prisoners. In human rights law, there are many rules on conditions of detention, but they mostly constitute soft law. One of the few binding provisions, Article 10 ICCPR, states that every detainee must be treated with dignity and humanity. However, it does not detail more specific standards, which only exist in soft law instruments such as the Standard Minimum Rules for the Treatment of Prisoners of 1955. This is the reason why, to address this shortcoming in human rights law, it would be important to draft and adopt an international *Convention on the Rights of Detainees*. In the many countries I have visited as UN Special Rapporteur on Torture, the conditions of detention I have witnessed were absolutely outrageous. The overcrowding, the lack of hygienic conditions, the shortage of food and medicines, added to other factors, often concurred to create appalling conditions. Persons deprived of their liberty are lacking most human rights, and are therefore more vulnerable. There is therefore an urgent need to create a stronger legal basis for the minimum standards in detention in relation to many rights, such as the right to privacy, the right to food, or the right to health.

In other aspects however, human rights law is more detailed and also provides better protection than International Humanitarian Law. This particularly applies to the CAT, which comprises various specific positive obligations of states to prevent torture, including Article 3 CAT on *non-refoulement*, which stipulates that no one should be sent to another country or jurisdiction where there is a serious risk of torture. Other provisions also provide for better protection, including Article 15 CAT, stating that no evidence extracted by torture should be used in any judicial or administrative proceedings. The right of victims of torture to be provided with an effective remedy and adequate reparation, as stated in Articles 13 and 14 CAT, are very important additional obligations, as states should not only criminalize, and prevent acts of torture, but also provide the victims with redress.

In *Mohamed et al. v. Jeppesen Dataplan*, involving five persons who were secretly detained and severely tortured in Morocco and other countries after extraordinary rendition flights organized by the CIA during the Bush administration, the current US Government invoked the state secrets privilege as a defense, in clear violation of its obligations under



Articles 13 and 14 CAT. The American Civil Liberties Union (ACLU) is at the moment trying to bring this case before the Supreme Court, in order to finally provide victims of torture of the 'war on terror' with the right to an effective remedy and adequate reparation.



## Transfers of detainees

*Thomas Winkler*

Under-Secretary for Legal Affairs, Ministry of Foreign Affairs, Copenhagen

It gives me great pleasure once again to address the distinguished audience here at the yearly Round Table of the International Institute of Humanitarian Law.

I thank the organizers for the invitation to speak, and I congratulate the Institute on its 40<sup>th</sup> anniversary. I will regrettably have to disappoint you three times in the first couple of minutes.

Firstly, I have to admit to being a government expert. As the legal adviser of the Danish Ministry of Foreign Affairs I of course speak on behalf of my government.

Secondly, I will not talk on piracy – even if I am the chairman of the legal working group – working group 2 (WG2) – of the Contact Group on Piracy off the Coast of Somalia. I came here to talk about something else, but will add a few comments on piracy related to the comments made by other speakers on this subject today and yesterday. My working group may disagree on a number of issues but we all agree that International Humanitarian Law (IHL) is not relevant to counter-piracy, as we are not in an armed conflict with pirates. I will refer to the very specific questions from the plenary e.g. on ship-riders to the WG2 legal tool box, where you will find the answers.

The human rights challenges in regard to counter-piracy, including on post-trial transfers, are at the top of the agenda, when my working group meets the next time on 2-3 November in Copenhagen. In this regard, no State or organization engaged in counter-piracy may disregard the judgements from Strasbourg in the Medvedev case and from a court in the Netherlands on the five pirates transferred there for prosecution by Denmark. And finally: As mentioned by my colleague from the European Union the key challenge in regard to ensuring prosecution, including the human rights of suspected or convicted pirates, is to identify one or several States, prefer-

ably in the region, who are willing to host prosecution and – not least – imprisonment. This, however, is primarily a political and not a legal issue.

I will now turn to the true subject of my presentation: the Copenhagen Process on the Handling of Detainees – an attempt to resolve some of the many challenges mentioned in this room during this round table.

As some of you will know, I was here two years ago informing the participants about the Copenhagen Process on the Handling of Detainees in International Military Operations; a process which at that time was at a very early stage. Much has happened since and we are slowly moving toward a result.

A draft Outcome Document has been produced – as is now being negotiated. And this is the third and final disappointment in my speech: I will not be able to provide you all with a copy of the draft. I will explain why. And I can and will provide you with the contours of the current draft and the future processes. This is the first time I have done so in public.

I will begin with a brief outline of the context and background to the Copenhagen Process.

The initial drive for the Copenhagen Process came from the changing nature of international military operations. In addition to traditional United Nations peacekeeping or peace-making operations, new types of operations have emerged, where military forces have taken on new roles.

Military forces are often asked to – or have to – act in support of governments in need of assistance to stabilize their countries, or, in some cases, instead of governments, filling a governmental and institutional void. In doing so, military forces are frequently required to act as police or conduct tasks normally performed by domestic authorities. This is exactly the situation which our colleague from the UN described this very morning.

As a consequence, soldiers – already obliged to operate in accordance with international law and relevant national law of their own State – also have to respect the sovereignty and jurisdiction of the host State. And these rules are not necessarily in conformity with one another.

Troop-contributing States with a mandate to fight insurgents normally also have the power to detain them, typically with a view to transferring them to local authorities. Such transfer to the custody of local authorities is the general rule, as we operate under the assumption that the suspicions, which are the reason for detention, fall within the jurisdiction of the host State – regardless of whether we are talking about detention for security reasons or for criminal acts. In these situations, the actions of the local authorities cannot be constrained *per se* by the troop-contributing State.

And this is a challenge as the transferring State typically will have its own legal obligations to observe.

Some States have entered into bilateral agreements with host States to ensure that the conditions of transfer satisfy their domestic and international obligations. But not all States in a given military operation may have such agreements – as is the case in Afghanistan. Furthermore existing agreements may differ – creating an overall unclear situation. At the same time, questions are being raised as to the efficiency of such agreements in securing the rights of detainees.

The issue of transfer – to local authorities or within a coalition of forces – has become increasingly important. Numerous States face litigation arising from detention during military operations. We have heard about some of the UK cases this morning. In Denmark there is an on-going case concerning the apprehension by Danish forces of 31 Afghans during a joint US-Danish military operation in March 2002 in Afghanistan and the subsequent handling-over of these individuals to the US forces. The claimant alleges to be one of the apprehended Afghans. He initiated a case against the Danish Ministry of Defence arguing that Danish forces violated their international obligations by handing him over to US forces at Kandahar Air Base, where he claims to have been mistreated. He argues that Danish authorities should have been aware of the risk of mistreatment at the time of transfer in 2002, and it is this awareness that creates liability.

The case is interesting for our purpose here because it shows how complex factual circumstances in multilateral operations can give rise to discussion of a host of legal issues, concerning, among others, jurisdiction, applicable law and State responsibility. It also underscores how a common approach might help avoid difficult and time-consuming litigation and why these challenges necessitate a multilateral response.

States need to agree on how 20<sup>th</sup> century rules apply to 21<sup>st</sup> century realities. Time and time again, realities on the battlefield have highlighted the challenges in applying International Humanitarian Law as the sole legal framework to international military operations. I am not thereby saying that International Humanitarian Law is faulty or that it has to be changed. That is not the intention of my Government, and it has never been the purpose of the Copenhagen Process.

On the contrary, the States involved have been absolutely adamant that the purpose of the Process is not to try to develop new legal rules or to undermine existing legal obligations and standards. I have said so repeatedly, but will also use this opportunity to stress this point again.

Instead, the purpose of the Copenhagen Process is to address some of the legal challenges that military forces face in international military operations by attempting to reach consensus on some basic guidelines. And consensus is necessary, not only to ensure that States fulfil their international obligations and protect individual rights, but also to ensure effective military operations and cooperation and, ultimately, the success of international military operations. These issues go hand in hand; and any uncertainty about the legal framework – as we all know – may have a negative impact on the ground.

Arrest, detention and transfer are not in themselves new and, as both Professor Sassoli and Professor Gaeta have just explained numerous rules exist to regulate the deprivation of liberty in armed conflicts.

The mentioned changing character of military operations has, however, pinpointed new legal challenges. This involves questions which might at first glance appear simple. Questions such as: what is the legal basis for detention? What is the relevant procedure? How long can a person be detained? And: must the detention be reviewed by a judge?

These are questions that any legal system can answer in times of peace. But the rules are not always clear in international military operations where the legal framework may be contentious. And practice in both Afghanistan and Iraq has clearly illustrated, that these are not always easy questions to answer, and that simple factual changes may further muddle the picture. A multilateral approach is therefore necessary.

The Copenhagen Process – initiated by Denmark in 2007 – is an attempt to focus on the most important of these challenges. States from all regions of the world with experience in international military operations as well as relevant international and regional organizations were invited to participate. Since then other States have joined, and at the last conference in June 2009 representatives from 25 States and various international organizations met in Copenhagen to discuss the handling of detainees in international military operations.

The conference was entitled: “Towards a Common Platform”, and the aim of the conference was to initiate the process towards the creation of a common platform for the handling of detainees. The conference was based on the key understandings previously established in the Copenhagen Process, namely that: “Detention is a necessary and legitimate mean to ensure important aims in international military operations” and that “The challenges related to detention must be addressed in order to ensure both the protection of the detainees and the effectiveness of the military operations”.

At the same time, it was emphasized that it was important to keep in mind the diversity and complexity of the legal and factual situations – including local conditions – which may face military forces. Thus we are not aiming for a *panacea* to all legal challenges. That, I am afraid, is too ambitious. Instead the Process focuses on a more limited list of issues in relation to detention in international military operations: the legal basis for detention, treatment during detention, review of detention and transfer.

This brings me to the contours of the draft Outcome Document. As I said initially, I cannot today reveal the specific content of what is essentially still a work in progress. Not only would this be premature, but it might also jeopardize the process itself.

While I cannot say exactly how the Outcome Document will look in the end, or precisely what it will contain, I can fairly confidently say what it will not look like: it will not be a new *Montreux* document or a new *Turku* declaration. Both the Swiss Government and the group of experts involved in the Turku process must be applauded for their efforts. Denmark has – as many other States – voiced – its support to the *Montreux* document. As a legal advisor to the Danish Government I can also say that I cannot help being a little envious of what the Swiss have achieved. The Copenhagen Process is, however, a very different process.

The Copenhagen Process concerns issues that have been or are being tried before domestic courts in several of the States involved, including Denmark. This, naturally, makes the issues very sensitive. This is also one of the reasons why the Process might not have been as transparent as some would have liked. In that regard I will stress, that the Process was never supposed to be exclusive or in any way secret. We have listened and received useful information from many NGOs and valuable support from the International Committee of the Red Cross. That said the nature of the subject matter and the process call for a cautious approach.

This, however, does not imply that NGOs will not be included more intensively in the process in the future. Quite the contrary: the impact that my Government wants to achieve will not be possible without involvement of relevant NGOs. At the same time it will be a prerequisite for any NGO wanting to be involved that this involvement is to be constructive: the aim of the process is to identify solutions.

At the last conference in 2009 it was agreed that Denmark should develop a draft Copenhagen document for further discussion. The document has been drafted on the basis of discussions at the previous events as well as other input received throughout the process, including from NGOs.

As I said earlier, the Copenhagen Process in no way seeks to devalue or in any other way undermine the existing legal framework. Instead, the Process seeks to create consensus on some basic issues that I mentioned before: the legal basis for detention, treatment, review and transfer.

The Document in its present draft form is in itself very simple. It contains a short list of “Guiding Principles” on the handling of detainees in international military operations.

The reason that the Guiding Principles have been drafted short and concise is not that the underlying issues are uncomplicated. Instead, the Principles, which are not to be legally binding, have been drafted as they are to enable a broad consensus on some core issues. There is also the very practical issue that the Principles might have to be used by the soldiers on the ground. It is on the ground, after all, that the difficult decisions have to be taken.

Another pragmatic consideration is that the realities on the battlefield may not always be easily compatible with the assessments that in theory have to be made under existing legal frameworks. It is rarely easy to determine – under fire and with little time to take decisions – if a conflict – or an element in a conflict – constitutes an international or a non-international armed conflict. Or whether there is an armed conflict at all. Thus to insure their continued significance, the Guiding Principles are purposively drafted to apply in all situations regardless of the legal qualification of the conflict in question. This does not, however, imply that the underlying aspirations are inconsequential. On the contrary, it is precisely because the Principles seek to address realities on the ground that they may provide guidance in all situations and at all times.

Furthermore, experience tells us that detainees are most at risk of ill-treatment immediately after having been apprehended. Accordingly, the Guiding Principles seek to establish a framework of guiding principles applicable at all stages of detention. From the moment that a person is apprehended – or rather detained – until he is transferred or released.

Circumstances may, however, vary. If a person is detained by a group of soldiers on patrol on foot in the Wakhan Mountains of Afghanistan then it might not be possible to have the legality of that person’s detention reviewed within a time that is otherwise required by the normal rules of due process. But that does not mean that no safeguards should exist. The Outcome Document, therefore, seeks to take account of scenarios such as these.

Many of the Principles will be uncontroversial. Some might even say trivial. Nonetheless, the fact that these principles might, at least by some,



be considered trivial does not mean that they are not worth stating. We should remember, that the aim is to create consensus on some fundamental issues, and, if possible, in a clear and concise language which may be used by all.

On the substance I have to repeat that we – and that includes all the interests represented here – should be careful not to exaggerate the challenges. When in-depth studies are undertaken on the facts and the relevant law – as we have done as part of the Copenhagen Process – it often turns out that the many assumed challenges and claimed gaps are – with a few exceptions – either non-existing or manageable. That also applies to the much discussed topic of the relationship between IHL and human rights law.

Even if it may sound so, we have not spent the last three years drafting a small set of guidelines that will fit in your shirt pocket. The Guiding Principles are accompanied by a longer and more elaborate explanatory note, which explains and substantiates the Guiding Principles. These explanatory notes may not necessarily at the end of the day be a formal part of the Outcome Document, but they are written to assist me and my team during the coming discussions with the participants on the process and other interested parties.

This is all that I can reveal at this stage about the form and content of the Outcome Document. This, however, still leaves one question: where do we go from here?

In the coming four to six months my team and I will discuss the draft Outcome Document with all the participants in the Copenhagen Process. We will then engage NGOs and others interested in the process before calling a third Copenhagen Conference – at present, and very tentatively, scheduled for sometime in the first half of 2011. The ambition is that we will discuss and agree to the Outcome Document and on the way ahead. Our ambition, however, does not stop at reaching a consensus on the Outcome Document. We believe that it is important to ensure as broad an international support for the Principles as possible, and we will hopefully in the years after the Third Copenhagen Conference achieve such support through a continued diplomatic effort.



### **III. Individual guarantees in detention**



## **Permissible grounds for internment/ administrative detention**

*Oscar Solera*

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The topic of permissible grounds for administrative detention goes hand in hand with a series of inter-related issues. I will first say some words in relation to the applicable legal framework permitting the use or application of administrative detention measures, in particular in non-international armed conflicts. I will then refer to the grounds for which administrative detention could be invoked and the limitations to such practice. Finally, I will briefly refer to the relationship between different bodies of law, in particular International Humanitarian Law and international human rights law.

Previous speakers referred at length to some of these questions particularly in relation to international armed conflicts. As they explained, in international armed conflicts, International Humanitarian Law, in particular the Geneva Conventions and Additional Protocol I contain a series of provisions in relation to security detention that, in general terms, are complemented by similar requirements under international human rights law. Yet, as you may know, the case of non-international armed conflicts is somewhat different because neither the Geneva Conventions, nor Additional Protocol II, contain specific provisions relating to the authority of parties to a non-international armed conflict to detain persons on the basis of their security concerns. For instance, article 3 common to the Geneva Conventions refers to requirements of humane treatment. Article 5 of Additional Protocol II, for example, only refers to guarantees to be observed in relation to persons whose liberty has been restricted, including persons under administrative detention. This is of relevance from the perspective of international law because, in the absence of international norms, the legal basis would need to be expressly established in domestic law.

Discussing this lack of explicit authorization under International Humanitarian Law (IHL), experts participating in a meeting organized by the ICRC on procedural safeguards for security detention in non-international armed conflicts agreed, and I quote from the report, that “there was not so much a ‘right’ but rather an authorization inherent in IHL to intern persons in NIAC”<sup>1</sup>. In this respect, experts concluded, not surprisingly, that it flows from the practice of armed conflict and the logic of IHL that parties to a conflict may capture persons deemed to pose a serious security threat and that such persons may be interned as long as they continue to pose a threat<sup>2</sup>. Such argument of inherent authorization has nevertheless been rejected by those who correctly claim that detention must have an adequate and sufficient legal basis.

From a human rights perspective, because of its very nature as a protection system, international human rights law provides conditions or limitations to the exercise of State power, *inter alia*, in relation to deprivation of liberty. For instance, the International Covenant on Civil and Political Rights, which has been ratified by 166 States, provides in article 9 that everyone has the right to liberty and that no one shall be subjected to arbitrary arrest or detention. The European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights contain similar provisions. Moreover, the Universal Declaration of Human Rights states in article 9 that no one shall be subjected to arbitrary arrest, detention or exile<sup>3</sup>.

Thus, international human rights law does not prohibit internment or administrative detention *per se*. The Human Rights Committee, which as you may know, is the body that monitors the implementation of the International Covenant on Civil and Political Rights, has in fact accepted that the practice of administrative detention could be envisaged under the Covenant under certain conditions. In its case-law, the Committee has recognized the possibility of States using internment measures in a lawful way. For example, in the case of *Campora Schweizer v. Uruguay*, the Committee stated that “administrative detention may not be objection-

1. Report of the Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict, p. 3, available at [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/security-detention-report-091209/\\$File/security-detention-chatham-icrc-report-091209.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/security-detention-report-091209/$File/security-detention-chatham-icrc-report-091209.pdf).

2. *Ibid.*, p. 4.

3. It should be noted that Article 5 of the European Convention provides the most explicit list of situations in which a person may be deprived of his liberty, but none of these exceptions refer to armed conflict.

able in circumstances where the person concerned constitutes a clear and serious threat to society, which cannot be contained in any other manner”<sup>4</sup>.

Similarly, the Working Group on Arbitrary Detention has stated in its 2010 report that “if there has to be administrative detention, the principle of proportionality requires it to be the last resort”<sup>5</sup>.

The Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights also dealt with the issue in the late 1980s<sup>6</sup>. In his report on the practice of administrative detention, Prof. Louis Joinet noted that State practice showed that “most countries, including those which regard themselves as being among the most democratic, provide in their national legislation for detention where the power of decision lies with the administrative authority alone”<sup>7</sup>. Joinet points out, however, to the fact that “it is thus not so much the principle of administrative detention that is at issue” but rather “the safeguards provided for by law and the conformity of such safeguards with international rules”<sup>8</sup>.

Among the different admitted practices of administrative detention as an admissible exception to the right to liberty, Prof. Joinet referred in his report to threats to public order and to State security. As he indicated, these threats may arise, *inter alia*, in situations of armed conflict, in emergency situations, and in situations of internal unrest and tensions<sup>9</sup>.

The Human Rights Committee has also accepted that threats to public security could be an admissible ground to deprive a person of his liberty. However, as stated in its General Comment 8, “if so-called preventive detention is used, for reasons of public security, it must be controlled by [the provisions of article 9 of ICCPR], i.e. it must not be arbitrary, and must be based on grounds and procedures established by law, information of the reasons must be given and court control of the detention must be available, as well as compensation in the case of a breach”<sup>10</sup>.

4. CCPR, Communication No. 66/1980 (12 October 1982), para. 18.11

5. A/HRC/13/30 of 15 January 2010, para. 59.

6. In resolution 1985/16 of 11 March 1985, the Commission on Human Rights requested the Sub-Commission to make recommendations regarding the practice of administrative detention. The Sub-Commission’s report was prepared on the basis of information submitted by States and by non-governmental organizations.

7. E/CN.4/Sub.2/1989/27, at para. 15.

8. Ibid.

9. Ibid., para.s. 22-28.

10. General comment 8, para. 4.

In General Comment 16 the Committee clarified that “the expression ‘arbitrary interference’ can also extend to interference provided for under the law”. The Committee further stated that “the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances”<sup>11</sup>.

The prohibition of arbitrariness in article 9 of the International Covenant on Civil and Political Rights (ICCPR) constitutes an important limitation on administrative detention measures that is directed at both the national legislature and administrative organs. In this respect, as underlined by the Committee, it is not enough for administrative detention to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law must not take place arbitrarily. Professor Nowak, in his commentary to the ICCPR explains that, on the basis of the historical background of article 9, the prohibition of arbitrariness is to be interpreted broadly and, therefore, deprivation of liberty must be provided for by law and must not be manifestly disproportional, unjust or unpredictable, and the arrest must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case<sup>12</sup>.

Now, as you know, a handful of States have manifested some scepticism about the idea that international human rights law is applicable to armed conflict situations. They have sometimes argued that because of the derogations system foreseen in article 4 of ICCPR, international human rights law does not provide adequate protection in such situations. In particular, it has been pointed out that the provision in article 9 of the Covenant on the right to liberty is subject to derogation and, therefore, if such derogation is adopted, human rights law would not provide an adequate response to administrative detention measures adopted in emergency or conflict situations.

While this cannot be ignored, it should be noted that the Human Rights Committee has made it clear that certain provisions in the Covenant are not just conventional obligations, but are also part of customary international law and some of them have reached the status of *jus cogens* norms. For example, in General Comment 24 the Committee indicated that the prohibition to arbitrarily arrest and detain persons is a *jus cogens* norm

11. General comment 16, para. 4.

12. Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, p. 225.



that admits no reservation<sup>13</sup>. In General Comment 29 the Committee further stressed that “the enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law”. The Committee further stated that “the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance, by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence”<sup>14</sup>.

In other words, even if article 9 of ICCPR is not included in the non-derogable provisions listed in article 4 of the Covenant, its legal nature as a peremptory norm of international law implies that no derogation from it is permissible under general international law. Therefore, States may not, in conflict situations or otherwise, allow for administrative detention measures that could be considered as arbitrary, either because they don’t respect the principle of legality, or because the enabling legislation, or its implementation by administrative authorities are themselves arbitrary.

Finally, it should be recalled that modern international law recognizes the complementary and mutually reinforcing character of International Humanitarian Law and international human rights law. The International Court of Justice has recognized such relationship in its advisory opinion on *The Wall*, and reiterated such argument in the *Democratic Republic of Congo (DRC) v. Uganda* case. The Human Rights Committee has held a similar view in its General Comment 31 when it stated that “the Covenant applies also in situations of armed conflict to which the rules of International Humanitarian Law are applicable. While, in respect of certain Covenant rights, more specific rules of International Humanitarian Law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive”<sup>15</sup>. The Committee has reiterated such view in its concluding observations, *inter alia*, on the periodic reports submitted by Israel in 2003 and by the United States in 2006<sup>16</sup>.

13. General comment 24, para. 8.

14. General comment 29, para. 11.

15. General comment 31, para. 11.

16. See CCPR/CO/78/ISR of 21 August 2003, at para. 11; and CCPR/C/USA/CO/3/Rev.1 of 18 December 2006, at para. 10.

It is not surprising, therefore, that the ICRC study indicates in rule 99 that “arbitrary deprivation of liberty is prohibited”. The resemblance between this rule and article 9 of the ICCPR as well as article 9 of the Universal Declaration are striking, but hardly surprising. Indeed, much of the State practice that can be found to that effect and that is referred to in the ICRC study could arguably be the result of States’ observance of their human rights obligations. Such practice, as the study indicates, includes legislation prohibiting arbitrary deprivation of liberty in armed conflict situations. This is, in my view, the complementarity between IHL and international human rights law working at its best.

In conclusion, it is not so much what are the permissible grounds for administrative detention in the abstract. Rather, an examination is required on a case-by-case basis to determine whether a given situation of administrative detention constitutes an arbitrary deprivation of liberty, in the terms of article 9 of ICCPR, which reflects a norm of *jus cogens*. Such analysis should include a determination of whether the principle of legality has been respected, of whether the enabling norm is not in itself arbitrary, and that the implementation of the norm by administrative authorities is not arbitrary. Furthermore, that analysis should consider whether procedural safeguards and a right to a remedy are adequately provided for, both in law and in practice.

## **Review of the lawfulness of internment/ administrative detention**

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My topic deals only with the review of the lawfulness of detention but it is very difficult to address the subject without looking at the grounds of detention, so there may be some overlap with the previous speaker. I will include in the concept of review not only a general right to have the lawfulness of detention reviewed at periodic intervals but also initial decisions which may determine whether or on what basis a person is detained. So, for example, I will include status determination tribunals for Prisoners of War (POWs) in the concept of review.

I first need to identify the applicable law. I am only addressing situations in which International Humanitarian Law (IHL) is applicable, in other words situations of armed conflict. However, a detainee is always “within the jurisdiction” of the detaining power, which means that human rights bodies of one type or another have jurisdiction. That is not the same thing as saying that human rights law is applicable. Where both IHL and human rights law are applicable, the International Court of Justice (ICJ) has said that IHL is the *lex specialis* but it is completely unclear what that means. Given that human rights bodies have jurisdiction, it may mean that where IHL is applicable (in other words, in situations of armed conflict) they should interpret human rights law in the light of IHL. In other words, there will only be a violation of human rights law if there is also a violation of IHL. I will use “internment” as a synonym for administrative detention and to mean detention related to a security situation where the detainee allegedly poses security concerns and where there is no intention to bring criminal proceedings against him.

The position in international armed conflicts (IACs) is straightforward. A person can be detained as an ex-fighter and in certain circumstances is entitled to POW status. There is provision for status determination but no provision for any subsequent review of lawfulness of detention. The

detainee can be held until the end of active hostilities. Since the whole point is that the individual belongs to an organised armed group which is still fighting, there would seem to be no point in review – he will remain a security threat until the end of active hostilities. There is a question about those detained on the grounds of having fought but where they are not subjected to the regime for detained civilians. Art. 75.3 of Additional Protocol I effectively treats them as civilians by saying they should be released when the circumstances justifying detention (presumably the security threat they pose) have ceased to exist. Art. 75 does not say how that is to be determined or provide for the fact of or periodicity of review. In the case of civilians in IACs, there are two situations in which they may be interned. A civilian in the power of the other side can be detained only if the security of the detaining power makes it “absolutely necessary” or if he requests it and his situations makes it necessary. The decision to intern has to be considered by a court or administrative board and re-examined, twice yearly if possible. Civilians in occupied territory can be detained for committing an offence solely designed to harm the occupying power and not involving harm to a human person or for “imperative reasons of security”. Where detained for an offence, there is no provision for review but the detention must not be disproportionate to the offence. Where based on security concerns, there must be a regular procedure established by the Occupying Power, a right of initial appeal and periodic review, if possible every six months, by a competent body.

The position with regard to non-international armed conflicts (NIACs) is much more complicated. First, it is necessary to distinguish between two different types of NIACs. There are those which are purely territorial – the fighting is confined to the relevant national territory and there is no involvement of elements external to the State. Then there are what I shall call extra-territorial NIACs. These come in two forms. First, there are operations by the armed forces of State A in the territory of State B but not directed against State B but rather against some non-State actor operating from within B’s territory. Second, there are situations in which State A is operating within State B’s territory, either assisting State B in dealing with a NIAC in the territory of B and/or discharging an international mandate.

The essential problem in NIACs, and it should be remembered that, in one form or another, they represent the majority of conflicts today, is that there is nothing in IHL treaty law on grounds of detention or review of the lawfulness of detention. There is a reason for that silence. The assumption underlying common Article 3 and APII was that NIACs were territorial.

Domestic law would be applicable, possibly accompanied by human rights law. That is fine in the case of territorial NIACS but causes problems in the case of extra-territorial NIACS.

In the case of territorial NIACS with no external involvement, the requirements of review will be based on human rights law. For parties to the International Covenant on Civil and Political Rights, it is not clear whether it is necessary to derogate in order to be able to intern. It is clear that parties to the European Convention on Human Rights must derogate in order to be able to intern. Whilst in both cases the provisions on detention are potentially derogable, there is strong evidence to suggest that the principle of review is non-derogable. That does not mean that the ordinary peacetime provisions on *habeas corpus* or *amparo* remain applicable, even in an emergency or armed conflict. It may be possible to modify the scope of review or the body which carries out the review. The situations in which the issue has been examined to date are generally ones in which the domestic authorities denied the applicability of IHL. We, therefore, do not yet know what the impact of the applicability of IHL will be on review provisions in situations of conflict. At this point, it is perhaps helpful to signal an important respect in which human rights law differs from IHL. IHL defines the bottom line. Human rights law, on the other hand, determines what should have been done in a particular situation. It is usually invoked after the event, in other words with the benefit of hindsight. The law has to be set at the bottom line and not at the level of best practice. Best practice will always be in the interests of the military commander. If he can go further than the bare legal requirements, that will be in the interests of the detainee and of the commander. That does not mean that the law should be set at that place. Nor, however, does it mean that the law should be set so low as to provide no protection for the detainee.

Generally, the situation in territorial NIACS is clear. There would be a problem in an APII type situation if the State invoked the applicability of IHL. In relation to the review of internment, the State would have to rely on customary IHL and, notwithstanding the comments of Mr. Kellenberger on Thursday, that is unclear. In particular, it is unclear what customary human rights law is and what customary IHL is and whether the source of the customary rule makes a difference.

Far greater problems arise in transnational NIACS. I only have time to itemise some of the difficulties. I will deal first with transnational NIACS with the consent of the State or with an international mandate. The legal difficulties include: can the outsiders rely on the domestic law of the territorial State; what if the law of the territorial State with regard to review

does not conform to either its own human rights obligations or those of the intervening States; can the intervening States rely on a derogation by the territorial State; if not, can they themselves derogate where the territorial State has not done so, even though the emergency is that of the territorial State? I assume that in most, if not all, cases, the domestic law of the intervening States will not provide authority to intern outside national territory and, therefore, not address review. In the case of operations with an international mandate, I will confine myself to a Security Council mandate. Where the operation is carried out under Chapter VI of the UN Charter and says nothing about the power to intern or the modalities of review, there are all the problems to which I have just referred. The mere presence of a multinational force with a mandate is not sufficient for that force to have a power to intern. Where the mandate of the force, under Chapter VII of the UN Charter authorises the force to use “all necessary means”, in my view that is addressing the circumstances in which they can open fire and is providing a general authority. It is not a sufficient legal basis on which to intern. Detention requires both specific authority to detain and defined grounds of detention. Security Council mandates need to contain express provision to this effect. They should also indicate the modalities of review, notably the body which will carry out review and the periodicity of review. There is also an operational problem where there is a group of intervening States. They may have different IHL and/or human rights law obligations or may interpret them differently. This is a problem of legal interoperability.

In transnational NIACS without the consent of the territorial State or without an international mandate, there can be no question of relying on the law of the territorial State or any derogation made by the territorial State. The question then will be whether any domestic authority to intern on the part of the intervening State applies extra-territorially and what human rights law has to say about that. There will also be the question of whether a derogation made by the intervening State applies extra-territorially. That may depend on whether there is an emergency within the intervening State or whether the only emergency is that in the territorial State brought about by the actions of the intervening State.

I would suggest that there may be a way forward which will reconcile to the greatest extent possible the needs of the military and the requirements of human rights law. I would emphasise that this is a problem about the legal bottom line. Wherever it is possible for the detaining power to do more, it would be well advised to do the best it can. My proposal is as follows: in the case of a territorial NIAC, up to the threshold at which a

non-State actor can carry out sustained and concerted attacks against the armed forces of the State (in other words the Additional Protocol II threshold without the need for territorial control), only domestic law and human rights law, possibly with a derogation, would apply to internment, including the review of lawfulness of internment. Above that threshold in territorial NIACS and in all extra-territorial NIACS, States should operate a system based on Geneva Convention IV. They could only intern for “imperative reasons of security”. There would be a right of initial appeal against detention. Thereafter, the necessity for the detention would need to be reviewed at least every six months. The body carrying out the review (a court or administrative board) should be as independent as possible and, in any event, the personnel carrying out the review must be out of the chain of command of those detaining the individual.





## Contacts with the outside world

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By the wording contacts with the “outside world”, we understand contacts between the internee and someone other than captors, guards or co-inmates; this outside world includes for example family of the internee, independent lawyer or doctor, another outside body such as a NGO or the ICRC. Internment without any such contact actually means *incommunicado* detention. Numerous human rights bodies have found that prolonged *incommunicado* detention in itself amounts to ill-treatment because of the mental suffering caused by the victim’s uncertainty as to the length of detention, social isolation and denial of communication with family. Many have also concluded that *incommunicado* detention substantially increases the risk of torture or other forms of ill-treatment. Experience does in fact show that such forms of detention, when prolonged, almost invariably go hand in hand with ill-treatment.

Where a detaining authority refuses to acknowledge to the family, the ICRC or another outside body that they hold an individual in their custody, or where such information is being withheld for longer than what could be considered reasonable, such detention, in our view, becomes secret. The practice of secret detention is of particular concern because it has long been recognized as one of the main risk factors for disappearances and all forms of ill-treatment. From the perspective of the families and the outside world, an arrested relative who has not been notified has effectively disappeared, with all the emotional suffering that this entails.

Allow me to detail some elements foreseen by International Humanitarian Law (IHL) and human rights law, in order to enable and maintain contacts between the internee and the outside world. I will focus first on family contacts before turning to issues related to notifications and access to the ICRC.

With regard to family contacts, in international armed conflicts, it is mandatory for the detaining power to have a capture/internment card filled out by each internee and to send all relevant information, namely information of detention/address and state of health, in particular to the families immediately upon capture for prisoners of war or as soon as the individual is interned for civilian internees or at the latest not more than one week after their arrival in a place of internment. The detaining power must also register, draw up lists of such persons and establish a national information bureau responsible for centralizing information on them<sup>1</sup>. In all other situations, the immediate, accurate registration by duly appointed government officials of all persons taken into custody is required under customary IHL, as well as under various instruments of international human rights law<sup>2</sup>.

After this first step of immediate information of their detention to their families, internees shall be permitted regular and on-going contacts with their relatives as foreseen in many provisions of the Geneva Conventions (GCs), customary IHL applicable in International Armed Conflict (IAC) and Non-International Armed Conflict (NIAC), and human rights instruments. Most of the time, these contacts are made by letters, cards, Red Cross messages but in certain contexts it is also done via phone calls. In the most developed situations, we can also have systems of video teleconference. Without minimizing the importance of such means of communications, by experience we can say that nothing will replace actual face-to-face contacts during family visits to the internee in his or her place of detention. Family visits are foreseen in the Convention on the Rights of the Child, in soft human rights law and in customary IHL. The right of Civiglia Internee (CI) held in connection with an IAC to receive “visitors, especially near relatives, at regular intervals and as frequently as possible” is recognized in GC IV.

The ICRC considers the possibility to be in contact with one’s family to be a fundamental right of any internee. Contact with families should notably not be subject to disciplinary considerations and not be curtailed or suspended as a result of non-compliance with facility rules. Similarly, it should not be made dependent on cooperation during interrogation.

Let me turn now to the rules regarding notifications and access to the ICRC.

1. Third Geneva Convention, Articles 70 and 122; Fourth Geneva Convention, Articles 106, 136 and 138.

2. Rule 123 of the ICRC Customary International Humanitarian Law Study (2005); Rule 7 of the Standard Minimum Rules for the Treatment of Prisoners (1977); Principle 16 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988).

As a matter of law, in situations of IAC, the ICRC's mandate for its activities on behalf of persons deprived of liberty, including internees, are clear: the GCs provide the ICRC with the right of access to these persons and entitle it to receive all relevant information pertaining to them<sup>3</sup>. In IAC, GC IV foresees that the detaining power is bound to notify the ICRC within the shortest possible period of the details of any protected person kept in custody for more than two weeks<sup>4</sup>. GC III, relative to Prisoners of War (POW), omits even the two-week time frame and simply states that such information shall be provided within the shortest possible period<sup>5</sup>. Under the GCs, the notification obligation is absolute and suffers no exception whatsoever, e.g. a State cannot invoke the argument of "imperative military necessity" in order to avoid or delay notification. Indeed, as far as detention is concerned, "imperative military necessity" is foreseen by the Geneva Conventions only for issues related to ICRC access<sup>6</sup>.

As you know, ICRC access to detention facilities is the cornerstone of its humanitarian mandate to ensure that persons held in relation to armed conflict and other situations of violence are treated humanely and with respect for their dignity. ICRC visits may not be prohibited except, as I just said, for reasons of "imperative military necessity"<sup>7</sup>. The ICRC considers that in order to be lawful this exception must fulfil four cumulative criteria: it must be imperative, for lawful purposes, exceptional and temporary.

"Imperative military necessity" means a situation where the military environment is such that it leaves no other choice to the detaining authorities but to deny the ICRC visits to certain places because it would be impossible or too dangerous, either for the detainees, the ICRC or the detaining authorities themselves (e.g. areas near combat positions or situations where such visits would harm the detaining authorities' own military position). The criterion of "imperative military necessity" was meant to refer to on going hostilities and the dangers and impediments to movement or to military action in such situations. It was not meant to refer to a security threat

3. Third Geneva Convention, Articles 123 and 126; Fourth Geneva Convention, Articles 76, 140 and 143.

4. Fourth Geneva Convention, Articles 136 and 137. The ICRC acts as the Central Tracing Agency pursuant to Article 140 and as a substitute of the Protecting Power pursuant to Article 11(3) of the Fourth Geneva Convention.

5. Third Geneva Convention, Article 122.

6. See Third Geneva Convention, Article 126 and Fourth Geneva Convention, Article 143.

7. Third Geneva Convention, Article 126 (2); Fourth Geneva Convention, Article 143 (3).

emanating from an individual. “Lawful purposes” means that a claim of imperative military necessity cannot be used to deny ICRC visits in situations where unlawful acts are being carried out in the concerned place of detention, e.g. where detainees are being ill-treated. “Exceptional” means that ICRC access should be the rule and that any denial must remain an exception, and not a pattern. For denial of ICRC access to remain an exceptional measure, the assessment carried out by the detaining authorities must necessarily be situational. Finally, “temporary” means that the detaining authorities should allow ICRC access again within the shortest possible period.

In NIACS, although there is no treaty provision explicitly granting the ICRC access to persons deprived of liberty, Article 3 common to the Geneva Conventions authorizes the ICRC to “offer its services” to the parties to a non-international armed conflict (the ICRC’s conventional right of humanitarian initiative). ICRC visits are a constant practice of the institution accepted by governments in virtually all non-international armed conflicts. They are recognized internationally, in particular via numerous resolutions adopted at the International Conference of the Red Cross and Red Crescent and hence also by States party to the Geneva Conventions. Moreover, ICRC access to detainees in situations that do not amount to armed conflict is provided for in international treaties as well; for example in UN and regional conventions on terrorism, as well as in other international instruments<sup>8</sup>.

To conclude, I would say obviously that anyone interned must be allowed contacts with the outside world throughout the time they are in internment. But I would like to argue as well from a detaining power viewpoint that enabling and maintaining contacts between internees and the outside world ensure transparency, contribute to the dispelling of rumours and improve the perception of the detaining authority by the public on the battlefield, at home and worldwide. Given that lack of contact inevitably leads to higher tension levels among detainees, respect for family life in detention and encouraging interaction with the outside world is beneficial for detainees, families and, indirectly, the guard force. As such, contacts with the outside world represent not only a legal and humanitarian imperative but also sound detention policy.

8. See for example, International Convention for the Suppression of Terrorist Bombings (Article 7/5); International Convention for the Suppression of Acts of Nuclear Terrorism (Article 10/5); International Convention for the Suppression of the Financing of Terrorism (Article 9/5); Draft Comprehensive Convention on International Terrorism (Article 10/5). See also Council of Europe Convention on the Prevention of Terrorism (Article 15/5).

## Military vs. civilian courts

*Clive Baldwin*

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For someone who was also born in 1970, it is a pleasure to share your 40<sup>th</sup> Anniversary, and I look forward to another celebration in 40 year's time.

My other thanks to the organizers is that, in giving me the topic of "Military versus Civilian Courts", they also gave me permission not to focus on the Guantanamo Bay military commissions, which as a representative of Human Rights Watch you might have expected me to do.

Instead I am going to focus on what I think is one of the most important inquiries that is going on at the moment regarding investigations into possible human rights and International Humanitarian Law (IHL) violations, as well as crimes committed by members of an international military force. That is the inquiry in the UK into the death of Baha Mousa.

This inquiry is important because it raises many wider issues about the responsibility of military forces when exercising policing powers and detaining civilians. Next month it will go into its fourth phase, which is looking beyond what happened in that case, to these broader issues. It will make recommendations not just on how to prevent such situations in the future, but on how armed forces should investigate and prosecute such situations, and whether those are best done by military or civilian tribunals and investigators.

To put it in a broader context it seems that the operations of the British armed forces in Iraq from 2003 and 2008 are creating some of the most important international law in recent years. At the European Court of Human Rights this year we have had the key *Al Saadoon* verdict prohibiting transfer of detainees to any authority where there is risk of the death penalty (and by extension of torture or ill treatment). We are also waiting on the *Al Jeddah* ruling about the legality of detention by the

British army in Iraq, and the *Al Skeini* ruling on the legality of killings of civilians. Baha Mousa is one of the cases in *Al Skeini*.

For those who are not aware, Baha Mousa was detained by British forces in Iraq in September 2003 – so during the official occupation phase of Iraq – and he died in custody. His death has been a subject of investigations ever since.

Several British soldiers faced prosecution in a court-martial three years later in connection with the treatment and death of Baha Mousa. One person was convicted, having pled guilty to inhumane treatment, as a war crime under the International Criminal Court Act. This was the first conviction in the UK under that act. However, all the other trials were stopped by the court-martial due to various reasons, mostly for lack of sufficient evidence.

But in 2008 the UK Government agreed to pay compensation to Baha Mousa's family and acknowledged a serious violation of Article 2 and Article 3 of the European Convention on Human Rights, that is of the right to life and of freedom from torture and inhuman and degrading treatment. What is happening now is a public inquiry under the Human Rights Act to comply with the European Convention on Human Rights obligations that Articles 2 and 3 now impose on state authorities where there is evidence suggesting a serious violation of the right to life or inhuman or degrading treatment. That requirement is that there needs to be an inquiry which is public, open – particularly for the victims or their families – which would identify what had happened and those responsible, which should lead to their prosecution.

This, as has been mentioned yesterday, is only the first such case. There has been a series of about fifty applications by other Iraqis claiming to be victims of similar violations by British forces and requesting similar public inquiries. There is also an application to the courts to have one combined inquiry.

This is all new because the Human Rights Act only came into force in UK in 2000, and in international law the application in practice of human rights law in cases of armed forces acting overseas is also relatively recent.

These cases raise all issues of International Humanitarian Law. The British had initially been part of an international armed conflict in Iraq, then were part of the formal occupation in 2003-4 and also were party to a non-international armed conflict of unclear dates. The law was further complicated by a Security Council resolution apparently authorising detention by international armed forces. The British armed forces had unclear legal responsibilities and powers on security and policing in Iraq.

So, this takes us to the question I was asked to address, in terms of how prosecutions and investigations should be conducted with respect to a military operating in another country. In the case of the British army in Iraq there are many allegations, some apparently grounded, of serious violations of IHL or human rights law or of international criminal law (i.e. torture and war crimes). Some of the lessons that can be drawn are specific to the British system, but there are, I think, broader lessons of relevance elsewhere. The first concerns whether and how independent military investigations can be conducted into possible criminal activities by that same military force. In the British case such investigations have been conducted by the Royal Military Police (RMP), the army's police.

I think it was mentioned yesterday that when considering how to ensure the independence of the investigation, key issues are the formal independence of the investigator from those possibly implicated in the crime; whether the investigator can be instructed by senior military to investigate or not to investigate a particular issue; and can the local commander restrict access to the investigator, even when that commander is one of those persons possibly implicated. The restriction of access to a crime scene may be critically important given the importance of getting evidence very shortly after the crime. Restrictions of access may not be formal – some members of the military police have complained about lack of access to helicopters in Afghanistan, which is the only way they could travel to conduct investigations.

Can a military police force, which is part of a military operation, ever be *de facto* independent? Several members of the military giving evidence to the inquiry have pointed out that when the Red Caps (the military police) were starting to investigate possible crimes by members of the British military in Iraq in September 2003, it came just weeks after they had suffered their greatest loss of life on one day in an attack in Iraq earlier that year, which it has been suggested may have particularly strongly bonded them to the overall British military mission.

Separating the army police functionally from the command structure, to allow independent investigating of other members of the forces of the mission, may be difficult in practice. Military criminal investigations need to be operational from day one of a mission so it can deal with situations as in Iraq and Afghanistan. As previously in Kosovo, such military police need to be able to deal with members of the local population who claim crimes have been committed by the international military. In the case of Iraq the alleged victims of attacks were the key to the police investigation, and it raised the issues of how difficult it is for a

foreign military police force, used to investigating relatively low-key crimes on military bases, to interview civilians in a foreign country, using interpreters, and to understand a different culture and legal system. In Kosovo, where the UN set up the justice system in 1999, it took international police and prosecutors years to be able to take reliable and speedy evidence from witnesses.

This issue would be critical because next year there is a new Armed Forces Act and one of the key findings of the Baha Mousa inquiry will be its recommendations on ensuring independence of the military police when they are investigating potential crimes in situations such as Iraq.

There has already been significant changes in recent years in the military justice system in Britain, partly because of the Iraq experience including how the military prosecution was criticised over Baha Mousa and others and more broadly due to its previous lack of independence from the command structure.

In the last Armed Forces Act in 2006, the military prosecution system in UK was made independent of the chain of command, and it has its first director of service prosecutions, who is a civilian. It remains to be seen how its paper independence will work in practice, but its model of independence has become much closer to the civilian model.

On a separate issue the prosecution is still not independent of the government. Specifically the Attorney General, who is always a politician with cabinet rank, has the power to intervene in individual cases, and stop prosecutions. This problem is however also present in the civilian prosecution system where the Attorney General has to give his or her permission for prosecutions of certain crimes, including the international crimes of torture and crimes against humanity.

This issue of the role of the Attorney General is rather peculiar in its particular form to England and Wales. However, the broader issue of the extent to which government ministers can interfere in individual criminal investigations and prosecutions is more widespread.

So in looking forward to what lessons have already emerged from the inquiries, these should focus on how to police the military operating in a multinational operation, which lasts for years, where the foreign military engages with civilians daily, often in policing and detention, and for the most part not in an armed conflict, and where local civilians have made allegations of serious crimes by members of these armed forces. The key starting point should be determining the best system to ensure that basic rights are respected, including the rights of accountability for serious crimes, which include the basic duties for states to investigate and prose-



cute the key international crimes when they take place, particularly in their territory or by their nationals, including their military.

Long-term international missions by the military are not generally situations which their existing internal policing structures have been designed to address. That criminal investigations into the military are not just independent on paper and in practice, but are also perceived to be such, is critical. The default position would be that each international military brings with it its own police and polices itself. However, that may not be possible in a system of multinational operations, particularly when you have several nations involved. If in the Baha Mousa case there had been forces from several countries in the detention centre where he died, who would conduct a criminal investigation?

One of the possible solutions that has been suggested is having a joint criminal investigation system for multinational force, but that means setting up what would amount to a new legal system, it would appear impossible to do quickly at the start of a mission and would mean trying to combine the different military policing systems for countries with very different legal systems.

The alternatives are civilian. There are two: one is the civilian prosecutors and police of the country concerned, so in the Baha Mousa case, the UK. In several countries the civilian prosecutors do have jurisdiction over the military anywhere in the world. This is not the case in the UK although, as I said, the military prosecution recently became much more similar to its civilian counterpart.

The practicalities of civilian police investigating their military operating in other countries, do raise problems. Although they would definitely be independent of the military chain of command, they would need to be present with the military from very early on in a mission, and would need clear powers to get access to crime scenes, witnesses and evidence. There may be examples from gendarmeries, e.g. the *Carabinieri*.

What needs to be considered much more is using the civilian justice system of the country where the alleged crimes took place to investigate and prosecute members of the foreign militaries in that country for serious crimes committed there. This should particularly be the default case where the foreign military force is in the country for a long period, and is part of the criminal justice system there (e.g. through policing powers, or detaining civilians).

Of course it will be impossible to involve the domestic criminal justice system during the times where there are no courts, as was the case at the beginning of the Kosovo and Iraq missions. Neither could the domestic

justice systems be involved where there are serious risks of torture or unfair trials. The European Court of Human Rights has made clear that European states cannot hand over their detainees to such risks, or to that of the death penalty – and this would also apply to members of the armed forces accused of crimes. But, in long term missions, where the foreign military are in effect part of the criminal justice system, granting them effective immunity from that system is problematic.

This is where the immunity from domestic criminal justice which is traditional for military presences in other countries is not appropriate. Immunity from a particular criminal justice system is not a right, it is a privilege. It should only be granted where the forces wanting to claim immunity can demonstrate that serious international crimes committed by their forces there will be effectively and independently investigated and prosecuted, including having the full involvement of victims and their families. Immunity in one particular legal system should never mean impunity when international crimes are involved.

An extreme case, where immunity from domestic criminal justice granted to the foreign military had very negative consequences, is in Kosovo. This was of course governed by the UN mission for many years, who created the justice system, including international judges and policing was shared between the military mission Kosovo Force (KFOR) and the UN. Despite this, both KFOR and the UN declared themselves, and all their staff, immune from the Kosovo legal system. Not only did this give the message to Kosovans that they had no confidence in the criminal justice they had created and were operating, it also gave what amounted to impunity for international civilian and military in Kosovo, even those operating as police. Some very high profile crimes where internationals were accused, simply saw the person accused leave Kosovo without any trial. Trials outside the country concerned are also problematic in terms of securing evidence and witnesses, but also in ensuring that justice is seen to be done, a critical message to get across in new justice systems.

So the fourth phase of the Baha Mousa enquiry will be particularly important in terms of suggesting future practice for policing multinational engagements. Such practice must be based on the basic principles that any investigations into serious crimes must be speedy and fair, both to the victims and to the accused.

The fact that in Britain there are now public inquiries some years after the crimes shows that some justice can be done belatedly but in the future we must make sure that justice is done at the time.

It is an important issue raising also the question to what extent International Criminal Law is equipped thereto and what role domestic jurisdiction has to play in this respect. We should not forget that plundering natural national resources often fuels a few possible violations of International Humanitarian Law, most specifically *vis-à-vis* the local population.

Very interesting observations regarding the use of force and the specificity of Law Enforcement Operations were presented by Captain McLaughlin. A further study to clarify these issues would be welcomed.

The purpose of the Convention on prohibitions or restrictions on the use of certain conventional war weapons which may be deemed to be excessively injurious or to have indiscriminate effects, is to ban or to restrict the use of specific types of weapons that are considered to cause unnecessary or unjustifiable suffering to combatants or to affect civilians indiscriminately.

The structure of the ccw, a chapeau Convention and annexed Protocols – containing the prohibitions and restrictions – guarantees a certain flexibility also with regard to the future.

Having heard the different reflections by Ambassador Trezza on the type of weapons allowed to be used and the present state of art, an important question regarding nuclear weapons was raised, which took into account also the advisory opinion of the International Court of Justice on the legality of such threat. Furthermore, Dr. Kellenberger in his address on 20 April 2010 made reference to this specific issue and it is considered that further reflection might be needed in disarmament circles. Certainly Sanremo is prepared to serve as a platform for humanitarian dialogue.

Detention challenges from a national perspective focused also on the applicability of the European Convention on Human Rights (*in casu* its Article 1) that offers rights and obligations to persons within the jurisdiction of contracting states. This has raised the issue of implementing the Convention outside the territory of contracting party. The Director General of army legal services highlighted these specificities and states should give proper attention to this issue.

Views from the ground, certainly in respect of the privation of liberty in armed conflicts and other situations of violence were more than welcomed in light of the legal aspects concerned. It is noted that for the United Nations, NATO as well as the European Union, in respect of the different operations in which they are engaged, the mandate to be given, the nature of such mandate and its implementation, is an important common issue.



## Challenges of evidence gathering

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First of all, I would like to thank the Institute for inviting me to this Round Table, and also to congratulate the co-ordinators for an extremely excellent and comprehensive program. Permit me also to extend my felicitations to Ambassador Moreno, the President of the Institute, as well as to its able and dedicated staff for the extremely useful and valuable work they have been carrying out in these forty years, disseminating humanitarian law and ensuring that the principles of human dignity are respected during armed conflict.

The topic for this session is Judicial Guarantees in Armed Conflicts and in other situations of violence. My assignment is to address the challenges of evidence gathering. Judges have not been oblivious to the challenges uniquely associated with collecting evidence of violations of International Humanitarian Law in armed conflict situations. It is imperative that even in armed conflict trials, judicial institutions preserve both the integrity of the judicial process as well as the due process *régime* enshrined by law.

I am asked also to make an observation here on evidence and the process of international litigation. I think the professors are offering this to encourage their students to look into these aspects for their research about the standard of evidence required in litigation involving the violation of International Humanitarian Law.

The literature on this issue is developing. As is well documented, recent investigations into armed conflicts have been initiated at the request of the United Nations. They have been demanded by judicial bodies such as the International Criminal Court, by State parties or by the prosecutor *proprio motu* for investigation purposes. Setting up an international apparatus to undertake the required investigation takes a considerable amount of time.

While the time required for initial operations may vary from situation to situation, experience has shown that a minimum period, from six months

to a year, is required to set up or fill offices, recruit staff, as well as obtain legal clearance for operational activities from States on whose territories investigation will be carried out.

Quite apart from the time period required for initiating procedures, experience has shown that States on whose territories investigations are conducted do not take sufficient steps to preserve evidence or do not have the capacity to preserve evidence which is pertinent to war crimes investigations. While in some cases the affected States may be willing to take steps to preserve evidence and support international investigations, experience has shown that elements within governmental circles and official State structures may take steps to undermine effective investigations when such elements perceive threats of prosecution from such investigations. In addition, armed groups opposing government forces who perceive a threat of prosecution arising from investigations may take steps to either destroy physical evidence or engage in conduct designed to impede such investigations.

Moreover, crimes alleged in armed conflicts are often large-scale and massive. In some cases the areas where the most serious crimes are reported remain inaccessible for security reasons. Victims and survivors continually live in fear, and remain reluctant to share information relating to their victimization and the experiences witnessed during armed conflicts. Official State structures which should protect citizens in such situations remain ineffective. Law and order, therefore, remain an illusion.

One of the challenges is the lack of effective State co-operation. Perhaps nowhere in the field of international legal practice is State co-operation more required than in the collection of evidence of international crimes arising out of armed conflicts. By nature, the international response set up to investigate violations of International Humanitarian Law in armed conflicts do not enjoy the same degree of effectiveness as courts do in national systems. They do not have time to set up an investigating force to understand the geography of a particular country or a particular area. Such teams, when constituted, normally promptly respond to take steps to secure and preserve evidence for investigation.

Furthermore, in national systems, national investigating bodies have coercive powers and carry out research, secure arrests and require the production of evidence. International investigators do not automatically have these powers. To the international investigator, achieving these investigating objectives requires the co-operation of States. Without State co-operation, international investigations may be unsuccessful.

Given the threshold standard required for proving crimes under the statutes of various international judicial bodies, the initial steps taken by

international investigations, including the identification of safe and secure locations for setting up field offices, depends on the co-operation of the affected States as well as regional bodies. While a responsible international investigative team would have commenced gathering intelligence on the identification of safe locations, in reality the actual location and establishment of such field offices require support from the affected States. There is a real risk that State involvement in the initial phases of investigative set-up would lead to possible interference which may affect both the direction and outcome of the investigations.

Against this background, it is reasonable to conclude that State interference at the initial phases in armed conflict investigations would ultimately affect both the conduct and outcome of the investigations.

Another issue to be considered is the failure of States to adopt legislative measures to give effect to international obligations, which include support for international investigations. If an operation has a problem within the territory of the affected States or other States which may be of interest to the investigators, most international legal instruments establishing international investigations oblige affected States and other States to take legal and other measures necessary for the implementation of the obligations under these international instruments. In these circumstances experience has shown that initial investigative steps are hampered because most departments in affected States would cite national law to justify their failure to provide support to an international investigative team. Such legal impediments affect the operational capability of the investigative team in the conduct of its work.

A prime example is Uganda, which had not adopted the national law giving effect to its obligations under its own statute at the time the ICC commenced its investigation in that territory. As stated, most international investigations arise as the result of either a State referral or international pressure.

Normally, one would expect a referring State to readily share and provide information on its position to an investigative team. In reality, experience has shown that this is not the case. While it is the intention of most referring States to use international investigations to target opposing armed groups, in reality governments of these States remain concerned as to the outcome of such investigations. Intelligence sharing becomes more difficult when States perceive that the investigation undertaken is objective and may well target individuals within their own governments.

For this reason, experience has shown that States are reluctant to share information and intelligence which may lead to an objective investigation.

Certain States have shared information which may implicate the actions of armed rebel groups while withholding information that may possibly affect government officers.

Additionally, States traditionally plead their national security interests in order to limit the geographical reach of an investigation, thereby making certain areas inaccessible to investigators. The most famous example of this is the genocide cases.

What about State control and interference within international investigations? Most States have appointed personnel within official departments to serve as liaison officers on focal points for international investigations. Requests for assistance are issued through these liaison officers. While these liaison officers provide support for investigators, they also provide intelligence services for the State. In such circumstances, it is reasonable to assume that responses from State liaison officers are influenced by and predicated on the State's interests. Consequently, such State liaison officer positions affect the conduct and possibly the outcome of investigations and even the quality of the evidence.

In general, investigating teams are unable to effectively gather intelligence on the territory of a State without the support of that State. In many instances, State officers either decline requests for intelligence information or provide incomplete information. In others, State officers plead national security as a basis for withholding such information.

Without effective intelligence gathering capability, prioritizing investigative steps and directing limited investigation resources to priority areas may affect both the conduct and outcome of such investigations. State inability or refusal to share and provide mechanisms for effective intelligence gathering may have severe repercussions on investigations and may put the lives of investigators at risk, given that they are unfamiliar with a particular country concerned.

Also to be borne in mind in addressing the challenges of evidence gathering is the security of investigating personnel. Perhaps the single largest concern facing investigations in armed conflicts is the security of personnel undertaking investigations. International investigators rely almost exclusively on State security apparatuses to be able to effectively conduct their investigations. Practically, these investigators may only undertake a visit to set locations within the territory of the State. Experience has shown that States may direct attention and provide security clearance for some areas, while in others parts of the country security clearances and other information pertinent to the investigations are deliberately left out. By adopting such measures and strategies, States ensure that evidence remains undiscovered by investigators.



I would also like to address the issue of identification of intermediaries. Most international investigators are not permanently based in conflict zones. By the nature of their assignment, they travel to zones of various conflicts to undertake investigations from time to time, and rely on the assistance of intermediaries. The intermediaries provide assistance which includes but is not limited to identification of victims, witnesses and other physical evidence pertinent to the investigations.

A problem that arises is the proper identification of credible intermediaries. Without sufficient intelligence gathering mechanisms, it is practically impossible to properly vet intermediaries, whose role is central to the collection of evidence in many armed conflicts.

How may victims and witnesses be identified?

Relying on NGOs as intermediaries, it is often difficult to find an investigator who is familiar with a particular territory or a particular country and its native people and who speaks their language to identify victims and witnesses that may be of interest in the investigation.

Given this context, an initial point of reference would be NGO reports, public reports and media publications identifying various locations in a country where international crimes have been reported. Local interpreters are also an important resource but their neutrality, like that of intermediaries, is difficult to vet without credible intelligence gathering mechanisms.

Most investigators turn to NGOs with presence in such countries for assistance. A particular difficulty found is regarding the reliance on NGOs and the necessity for NGOs to remain neutral, and to be regarded as neutral by all parties. For that reason they provide limited information, so as not to be seen as compromising their neutrality.

An additional constraint is that NGOs do not collect information with the intention to have it used in criminal proceedings. The information collected is generally based on a variety of sources, some of which would not pass the threshold test of admissibility of evidence in international criminal proceedings. The NGOs also sign confidentiality agreements with their sources which means that while in some cases they may provide details regarding the identity and locations of persons, NGOs will often refuse to divulge such information on account of the confidentiality agreements. The reluctance of NGOs to share information has also been identified as *de facto* hampering the conduct of investigations in armed conflicts.

And what about crime scene investigations and tracing and identification of victims, witnesses and physical evidence? Experience has shown that the older war crime cases get, the more difficult they become to inves-

tigate. Victims, witnesses and other physical evidence such as documents, forensic DNA evidence, crime scenes, and mass graves become less available or accessible over time. When too much time passes, many victims choose to forget and not to share information pertaining to their victimization, while other eyewitnesses may have simply disappeared. Similar constraints apply to physical evidence, especially documentary evidence. Most leaders of armed groups, as well as governments, tend not to share detailed evidence regarding information pertaining to attacks. They can also intercept communications and military orders, and in some cases destroy such evidence. In relation to crime scenes such as mass graves, the quality of the evidence simply disappears with time as a result of a combination of natural factors such as rain, sunshine as well as human activity, making it difficult to perform DNA analysis at such crime scenes.

I will turn briefly to cultural impediments in relation to evidence gathering. Most international investigating teams have served with personnel from different countries. Foreign personnel are not equipped to deal with cultural issues which may impede the collection of information in some parts of the world. An example arises from the investigation of rapes and other acts of sexual violence in culturally conservative societies where the discussion of matters related to sex is considered taboo. Experience has shown that without proper training and without the inclusion of persons they identify with, sexual violence victims are usually reluctant to share details about the extent of their victimization. This thus undermines not only the ability to gather evidence but also the integrity of the evidence as well.

In conclusion, the challenges that have been identified in this presentation find resonance in armed conflict situations generally. The degree and intensity of the problems may differ from one country to another but the problems raised here apply, to a certain extent, in all investigations conducted in or following armed conflict situations. For instance, in the Balkans a key issue for the ICTY is the co-operation of one of the parties to the conflict. While in Africa, in addition to issues of co-operation, there is a weak State structure and security apparatus which does not guarantee the preservation of evidence, and which may contribute to impede effective evidence collection.

## **IV. Concluding remarks**



## *Baldwin De Vidts*

Vice-President, International Institute of Humanitarian Law, Sanremo

At the end of this successful Round Table, I would like to share with you a few reflections on some of the topics the Round Table has now discussed.

I would like to focus on Theme 1: “Contemporary forms of armed violence: International Humanitarian Law and human rights law at a cross-road”, as well as on the views from the ground regarding deprivation of liberty in armed conflicts and other situations of violence.

First of all, I would also like to refer to the key-note address by Dr. Kellenberger whereby he stated that “Global violence” is an important issue and considering the present situation, he raised the question to what extent the current provisions of International Law adequately address the huge contemporary humanitarian challenges we are facing today. Indeed, having in mind the different presentations we have heard, followed by fruitful discussions, we should aim for further clarifications and development of the Law.

It is important to have a clear and precise understanding of these contemporary challenges, which have a different nature, in order to ensure compliance with international norms and laws and to take action, as appropriate, by further clarifying and, as needed, developing International Law. Certainly, the International Institute of Humanitarian Law in concert with all players, as the International Committee of the Red Cross, is more than willing to take part in such a process.

Violence, as a concept and a phenomenon, has been central to discussions in various social, human sciences disciplines, philosophy, literature, governance and policy. The approach to violence is transverse and multidisciplinary. It has many origins and a range of local, national and international forms and consequences. What do we mean by “Violence” nowadays? When we come across new forms of violence are these really

new types *stricto sensu* or are they variations on old forms that have become more widespread in recent years or more severe and taken on new disguises? These new forms of violence, or should we say remodeled forms of violence, due to change of society challenge International Humanitarian Law as well as international human rights law. The difficulty is that to a certain extent we are dealing with different sets of instruments, but with a common denominator “the human treatment of persons and communities” involved directly or indirectly in military actions or subject to such actions.

Asymmetric warfare, *in se*, is acting and thinking or organizing differently as compared to the other party or parties in order to maximize one’s own advantages or to take advantage or exploit an opponent’s weakness. Asymmetric warfare, as explained by Professor Heintschel Von Heinegg, is not new, all armed conflicts are to a certain extent asymmetric. Look at King Philip’s war in the XVII century on US soil, the New England Indians abandoned their traditional restraints and prepared to wage war against all colonists regardless of their status as innocent civilians or combatants. Certainly, King Philip’s method of attacking the normally larger British Forces by using smaller, more mobile forces, taking advantage of the terrain, cannot be considered as a method which is not allowed. It exploits a specific vulnerability. However, as clearly explained, a party should not cover its own insufficiencies by resorting to methods which are not allowed.

Military imbalances carry incentives for the weaker party to level out its inferiority by disregarding existing rules regarding the conduct of hostilities. Faced with a party that systematically disrespects International Humanitarian Law, the other party may have the impression that legal prohibitions operate exclusively for the adversary’s benefit. The real danger/challenge in such a situation is that the application of International Humanitarian Law will be perceived as detrimental by all the parties to a conflict (the so-called spiral down effect) and that this will lead to an all-round disregard of International Humanitarian Law.

The so-called asymmetric warfare and its consequences never creates a justification to deviate from International Humanitarian Law. This is the message we should keep in mind: the respect of the principles of International Humanitarian Law in the short/long term, in such circumstances, remain essential and in conformity with military as well as political interests.

Terrorism, and certainly September 11, has drawn our particular attention to the draft Convention on international terrorism. An analysis of the

adequacy of International Law, including International Humanitarian Law, in dealing with terrorism certainly begs the question: “What is terrorism?”

Many definitions exist both in domestic legislation and at an international level, but currently there is no comprehensive international legal definition. The UN draft Comprehensive Convention on international terrorism has been stalled, because of this issue, among others, whether and how acts committed in armed conflicts should be excluded from its scope.

Regardless of the lack of a comprehensive definition, terrorists acts are crimes under domestic law and existing international and regional conventions on terrorism. These acts may, provided the requisite criteria are met, qualify as war crimes or crimes against humanity.

While International Humanitarian Law does not provide a definition of terrorism, it explicitly prohibits most acts committed against civilians and civilian objects in armed conflicts that would commonly be considered “terrorist” if committed in peace time. Once the threshold of an armed conflict has been reached, it could be argued that there is little added value in designating most acts of violence against civilians and civilian objects as “terrorist” because such acts already are to be considered as war crimes under International Humanitarian Law.

On the relationship between International Humanitarian Law and terrorism further reflections should be made to understand better the interplay between the two regimes and clarification/development of law. The fight against terrorism requires the application of a large range of measures: investigation, diplomatic, economic, legal, educational criteria etc., covering the spectrum from peace time actions to the use of military force. International Humanitarian Law is not the sole legal tool in such a complex framework.

International Humanitarian Law specifically mentioned, certainly prohibits measures of terrorism and acts of terrorism. Article 33 of the fourth Geneva Convention indeed states that “Collective penalties and likewise all measures of intimidation of terrorism are prohibited”. Article 4 of Additional Protocol II prohibits “acts of terrorism aiming to emphasize that neither individual nor the civilian population may be subject to a state of terror”. Also reference we can find in Additional Protocol I and II.

As already mentioned, certain actions, such as looting national resources, should also be considered within the framework of new forms of violence.

Professor Van Den Wyngaert underlined the role to be played through International Criminal Law and its implementation to face these challenges.

For the military personnel, the Rules of Engagement is an important issue to become familiar with the boundaries of action. Moreover, it also offers a political control on the use of force, regulates – besides operational planning – the conduct of armed forces by individual states, alliances and coalitions. A clear understanding of these Rules of Engagement should exist since they are often a mix of military and political policy requirements. Caveats might be problematic, but these constraints should not endanger the mission. I take this opportunity to remind all participants that the Institute in November last year, with the contribution of the International Committee of the Red Cross, issued the “Sanremo Rules of Engagement Handbook”. For interested parties some copies are still available.

The issue of accountability, the need of standardization, pre-training as well as training in mission are continuing challenges. Resolving them could take a global approach. Standard Operating Procedures (SOPs) are important so that participating states would be in a better position to comply with their obligations. The transfer of arrested/detained persons remain for different reasons a very sensitive issue and once again more clarification could be of importance in order to guarantee full fairness.

We were pleased with further information about the Atlanta Operation, the EU Naval Operation against piracy, and in this respect, I would like to refer to, to the best of my knowledge, the first judgment which was rendered on 7 September 2010 in the Kenyan prosecution in connection with the interdiction of a pirate group by EU NAVFOR warship.

This is a positive step in the repression of acts of piracy and armed robbery, it demonstrates the positive outcome of the bilateral agreement concluded between the states concerned and the European Union.



## *Philip Spoerri*

Director for International Law and Cooperation, International Committee of the Red Cross, Geneva; Member, IIHL

It is an honour to propose, with Baldwin de Vidts, some concluding remarks of this 33<sup>rd</sup> Round Table on “Global violence: consequences and responses”. Before doing so, allow me to first deeply thank the Institute of International Humanitarian Law for cooperating with the ICRC for this year’s jubilee event. In his opening address the ICRC President re-called the long cooperation between the ICRC and the Institute from the days of its creation four decades ago. In fact, the co-organisation of the annual round table has always been a very important aspect of this cooperation. The Round Table has proven to be a unique venue for debating the “burning” legal questions of the time related to International Humanitarian Law (IHL). Year in and year out the Round Table has been successful in drawing together a wide range of experts, combining theoretical and practical expertise thereby making an important contribution not only in advancing on the substance of difficult legal and practical issues, but also in opening an opportunity of rich exchange for all those working and interested in IHL and other related bodies of law.

In line with this tradition, I am very satisfied to make a concluding appreciation that this 33<sup>rd</sup> Round Table has been a success due to the choice of the topics, the quality of the panels and the quality of dialogue. I wish to express special thanks for this to the coordinators of the event Dr. de Vidts, Judge Pocar and Prof. Veuthey from the Institute together with my colleague from the ICRC, Mr Stéphane Ojeda, who shouldered the greatest share of the ICRC’s contribution on the substance and organization of the Round Table.

I must admit that it is not an easy task to encapsulate in concluding remarks all aspects of our discussions given the variety of the subject matters that were addressed, but I also think that for this year’s concluding remarks I can focus only on some salient points of the presentation and

discussions we have seen over the past 2 days due to the fact that the rapporteurs of each session have kept note and track of the essence of each session.

I will, therefore, just add a few remarks and observations on each session.

In our first session, speakers described the evolution of some “consequences” or, let me say, manifestation of contemporary armed violence particularly related to the means and methods of violence. They not only highlighted the variety/complexity of these phenomena, but also the legal complexities of issues such as suicide bombing, human shields, terrorism, the looting of natural resources and weapons-related aspects. We have been cautioned not to believe that the vast majority of contemporary forms of violence, e.g. the asymmetries in warfare, are necessarily something new that would, therefore, not be sufficiently covered by existing IHL. I believe that we could discuss at length what is truly new or not, yet what is certain is that numerous current developments pose new challenges, undoubtedly of course when they are caused by the introduction of new technologies in warfare or the development of technology in general (cyber-warfare). Fortunately, international law remains a living tool that has always adapted itself to the changing characters of violence. These adaptations have also been influenced by the political environment prevailing at that time. We also noticed, on Friday, that the long-lasting taboo of not discussing legal issues related to nuclear weapons has indeed been broken; and that the international community increasingly agree that the challenges posed by international terrorism should not go on a par with a weakening of IHL or other bodies of law.

During yesterday’s sessions, we were informed about two recent or on-going initiatives undertaken to address some current detention challenges, namely the 2010 UN *interim* standard operational procedures (SOPs) on detention; and, the Copenhagen process on the handling of detainees in international military operations. We heard Prof. Novak express his conviction that the lacunae in this area would call for the development of a new instrument, in his words, a “human rights convention on detainees”. Any idea or initiative aiming at enhancing the international protection of individuals affected by armed conflicts or other situations of violence is to be welcomed. However, we must make sure that such new developments build on existing international law, in particular IHL and human rights law (HRL). Contemporary challenges must not weaken what we already have but strengthen it.

As far as armed conflicts are concerned, the speakers and the audience agreed that it is in non-international armed conflicts that we face the greatest humanitarian and legal challenges. We heard some interesting proposals in this regard such as a flexible approach of human rights law or recognizing that a legal basis for detention exists for organized armed groups in IHL. As you know by now, the ICRC has been engaged for some years in a comprehensive study, which aims to identify the humanitarian concerns arising in today's non-international armed conflicts, with a view to identifying possible gaps or weaknesses in current treaty and customary law protection. While the study concluded that IHL remains an appropriate framework for regulating the behaviour of parties to armed conflicts, it also showed that IHL does not always offer fully satisfying solutions to all specific humanitarian needs observed on the ground, for instance, to the needs of persons deprived of liberty in non-international armed conflicts. Thus, I can reveal that it is not a pure coincidence that we believed that this issue is particularly topical for this year's Round Table. We believe that it is a topic that should continue to deserve our full attention; it will certainly be a key area of attention for the ICRC.

Another aspect tackled by various speakers is related to prosecution of alleged perpetrators of violations of IHL and/or HRL. Speakers drew our attention to various case laws related to detention in armed conflicts and other situations of violence, such as the jurisprudence of the International Criminal Tribunal of the Former Yugoslavia (ICTY), European Court of Human Rights (ECHR) and UK courts. In addition to such important developments in international criminal law, it was pointed out again and again that appropriate means for halting and redressing violations when they occur remain poor – and this is an understatement.

With regards to individual guarantees addressed today, one of the most currently debated legal issues is undoubtedly the legal basis for internment in non-international armed conflicts. This issue as well as the aspects related to the review of the lawfulness of internment are clearly at the crossroad of IHL and HRL. Let us hope that these debates will not end up in a global fight between the pro-IHL fans and the pro-HRL fans but will result in a constructive debate in which they will be able to understand each other's point of view, based on the different reality that these two bodies of law govern. As has been pointed out, Judicial Guarantees (JG) is an area in which IHL and HR law are almost identical, even though certain aspects, such as *habeas corpus* in non-criminal proceedings or the advantages and disadvantages of military *versus* civilian justice, remain hot topics in current discussions. There is in my view no doubt that the relation between

IHL and HRL will remain one of the central questions that we shall have to further explore in the years to come.

I will stop here. I am sorry for not having included all the specific aspects debated during this round table in these concluding remarks. I am confident, however, that the wealth of debates has been well captured thanks to our rapporteurs' excellent work. As always the Institute will be publishing the contributions and outcomes of the Round Table. We look forward to this. Let me thank you all once more, organizers, speakers, participants and interpreters. Again, happy birthday to the Institute and see you next year!



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## Acronyms

AC	Appeal Chamber
ACLU	American Civil Liberties Union
API	Additional Protocol 1
APII	Additional Protocol 2
ATCA	Alien Tort Claims Act
CBRN	Chemical, Biological, Radiological and Nuclear
CCW	Certain Conventional Weapons Convention
CD	Conference on Disarmament
CEDU	European Court of Human Rights <i>Italian: Corte Europea dei Diritti dell'Uomo</i>
CERD	Committee on Elimination of Racial Discrimination
CIA	Central Intelligence Agency
CICIG	Commission to Investigate Organized Transnational Crimes in Guatemala <i>Spanish: Comisión Internacional Contra la Impunidad en Guatemala</i>
CICR	Comité International de la Croix-Rouge
CIDT	Cruel, Inhuman and Degrading Treatment
CIHL	Customary International Humanitarian Law
CIL	Customary International Law
CIVPOL	Civilian Police
COE	Centre of Excellence
CT	Counter Terrorism
CTC	Counter-Terrorism Committee
CTED	Counter-Terrorism Executive Directorate

CTITF	Counter-Terrorism Implementation Task Force
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of Congo
ECHR	European Court of Human Rights
ERW	Explosive Remnants of War
EU	European Union
FARC	Revolutionary Armed Forces of Colombia <i>Spanish:</i> Fuerzas Armadas Revolucionarias de Colombia-Ejercito del Pueblo
FGM	Female Genital Mutilation
FRY	Federal Republic of Yugoslavia
GC	Geneva Convention(s)
GDP	Gross Domestic Product
HIT	Human Integrated Treatment
HR	Human Rights
IAC	International Armed Conflict
IAI	Institute of International Affairs <i>Italian:</i> Istituto Affari Internazionali
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDLO	International Development Law Organization
IDPS	Internally Displaced Persons
IED	Improvised Explosive Devices
IG	Inspector General
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IHL	International Institute of Humanitarian Law
IILA	Istituto Italo Latino Americano
INTERPOL	International Criminal Police Organization
IOM	International Organization for Migration



ISAF	International Security Assistance Force
ISOP	Interior Standard Operating Procedures
ISPI	Istituto per gli Studi di Politica Internazionale
JCE	Joint Criminal Enterprise
JNA	Yugoslav People's Army <i>Slovene:</i> Jugoslovenska Narodna Armija
LOAC	Law of Armed Conflict
LTTE	Liberation Tigers of Tamil Eelam
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NIAC	Non-International Armed Conflict
NPT	Nuclear non-Proliferation Treaty
OIM	International Organization for Migration <i>French:</i> Organisation Internationale pour les Migrations
OMS/WHO	World Health Organization <i>Italian:</i> Organizzazione Mondiale della Sanità
ONG	Non-Governmental Organization <i>Italian:</i> Organizzazione Non Governativa
ONU	United Nations <i>Italian:</i> Organizzazione delle Nazioni Unite
OPCW	Organization for the Prohibition of Chemical Weapons
PNR	Passenger Name Record
POW	Prisoner of War
R2P	Responsibility to Protect
ROE	Rules of Engagement
SC	Security Council
SCSL	Special Court for Sierra Leone
SOP	Standard Operating Procedure
SHAPE	Supreme Headquarters Allied Powers Europe
SPLA	Sudan People's Liberation Army
SWIFT	Society for Worldwide Interbank Financial Telecommunication
TC	Tribunal Court
TNG	Transitional National Government
UE	European Union <i>Italian:</i> Unione Europea
UNC	Universal Naming Convention

UNCTOC	United Nations Convention against Transnational Organized Crime
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
UPDF	Ugandan People's Defence Force
USMC	United States Marine Corps
VDP	Vessel Protection Detachment
WMD	Weapons of Mass Destruction
WOT	War on Terror

**Celebration of the 40<sup>th</sup> Anniversary of the International Institute of Humanitarian Law  
Round Table on “Global Violence: Consequences and Responses”  
Sanremo, 9<sup>th</sup>-11<sup>th</sup> September 2010**

**PROGRAMME**

**Thursday, 9<sup>th</sup> September**

*Opera Theatre of the Casino of the Municipality of Sanremo*

**10.00-13.15 - OFFICIAL CEREMONY**

*Welcome addresses*

**Ambassador Maurizio MORENO** - President, International Institute of Humanitarian Law, Sanremo

**Mr. Maurizio ZOCCARATO** - Mayor of Sanremo

**Mr. Donato DI PONZIANO** - President, Casino of the Municipality of Sanremo

**Hon. Francesco BELSITO** - Secretary of State, Office of the Prime Minister, Rome

**Hon. Sonia VIALE** - Secretary of State, Ministry of Economics and Finance, Rome

**Hon. Claudio SCAJOLA** - Member of Parliament; former Minister of Interior and former Minister of Economic Development, Imperia

*Keynote address*

**Dr. Jakob KELLENBERGER** - President, International Committee of the Red Cross, Geneva

**Presentation of the IHL Prize 2010 to the Municipality of Sanremo and to Professor Fausto Pocar**

*Addresses*

**H.S.H. Prince ALBERT II OF MONACO** - President, The Monaco Red Cross

**H.E. Mr. Jean-Pierre MAZERY** - Grand Chancellor and Foreign Minister, Sovereign Military Order of Malta, Rome Member, IHL

**Ambassador William Lacy SWING** - Director General, International Organization for Migration, Geneva

**Ambassador Claudio BISOGNIERO** - Deputy Secretary General, NATO, Brussels

**Gen. Vincenzo CAMPORINI** - Chief of the Defence General Staff, Rome

**Ms Patricia O'BRIEN** - Under Secretary General for Legal Affairs and Legal Counsel, United Nations, New York

**Lt. Gen. (ret.) Christophe KECKEIS** - President, The Geneva Centre for the Democratic Control of Armed Forces; Former Chief of Swiss Armed Forces, Bern

**Ambassador Betty KING** - Permanent Representative of the United States of America to the United Nations Office and Other International Organizations, Geneva

**Ambassador Antonio BADINI** - Director General, International Development Law Organization, Rome

**Dr. Francesco ROCCA** - Extraordinary Commissioner, Italian Red Cross, Rome

**Ambassador Soad Mahmoud SHALABY** - Director, Cairo Regional Center for Training on Conflict Resolution and Peacekeeping in Africa, Cairo

**Ambassador Anatoly ADAMISHIN** - President, Association for Euro-Atlantic Cooperation, Moscow

**Dr. Massimo BARRA** - President, Standing Commission of the Red Cross/Red Crescent Movement, Geneva

**Dr. Stefano DAMBRUOSO** - Judge, Head, Department for International Relations, Minister of Justice, Rome

**13.15 - LUNCHEON**

*International Conference Centre, Grand Hotel Londra*

**15.00-18.00 XXXIII ROUND TABLE ON CURRENT PROBLEMS OF INTERNATIONAL HUMANITARIAN LAW JOINTLY ORGANIZED BY THE INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW AND THE INTERNATIONAL COMMITTEE OF THE RED CROSS**

**“GLOBAL VIOLENCE: CONSEQUENCES AND RESPONSES”**

*Theme I*

**Contemporary forms of armed violence: International humanitarian law and human rights law at a crossroad**

*Moderator*

**Prof. Fausto POCAR** - Judge, International Tribunal for the former Yugoslavia, The Hague  
Vice-President, International Institute of Humanitarian Law, Sanremo

*Rapporteur*

**Dr. Mounir ZAHRAN** - Former Ambassador of Egypt; Member, IHHL

*a. Asymmetrical warfare and challenges to International Humanitarian Law*

**Prof. Dr. Wolff HEINTSCHEL VON HEINEGG** - Head of the Faculty of Jurisprudence, Viadrina University, Frankfurt  
Council Member, IHHL

*b. An approach to terrorism*

**Prof. Giuseppe NESI** - Professor of International Law, University of Trento  
Legal Advisor, Permanent Mission of Italy to the UN, New York

*c. New forms of violence before ICC*

**Prof. Christine VAN DEN WYNGAERT** - Professor of International Criminal Law, University of Antwerp  
Judge, International Criminal Court, The Hague

*d. International humanitarian law, new forms of armed violence and the use of force*

**Capt. Robert James McLAUGHLIN** - Director, Operations and International Law, Royal Australian Navy, Canberra

*e. Thirty years of the 1980 CCW Convention. Where do we go from here?*

**Dr. Ove BRING** - Professor Emeritus of International Law at Stockholm University and Swedish National Defence College, Stockholm - Member, IHHL

*f. Arms control and International Humanitarian Law*

**Ambassador Carlo TREZZA** - Chairman of the Advisory Board of the UN Secretary General for Disarmament Matters; Co-director and Diplomatic Advisor, CASD (Italian Centre for High Defence Studies), Rome

**Discussion**

*Villa Ormond*

**19.30-20.30 - CONCERT (ON INVITATION ONLY)**

**10.00-20.30 - BUFFET DINNER (ON INVITATION ONLY)**

Friday, 10<sup>th</sup> September

*International Conference Centre, Grand Hotel Londra*

**10.00-13.00 - PLENARY SESSION**

*Theme II*

**Deprivation of liberty in armed conflict and other situations of violence**

*Moderator*

**Judge Advocate General Arne W. DAHL** - President, the International Society for Military Law and the Law of War, Brussels Member, IHHL

*Rapporteur*

**Prof. Edoardo GREPPI** - Professor of International Law, University of Turin; Member, IHHL

**The views from the ground** (status, conditions of detention, treatment, transfers)

*a. Current detention challenges faced by the UN*

**Mr. Godfrey AROPET** - UN Police Division, Office of Rule of Law and Security Institutions, UN Department of Peacekeeping Operations, New York

*b. Current detention challenges faced by NATO*

**Capt. Sheila ARCHER** - (Navy) Canadian Forces, Assistant Legal Adviser, SHAPE; former Chief Legal Adviser, ISAF, Brussels

*c. Current detention challenges faced by the EU (Atalanta)*

**Dr. Gert-Jan VAN HEGELSOM** - Legal Adviser, Council of the European Union, Brussels

*d. Current detention challenges from a national perspective*

**Major General David M. HOWELL CB, OBE** - Director General Army Legal Services, Andover, UK

**Discussion**

**13.00-14.00 - LUNCH BREAK**

*International Conference Centre, Grand Hotel Londra*

**15.00-18.00 - PLENARY SESSION**

**Legal Aspects**

*a. Legal basis of detention and determination of detainee status*

**Prof. Marco SASSÓLI** - Professor of International Law, University of Geneva

*b. Treatment of detainees and conditions of detention*

**Prof. Paola GAETA** - Professor of International Humanitarian Law, Director of the Master of Advanced Studies Academy of International Humanitarian Law and Human Rights, Geneva

*c. The crime of torture*

**Prof. Manfred NOWAK** - Professor of Constitutional Law and Human Rights, University of Vienna  
Special Rapporteur on torture, UN, New York

*d. Transfers of detainees*

**Ambassador Thomas WINKLER** - Undersecretary for Legal Affairs, Ministry of Foreign Affairs, Copenhagen

**Discussion**

*Grand Hotel Royal*

**18.30-20.00 - RECEPTION (ON INVITATION ONLY)**

*Yacht Club*

**19.45 - MEETING AND DINNER OF THE ALUMNI ASSOCIATION**

**Saturday, 11<sup>th</sup> September**

*International Conference Centre, Grand Hotel Londra*

**09.00-12.30 - PLENARY SESSION**

*Theme III*

**Individual guarantees in detention**

*Moderator*

**Ambassador Jürg LINDENMANN** - Federal Department of Foreign Affairs, Directorate of International Law, Bern

*Rapporteur*

**Dr. Pernilla NILSSON** - Legal Adviser, Department for International Law, Human Rights and Treaty Law, Stockholm

**Procedural safeguards in armed conflict and other situations of violence**

*a. Permissible grounds for internment/administrative detention*

**Dr. Oscar SOLERA** - Human Rights Officer, Rule of Law and Democracy Section, United Nations High Commissioner for Human Rights, Geneva

*b. Review of the lawfulness of internment/administrative detention*

**Prof. Françoise HAMPSON** - Professor of International Law, University of Essex

*c. Contacts with the outside world*

**Mr. Stéphane OJEDA** - Legal Advisor, International Committee of the Red Cross, Geneva

**Discussion**

**Judicial guarantees in armed conflict and other situations of violence**

*a. Fair trial rights in armed conflicts*

**Ms Jelena PEJIC** - Legal Advisor, International Committee of the Red Cross, Geneva

*b. Military vs. civilian courts*

**Dr. Clive BALDWIN** - Senior Legal Advisor, Human Rights Watch, New York

*c. Challenges of evidence gathering*

**Judge Abdul G. KOROMA** - International Court of Justice, The Hague; Member, IHHL

**Discussion**

**12.00-12.30 - CONCLUDING REMARKS**

**Dr. Baldwin DE VIDTS** - Vice-President, International Institute of Humanitarian Law, Sanremo

**Dr. Philip SPOERRI** - Director of International Law and Relations with the Movement, International Committee of the Red Cross, Geneva; Member, IHHL