

INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW
INSTITUT INTERNATIONAL DE DROIT HUMANITAIRE
ISTITUTO INTERNAZIONALE DI DIRITTO UMANITARIO



**CURRENT PROBLEMS
OF INTERNATIONAL HUMANITARIAN LAW**

27th Round Table, Sanremo, 4-6 September 2003

**INTERNATIONAL HUMANITARIAN LAW AND OTHER LEGAL REGIMES:
INTERPLAY IN SITUATIONS OF VIOLENCE**

- CHALLENGES AND PROSPECTS -

~ PROCEEDINGS ~

ACKNOWLEDGEMENTS / REMERCIEMENTS / RINGRAZIAMENTI

OFFICE FÉDÉRAL SUISSE DES RÉFUGIÉS

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

DÉPARTEMENT FÉDÉRAL SUISSE DES AFFAIRES ÉTRANGÈRES

CANADIAN DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE

FONDAZIONE CASSA DI RISPARMIO DI GENOVA E IMPERIA

SWEDISH MINISTRY FOR FOREIGN AFFAIRS

CROIX-ROUGE MONÉGASQUE

NORWEGIAN RED CROSS

REGIONE LIGURIA

TABLE OF CONTENTS / TABLE DES MATIÈRES / INDICE

27th Round Table

4-6 September 2003, Sanremo

Discours de Bienvenue

Prof. Jovan PATRNOGIC, Président du IIDH

Protection through complementarity of the law

Dr. Jacob KELLENBERGER, President of the International Committee of the Red Cross

Indirizzo di saluto

Dr. Alberto CUTILLO, Primo Consigliere presso la Rappresentanza Permanente d'Italia in Ginevra.

International Humanitarian Law & International Disaster Response Law

Dr. Bosko JAKOVLJEVIC, Member of the IIHL

International Humanitarian Law – International Human Rights Law. Some proposals for improving dissemination

Prof. Miodrag STARCEVIC, Member of the IIHL, Serbia and Montenegro Red Cross Society, Senior Adviser on International Humanitarian Law

Non-International armed conflict: legal qualifications and Parties to the conflict

Dr. Dieter FLECK, Director, International Agreements & Policy, Federal Ministry of Defence, Germany. Member of the IIHL

Conflit armé non international: conditions juridiques et parties en conflit

Dr. Dieter FLECK (*idem*)

Legal qualification and international humanitarian law as “lex specialis”: 10 basic questions concerning international armed conflicts... and answers?

Prof. Vitit MUNTARBHORN, Faculty of Law, Chulalongkorn University, Thailand

The Historical evolution of international humanitarian law, international human rights law, refugee law and international criminal law

Prof. Michael BOTHE, Johann Wolfgang Goethe University, Frankfurt, Germany

Quelle interaction entre l'article 3 commun aux Conventions de Genève, le Protocole Additionnel II et le droit international des droits de l'homme dans des situations de conflit armé non international?

Prof. Habib SLIM, Secrétaire Général Adjoint, Croissant-Rouge tunisien

International armed conflict: legal qualification and IHL as «lex specialis» - background presentation

Prof. Frits KALSHOVEN, University of Leiden

Extraterritorial law Self-Help: between pragmatism and legal doctrine

Dr. Yuval SHANY, Concord Research Center, Law School, College of Management, Academic Studies Division, Israel

Non-international armed conflict: legal qualification and Parties to the conflict

Brigadier Titus K. GITHIORA, Chief of Legal Services, Department of Defence, Nairobi, Kenya

La relation entre le droit international humanitaire, le droit international des droits de l'homme et le droit international des réfugiés dans les situations de conflit armé

Dr. Yves SANDOZ, Member of the IIHL – Member of International Committee of the Red Cross

International Humanitarian Law as "lex specialis"

Prof. Yoram DINSTEIN, Member of the IIHL, Professor of Human Rights, Pro-President, Tel-Aviv University, Israel

Conflit armé non international: interaction des différents régimes juridiques

Prof. Djamchid MOMTAZ, Member of the IIHL - University of Teheran, Iran

Some Considerations Regarding the Law of Armed Conflict and Contemporary Issues

Mr. Steven SOLOMON, Deputy Legal Adviser, United States Permanent Mission to the United Nations Office in Geneva

Extraterritorial "Self-help" Operations: Meaning and Applicable Law

Dr. Avril McDONALD, Head of the Section of International Humanitarian Law and International Criminal Law, TMC Asser Institute for International Law, The Hague; Managing Editor of the Yearbook of International Humanitarian Law

Présentation des rapports des II^{ème}, III^{ème} et IV^{ème} Séances

Dr. François BUGNION, Directeur du Droit et de la coopération au sein du Mouvement au Comité International de la Croix Rouge

Rapporteur's Report of Working Group VI -Detention-

Mrs Helen DUFFY, Legal Director, Interights, United Kingdom

Welcome Address

Jovan PATRNOGIC, Président du IIDH

Monsieur le Haut Commissaire des Nations Unies pour les Réfugiés

Monsieur le Président du Comité International de la Croix-Rouge

Messieurs les Représentants des autorités italiennes

Excellences

Mesdames et Messieurs, Chers amis,

Bienvenus à l'Institut International de Droit Humanitaire qui siège depuis 33 ans en Italie, dans cette ville de Sanremo qui a déjà accueilli un grand nombre de personnalités et différentes manifestations culturelles, politiques et humanitaires.

Alfred Nobel lui-même, ce grand humaniste suédois a passé la fin de sa vie ici, à Sanremo et il y a laissé son testament humanitaire pour encourager et motiver les savants dans différents domaines scientifiques, et également les combattants pour la paix dans le monde entier.

Nous avons créé notre Institut pour contribuer à la promotion, au développement, à la diffusion et à l'enseignement du Droit International Humanitaire, des Droits Fondamentaux de l'Homme et de la protection de Réfugiés. Nous avons déjà à notre actif un grand travail humanitaire avec l'organisation de différents programmes d'enseignement à l'attention des militaires et des fonctionnaires destinés au respect et à l'application du Droit International Humanitaire, des Droits Fondamentaux de l'Homme et du Droit des Réfugiés. Plus de six mille officiers et d'un millier de civils ont d'ailleurs assisté à ces formations pratiques et pragmatiques.

Notre plus grand souvenir restera toujours notre contribution à la Conférence Diplomatique sur le Développement et la Réaffirmation du Droit International Humanitaire applicable dans les conflits armés qui a adopté en 1977 les deux Protocoles Additionnels aux quatre Conventions de Genève.

Je voudrais juste vous rappeler qu'avec l'accord préliminaire des chefs des délégations nous avons organisé entre les sessions de la Conférence des tables ronde pour réunir les délégués gouvernementaux qui y participaient afin de discuter de manière informelle des questions qui soulevaient des débats dans la Conférence.

Le Conseiller Fédéral Suisse Pierre GRABER, alors Président de la Conférence nous a beaucoup aidé pour l'organisation de la première table ronde. Il nous a quitté il y a quelques mois à peine. Je tenais cependant beaucoup à évoquer son nom lors de l'ouverture de cette 27ème table ronde.

Les questions humanitaires sont de plus en plus complexes aujourd'hui: les interventions à la fois militaires et humanitaires dans les conflits armés sont de plus en plus courantes, la nécessité de la protection de victimes de violences en temps de conflit armé et en particulier la protection de la population civile et des Réfugiés continue malheureusement à être d'actualité. Tous ces domaines constituent toujours et peut-être même plus qu'avant de véritables défis aussi bien pour les Gouvernements que pour les grandes

Organisations Internationales, et en premier lieu les Nations Unies. Enfin la sécurité de individus et de Etats doit être considérée comme la priorité de tous les ordres des jours, qu'ils soient politiques ou humanitaires. Il faut pour cela prendre en compte le rôle et le potentiel humanitaire considérables des organisations et des institutions humanitaires.

En outre les développements récents de la guerre contre le terrorisme et les difficultés pour considérer les organisations et groupes terroristes comme des "Parties" seront à l'origine de nouveaux défis d'une grande complexité liée au Droit International Humanitaire, notamment d'un point de vue juridique.

Le rôle de notre Institut en tant que forum dédié à l'analyse et à la discussion informelle pourrait là aussi se révéler important.

Notre discours humanitaire est resté le même, toujours conforme à ses objectifs : permettre au dialogue de réunir ceux que la politique divise. Nous sommes ici quelques jours pour ouvrir nos pensées et pourquoi pas nos cœurs afin d'engager sincèrement notre débat.

La norme impérative des Conventions de Genève de respecter et de faire respecter le Droit Humanitaire doit nous guider. Et vous savez très bien que pour y parvenir, il faut tout d'abord trouver des gens de bonne volonté pour se mettre ensemble, des serviteurs de la cause humanitaire, des gens courageux qui ont travaillé toute leur vie à son service.

Nous avons perdu de nombreux combattants de cette cause humanitaire le 19 août dernier. Une violence et un crime bien organisés et bien préparés se sont abattus sur la maison de la paix, celle des Nations Unies qui s'était installée à Bagdad afin d'aider le peuple irakien à établir la Paix et une société démocratique et juste.

C'est là que Sergio Vieira de Mello avec ses collaborateurs et ses collaboratrices est tombé en grand serviteur, diplomate et négociateur de la cause humanitaire et des Nations Unies.

Je peux évoquer différents moments amicaux, agréables et complices que j'ai pu partager avec cette personne très simple et très naturelle que j'avais rencontré au HCR en 1975 déjà. Sergio a montré un grand intérêt pour notre Institut: il était souvent présent à nos réunions. Il était très intrigué par les activités humanitaires de notre Institut, notamment par notre système de formation des cadres militaires et civils dans les domaines du Droit International Humanitaire, des Droits de l'Homme et du droit des Réfugiés. Il se demandait également pourquoi les gens venaient en si grand nombre à nos réunions, comme par exemple aujourd'hui pour cette table ronde. Notre réponse était toujours la même : c'est grâce aux volontaires, c'est grâce à notre coopération avec les grandes organisations internationales telles que le HCR et le CICR. C'est grâce à un grand nombre d'experts militaires et fonctionnaires qui nous aident pour donner les conférences en tant qu'enseignants sans honoraires parce qu'ils ont compris notre esprit et notre politique humanitaire.

Alors que Sergio était en poste à New York il voulait que l'Institut coopère avec les Nations Unies en organisant des cours pour les fonctionnaires des Nations Unies en charge des affaires humanitaires. Il voulait faire vite et il a même envoyé un de ses collaborateurs ici à Sanremo pour assister à un cours et voir les modalités de la coopération. Mais son départ de New York nous a empêché de mener à bien ce projet. En tant que Haut Commissaire des Nations Unies pour les Droits de l'Homme, je suis persuadé qu'il avait déjà

des projets pour une coopération avec notre Institut, notamment pour nos cours sur les Droits de l'Homme destinés aux militaires.

Les disparitions sont toujours difficiles et douloureuses, mais nous sommes réunis ici afin de discuter de l'interaction du Droit International Humanitaire et des autres régimes juridiques dans les situations de violence.

Essayons peut-être de montrer avec une clarté juridico-politique qu'il ne s'agit pas seulement d'une relation d'interaction, de complémentarité, mais qu'il s'agit aussi d'une véritable interdépendance des Droits de l'Homme, du Droit International Humanitaire et du Droit des Réfugiés. Leurs objectifs sont les mêmes : assurer le respect et la protection de la personne humaine et de sa dignité en toutes circonstances, notamment dans les conflits armés et les situations de violence.

Grâce à nos rapporteurs et à nos modérateurs des groupes de travail nous allons engager un débat qui sera, j'en suis sûr, constructif et nous permettra de mettre en avant des réflexions et des recommandations pouvant contribuer au respect et à la mise en œuvre du Droit International dans son ensemble.

Enfin, je voudrais remercier une fois encore nos amis Messieurs Lubbers et Kellenberger d'être avec nous et de nous aider dans nos actions humanitaires. Certainement Sergio va nous manquer parce qu'il voulait s'associer à nos efforts et nous dire combien il accordait d'importance aux droits de l'homme et aux standards humanitaires. Sa présence ici aurait été une grande occasion pour lui de nous présenter ses réflexions sur les relations d'interdépendance entre le Droit International Humanitaire, les Droits de l'Homme et le Droit des Réfugiés.

Je vous propose donc d'observer en son honneur une minute de silence.

Je vous remercie.

Protection Through Complementarity of the Law

Jakob KELLENBERGER

President, International Committee of the Red Cross

Mr. President of the Institute,
Mr. High Commissioner for Refugees,
Mr. Sommaruga, former ICRC President,
Your Excellencies,
Ladies and Gentlemen,

I would like to thank the International Institute of Humanitarian Law for having organized this Round Table and to thank you all for your willingness to engage with us over the next couple of days in reflection and debate on the topic of this year's Round Table – which is “*International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence*”. We very much look forward to your thoughts and contributions on an issue that, in our view, is most relevant and timely.

Thirty-five years ago the International Conference on Human Rights held at Teheran adopted a resolution entitled “Human Rights in Armed Conflicts”. In political terms, the 1968 resolution signalled the international community's recognition that armed conflicts “*continued to plague humanity*” despite the United Nations Charter's prohibition on threats or use of force in international relations. By dealing with human rights in armed conflict, the resolution also put an end to more than two decades of United Nations reluctance to address issues of *ius in bello* for fear of undermining the Charter's provisions on *ius ad bellum*. In legal terms, the adoption of the Teheran resolution opened the way for a fresh look at the relationship between international humanitarian law and international human rights law in the protection of persons affected by war.

The decades that have passed since the Teheran Human Rights Conference have confirmed that comprehensive protection of individuals in armed conflict requires the application of international humanitarian law, international refugee law, international criminal law and domestic law. In addition to the United Nations, whose resolutions over the years have consistently invoked the various legal regimes, and the efforts of individual States, a major contribution to enhancing protection by reliance on the different bodies of law has been made by non-governmental organizations.

Despite the undoubted progress achieved in enlarging the scope and content of legal norms on the protection of persons, the question remains of the exact interplay between the different bodies of law in situations of violence. Are the different legal regimes, as some continue to believe, mutually exclusive, or are they, as others think, one and the same normative framework aimed at protecting human beings? Or, are they, as we believe, distinct but complementary? That is the overriding issue that this Round Table will attempt to address through the sessions and working groups planned for over the next two and half days.

I will not attempt to outline the factual evolution of international humanitarian law, or of the other bodies of law that we will be dealing with during the Round Table, as that will be aptly done by other speakers. What I would like to briefly touch upon are the similarities and differences between international humanitarian law and human rights law, which, for the purposes of my presentation, will also largely include international refugee law. The similarities are to be found in both purpose and content.

The common underlying purpose of international humanitarian and international human rights law is the protection of the life, health and dignity of human beings. While one of the specific aims of international humanitarian law is to ensure the protection of persons affected by armed conflict and, in particular, of those who find themselves in the hands of the adversary, the purpose of human rights law is to govern relations between States and individuals. In either case, the guiding principle is that individuals have the right to be protected from arbitrariness and abuse because they are human, which was an idea that revolutionised international law and had a lasting impact on international relations.

For centuries, international law was only concerned with relations among States, not recognizing that individuals could also be the subject of its rules. While international humanitarian law primarily establishes the duties of Parties to an armed conflict, there is no doubt that humanitarian law norms in fact serve to spare individuals – to the extent possible – from the ravages of war. It was international human rights law that gave normative expression to the notion that a State's treatment of persons on its territory or under its jurisdiction does not belong to the sphere of its internal affairs. Individuals thus became subjects of international law by means of various human rights mechanisms permitting international scrutiny over the way in which a State treats persons.

The result of these extraordinary developments for international relations was succinctly expressed by UN Secretary-General Kofi Annan in his Millenium Report. After a reminder that the avowed purpose of the United Nations is transforming relations among States, the Report adds: “[...] *Even though the United Nations is an organization of States, the Charter is written in the name of ‘we the peoples’. It reaffirms the dignity and worth of the human person, respect for human rights and the equal rights for men and women, and a commitment to social progress ... Ultimately, then, the United Nations exists for, and must serve, the needs and hopes of people everywhere*”, says the Report.

The similarity of purpose between international law norms dealing with the protection of persons is mirrored by the similar, albeit non identical, content of many of their norms. Like international human rights, international humanitarian law aims, among other things, to protect human life, prevent and punish torture and ensure fundamental judicial guarantees to persons subject to criminal process.

International humanitarian law rules on the conduct of hostilities and on the treatment of persons who find themselves in enemy hands are designed to safeguard the right to life. Basic international humanitarian law tenets such as the principle of distinction, the prohibition of direct attacks against civilians and the prohibition of indiscriminate attacks are meant to protect the lives of persons not taking a direct part in hostilities. Many other international humanitarian law norms serve the same purpose, among them provisions on the treatment of persons *hors de combat*, on internees and detainees, on humanitarian

assistance to populations in need. While international human rights norms protecting the right to life are more stringent – which is not surprising given that they are meant to be applied in a law enforcement context – the fact is that both bodies of law prescribe what constitutes unlawful taking of life within their respective scope of application. One of the basic tenets of international refugee law aimed also at safeguarding, among other things, the right to life, is the principle of *non-refoulement*.

As regards torture and other forms of cruel, inhuman or degrading treatment or punishment, it hardly needs to be emphasized that such acts are prohibited under both international humanitarian law and other bodies of law in all circumstances, and are considered crimes under international law. Permit me therefore to say that it is with the gravest concern that the International Committee of the Red Cross (ICRC) has been following the renewed public debate on whether torture or other cruel, inhuman or degrading treatment or punishment should in some cases be permitted. In our view, such acts are most certainly never justified, whatever the reasons or circumstances.

Fundamental judicial guarantees are another example of norms that are common to international humanitarian and human rights law. Article 3 common to the Geneva Conventions, which is applicable in all types of armed conflicts, prohibits the “*passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court*”. The fair trial standards of human rights law must be relied on to interpret and give specific content to the relevant provisions of common Article 3. The mutually reinforcing nature of humanitarian and human rights law in the area of judicial guarantees is, moreover, confirmed by the wording of article 75 of Additional Protocol I of 1977 and Article 6 of Additional Protocol II, which was clearly influenced by human rights law. And, despite those elaborations, IHL lawyers must still resort to human rights standards in order to apply certain terms used in the Additional Protocols such as the right of an accused to the “*necessary rights and means of defence*”. Similarly, human rights standards need to be relied on, particularly in non-international armed conflicts, when it comes to determining the treatment of persons deprived of liberty and their conditions of detention.

Apart from similarity of norms in the areas just mentioned, international humanitarian law facilitates the realization of a certain number of economic and social rights in situations of armed conflict. Even though international humanitarian law does not, for example, explicitly mention the right to food, many of its provisions are aimed at ensuring that civilians and other persons are not denied food or access to food in armed conflict. Thus, humanitarian law rules on the conduct of hostilities prohibit both starvation of the civilian population as a method of warfare and attacks against or destruction of objects indispensable to the survival of the civilian population.

As is well known, humanitarian law also contains rather detailed provisions on humanitarian assistance to civilian populations when basic needs, including food, are inadequately provided for. Just as important are humanitarian law provisions aimed at ensuring that specific categories of individuals are supplied with food and are able to receive individual and collective relief. The sheer volume of these rules is such that they cannot be covered in this brief review.

The similarity of purpose and, to an extent, of content between international humanitarian and human rights law is also evidenced by the adoption of several treaties containing a mix of international humanitarian law and human rights provisions. The Convention of the Rights of the Child and, in particular, its recent Protocol on the Involvement of Children in Armed Conflict are cases in point. Likewise, the Rome treaty establishing a permanent International Criminal Court pools together violations of separate bodies of law – war crimes, genocide and crimes against humanity.

It should also be mentioned that the ICRC's Study on Customary International Humanitarian Law Applicable in Armed Conflicts, which will be available at the International Conference of the Red Cross and Red Crescent in December this year, confirms the overlapping nature of a number of fundamental guarantees provided for in both humanitarian and human rights law. Among them are some already mentioned safeguards – the prohibition of arbitrary killing, torture or denial of judicial guarantees – as well as others, including respect for religious practices and respect for family life.

Even though international humanitarian and human rights law share certain features, there are also important distinguishing characteristics stemming from their distinct scope of application. Humanitarian law is the *lex specialis* designed to regulate armed conflict, whether international or non-international. The exceptional circumstances of armed conflict by their very nature demand that no derogations from any of the obligations of the Parties to a conflict be allowed if humanitarian law is to serve the purpose of protecting persons. Thus, in contrast to certain rules it defines the identical obligations of Parties to an armed conflict (which is not the case under domestic law), in order to provide predictability of behaviour and thus maintain the Parties' interest in abiding by humanitarian law norms. By contrast, international human rights law governs relations between a State and individuals. As is well known, the issue of how to hold organized armed groups accountable for human rights violations that do not rise to the level of crimes under international law remains contentious.

Another distinguishing feature of international humanitarian law is the extraterritorial applicability of its norms. There is no question, either as matter of logic or of law that the Parties to an armed conflict remain bound by their humanitarian law obligations regardless of where the hostilities triggering humanitarian law application may be taking place. Effective control over territory is not a precondition for Parties' compliance with treaty or customary norms governing the conduct of hostilities or the treatment of persons belonging to the adverse Party who may have fallen into their hands. The extraterritorial application of international and regional human rights treaty law, by contrast, is still being clarified by means of human rights jurisprudence.

Ladies and Gentlemen,

The general complementarity between the different bodies of law aimed at ensuring the protection of the human person does not mean that the law provides clear or sufficiently detailed guidance to those who are meant to apply it in every situation. Challenging questions remain related to determining the thresholds of violence necessary for the application of humanitarian law, to legally characterising new forms of violence, and to the exact interplay of the different bodies of law regardless of the type of violence involved.

Permit me to mention a few specific issues on the agenda which your deliberations, I am confident, will help clarify.

The Geneva Conventions and Additional Protocol I regulate international armed conflicts, defined as those taking place between High Contracting Parties, that is, States. However, acts of transnational violence since September 11th 2001 have led to suggestions that international armed conflicts may, under customary humanitarian law, also involve States and non-state actors. Although the ICRC does not share this view, it will be interesting to examine if there is a legal basis for such an interpretation and the content of the customary norms allegedly involved.

A distinct issue that also merits reflection is the exact scope of international humanitarian law as *lex specialis* in relation to other bodies of law in situations of international armed conflict. Does the *lex specialis* exclude the application of other bodies of law, and if, as we believe, it does not, how does human rights law help ensure the comprehensive protection of persons? Do, for example, persons interned for security reasons in international armed conflicts have the right to be assisted by a lawyer in proceedings related to the internment? Can it be said, as a result of developments in human rights law, that the right to appeal in criminal proceedings against protected persons today includes the right of having one's conviction and sentence reviewed by a higher tribunal? Or, is the right to appeal, as defined in Article 75 of Additional Protocol I, still limited to a person being advised of the availability of judicial and other remedies that may exist?

If the *lex specialis* nature of humanitarian law in international armed conflicts is well established, the relationship between international humanitarian law and other bodies of law is considerably more complex in internal armed conflicts. First, there are significantly fewer treaty rules regulating internal armed conflicts than international armed conflicts, which means that comprehensive protection can only be achieved by recourse to customary humanitarian law, human rights and domestic law. This is quite evident in non-international armed conflicts governed only by Article 3 common to the Geneva Conventions. While common Article 3 functions as a safety net, providing basic rules on the treatment of persons not taking or no longer taking part in hostilities, it must, as already mentioned, be given specific content by application of other bodies of law in practice.

Furthermore, non-international armed conflicts are those that ordinarily take place within the territory of a State, either between its armed forces and rebel groups or between rebel groups themselves. The existence of an armed conflict – and the application of humanitarian law – does not mean that the government is absolved of its human rights obligations toward persons on its territory or subject to its jurisdiction pursuant to treaty-based or customary human rights law. Human rights law continues to apply alongside domestic law in armed conflicts, except for the limited extent to which certain human rights norms may have been derogated from under the relevant treaty provisions governing states of emergency.

The complementary application of different bodies of law in internal armed conflicts does not, however, mean that effective protection of persons in these types of conflicts is provided. In fact, the contrary may be claimed. Sometimes governments deny that a solution of violence has risen to the level of

non-international armed conflict triggering humanitarian law application. The determination of this issue is not helped by the lack of precise criteria distinguishing sporadic violence from internal armed conflict. I am pleased that one Round Table session will be devoted to an examination of the legal and factual criteria that must be met in order to assert the existence of a non-international armed conflict, and look forward to learning about the outcome of your deliberations.

One form in which the post-September 11th 2001 fight against terrorism is being waged are so-called “*extraterritorial self-help operations*”, which you will also be discussing. These may be described as law enforcement – or sometimes even military-like actions – taken by one State on the territory of another, with or without the latter’s consent, against individuals or groups suspected of criminal activity. Given the scarce precedents over the last several decades – at least as a matter of public record – these operations raise a host of legal and protection issues. Among them are questions such as when does an “*extraterritorial self-help operation*” become an armed conflict and what legal regimes are applicable to such operations? Bearing in mind that the extraterritorial application of human rights law is still in the process of being clarified, dealing with possible protection gaps is also an issue deserving of attention.

Another consequence of the fight against terrorism has been the heroism of States’ compliance with international standards governing deprivation of liberty. Administrative detention without criminal charge or judicial review of persons suspected of terrorist acts is a tool that States have been resorting to, and is one that is often made use of in internal disturbances and tensions and in non-international armed conflicts. Apart from mentioning internment, humanitarian law applicable in internal armed conflicts does not regulate the rights of internees or the procedure to be followed, which means, as earlier explained, that human rights and domestic law must be relied on for guidance. Given the paucity of human rights treaty norms governing this type of detention, the Round Table’s examination of the substantive rules governing administrative detention is, in my view, most timely and welcome.

In this context, it should be remembered that humanitarian laws applicable in international armed conflicts does not allow the indefinite detention of protected persons. Prisoners of war and civilian internees must be released, if not before, then no later than after the end of active hostilities. If they have been charged with a criminal offense, protected persons must be released once the sentence imposed has expired, which can obviously occur at a later point in time.

Ladies and Gentlemen,

There are a range of other topics of equal importance that will be discussed at the Round Table that I simply do not have time to mention. Permit me, therefore, in closing, to briefly raise two final points. The first concerns complementarity in action between the agencies and organizations, including non-governmental organizations, entrusted with protection activities, and the second concerns the importance of ensuring compliance with the law.

It should not be forgotten that protection of individuals is primarily the responsibility of States and that the tasks associated with protection are assumed by humanitarian law and human rights organizations when States fail to meet their obligations. Therefore, before considering, or in parallel to assisting persons in need, the thrust of efforts of agencies and organizations involved in protection must be to encourage and help governments fully assume their protection duties and, when appropriate, to support them in that direction.

It is important, however, that humanitarian and human rights organizations be aware of and rely on the differences and complementarity between their specific specializations and skills if they are to achieve their goals. Just as the legal protection of persons depends on the complementary application of different bodies of law, it is essential that, in practice, each organization make full use of its specific mandate and mode of actions.

As is well known, the ICRC's primary mode of action is persuasion, through confidential dialogue with governments based on its mandate under international humanitarian law. The primary mode of action of human rights agencies and organizations is to engage with governments in a public dialogue on ways of improving human rights protection. The scope of human suffering in situations of violence is so vast that only a focused effort by the agencies and organizations involved can hope to address even the most basic needs.

Despite the fact that this Round Table is devoted to examining legal standards, I cannot end my statement today without a reminder that persistent work to ensure compliance with existing law continues to be our basic, common task. With this goal in mind, the ICRC recently organized several regional expert seminars – in Cairo, Pretoria, Kuala Lumpur and Mexico City – devoted to examining ways and mechanisms of improving compliance with international humanitarian law during armed conflicts. The final expert seminar in the series will be held in Bruges, Belgium, next week.

Regardless of some of the open questions in the law outlined above for the purposes of this Round Table, we must not forget that the international community has, over many decades, created a significant body of rules that does not permit the existence of any “*rights-free zone*” in situations of violence. Our abiding challenge is to make a difference to people's lives by ensuring that those norms are applied and by working constantly to defend and expand the scope of individual protection in practice.

Thank you for your attention.

Indirizzo di saluto del Ministero degli Affari Esteri italiano

Alberto CUTILLO,

Primo Consigliere presso la Rappresentanza Permanente d'Italia in Ginevra.

La Tavola Rotonda che l'Istituto Internazionale di Diritto Umanitario organizza puntualmente all'inizio di settembre può dirsi uno degli eventi più attesi, in questa ripresa dopo la pausa estiva, dalle persone e le istituzioni (Governi, Organizzazioni Internazionali, ONG, Università e Istituti di ricerca) attente agli sviluppi del Diritto Umanitario.

Il successo di questa formula si fonda su un insieme di elementi che l'Istituto sa dosare magistralmente, tra i quali vorrei ricordare l'altissimo livello dei principali oratori e, più in generale, dei partecipanti; i loro differenti interessi e punti di vista, che contribuiscono ad arricchire il dibattito; la scelta accurata di temi di attualità e di grande interesse. A nome del Ministero degli Esteri vorrei rinnovare l'apprezzamento ed il sostegno per l'opera svolta dal Professor Patrignone, dal Consiglio e da tutto lo staff dell'Istituto, abilmente guidato dalla dottoressa Baldini.

Anche quest'anno l'Istituto ha mantenuto le aspettative, invitando ospiti prestigiosi e altamente qualificati, tra i quali avrebbe dovuto esservi anche l'Alto Commissario per i Diritti Umani, Sergio Vieira de Mello, tragicamente scomparso nell'attentato alla sede delle Nazioni Unite a Baghdad insieme a quindici colleghi e sei altre vittime innocenti. A loro che hanno sacrificato la propria vita agli ideali delle Nazioni Unite, va oggi il nostro pensiero.

Il tema della XXVII Tavola Rotonda è quello non facile, ma cruciale, dell'interazione tra il Diritto Internazionale Umanitario e gli altri sistemi giuridici nelle situazioni di violenza. L'esperienza quotidiana ci pone di fronte a conflitti armati, internazionali e non, che non sono direttamente riconducibili alle regole vigenti sul piano internazionale a protezione dell'umanità coinvolta.

Il Diritto Umanitario, o dei conflitti armati ha trovato e trova una sua concreta applicazione in soccorso delle persone coinvolte, senza distinzione tra aggressore e vittima, ma ponendo in evidenza diritti e doveri per un loro adeguato livello di protezione.

La riconosciuta applicabilità del Diritto Internazionale Umanitario quale settore normativo rispettoso dei diritti fondamentali della persona umana viene invocata, in questa Tavola Rotonda per richiamare l'attenzione della Comunità Internazionale ad una verifica della sua validità non solo nei conflitti armati, ma anche in situazioni di crisi in cui l'uso della forza o atti di violenza mietono vittime tra la popolazione civile.

Nella discussione su tali difficili problematiche è particolarmente importante un sereno confronto, dal quale solo possono scaturire utili elementi di riflessione per un'efficace interazione tra il Diritto Umanitario e gli altri sistemi giuridici – interni ed internazionali – in materia di tutela dei diritti umani, capace di garantire alle categorie di persone maggiormente vulnerabili reale protezione ed effettive garanzie giudiziarie.

Sono certo che i risultati di questa Tavola Rotonda – e già lo dimostrano ampiamente gli interventi degli illustri oratori che mi hanno preceduto - forniranno a tutti i partecipanti utili elementi di riflessione, da cui il Ministero degli Esteri saprà trarre guida e ispirazione. Grazie.

International Humanitarian Law and International Disaster Response Law

Bosko JAKOVLJEVIC

Member of the IIHL

1. The theme of this year's Round Table is "*International Humanitarian Law (IHL) and other legal regimes: Interplay in situations of violence*", but there are other cases in which violence has been used in a more limited way. Therefore, the subject of the Round Table may include various types of situations.

This subject implies that different legal regimes, which have a well-defined field of application, are also interconnected, they may overlap to a certain extent, that is, regulate the same situation and the same action and categories of persons, but in a different way. They may also influence one another.

2. The first legal regime on the agenda is IHL. It is an old branch of international law, fully recognized as such, identified, with precise rules codified in international instruments widely or universally accepted. Its contents and scope are well defined. On the agenda of the International Red Cross and Red Crescent Conference it is a separate item, and a permanent one.

The rules of IHL on humanitarian assistance, as a form of response to the disaster of war, are carefully elaborated to take into account, on the one hand, the interest of the war victims, and on the other, the recognized interests of the Parties to the conflict, their military requirements and their sovereignty. Therefore, while permitting and enabling humanitarian assistance to be provided in time of war, IHL imposes certain restrictions, limitations to the action of those who intend to provide humanitarian assistance. The great architect and promoter of these very balanced and realistic rules is the International Committee of the Red Cross (ICRC). Thanks to its efforts the rules of IHL have been developed and broadly accepted.

3. The other legal regime, International Disaster Response Law (IDRL), applies to a completely different situation. This regime is still in the early phase of the process of identification and it is not yet broadly recognised. It forms a new initiative, hardly three years old. During this time the International Federation of Red Cross and Red Crescent Societies (IF, the Federation), has made great efforts to speed up this process. It was hoped that after the 26th International Conference of the Red Cross and Red Crescent, in December 2003, the identification and recognition of IDRL would have made progress and first conclusions could have been formulated. But today, the scope and contents of IDRL are still in the phase of debate.

4. The exploration made so far by the Federation confirms, in my view, that there exist numerous rules regulating disaster response actions in times of peace. They are contained in agreements and other legal acts. This is sufficient to conclude that legal regime rules applicable to relief operations exist for the benefit of disaster victims. The precise concept, scope and contents of these rules are coming to light every day. The contents of these rules could be discussed, but I think it would not be possible to say that such rules do not exist. In future action the identification of these rules would be one of the main tasks and then their recognition, as a result of such a process, would follow.

5. The general contents of the rules of IDRL show that this legal regime is more liberal than that existing for wartime. It is liberal in the sense that it gives more rights to the actors of disaster relief operations, and is more beneficial for the victims.

6. IDRL is made up of the rules belonging to different branches of law, but this also is the case with IHL and other branches. Examples: rules on customs co-operation, facilities to be accorded to the transport of humanitarian assistance, status of personnel participating in the delivery of humanitarian assistance, transport law, etc. These rules exist as parts of corresponding branches, but they are at the same time a part of the legal regime applicable to disaster response operations as rules of IDRL.

7. Disaster is a wide term, it includes man-made (wars, etc.), natural, technological and other types of disasters. The IDRL Project does not cover all kinds of disasters but only those other than armed conflict.

The Federation has decided that its initiative to contribute to the formation and identification of IDRL will be limited to peacetime disasters. The reasons are evident. For armed conflict situations, there exists a well-structured, recognised, identified and generally known and accepted branch of international law, IHL, and there is no sense in discussing it under IDRL.

8. It is evident that there is inequality between the two legal regimes, IHL and IDRL. The first one is well defined and well established, the other is in the process of identification and recognition. But this should not exclude the possibility of examining their relationship. Both of them, although unequal, regulate humanitarian assistance to certain categories of victims.

The subjects of their regulation are the basic rights of the victims, action to achieve the respect for these rights, and this could be expressed legally in the right to humanitarian assistance.

9. Each of these two legal regimes has its field of application, which are different. IHL contains rules designed for the war situation, and some of them are not applicable or are out of place in peacetime situations. IDRL, while regulating the disaster response operations, through rights and duties of their actors, contains rules which are not applicable in time of war. Examples: customs co-operation, transport law, facilities which are normal in peace but difficult to be accorded in time of war; developed monitoring system which is also difficult to be implemented in war.

Whether some principles common to both IHL and IDRL relating to humanitarian assistance actions exist, has to be studied.

Now, if these two legal regimes are so different, separate, there is no question of the possibility of their interplay or overlapping. However, as they both tend to protect the basic rights of the victims, it is worth examining whether these two legal regimes could complete each other, whether they could strengthen the position and the rights of the victims, and help to eliminate the lacunae of gaps.

10. There are situations in which the overlapping of the two regimes can appear. I shall indicate some of them:

- The difference in the qualification of a situation, whether it is an armed conflict or not;
- If IHL does not regulate all the questions or relations, can the rules of IDRL help by offering its rules?

- During the war there can be longer periods of peaceful situations, before the hostilities are resumed. Which law applies in such periods?
- In non-international armed conflicts this dilemma is more evident, because the rules of IHL for non-international conflicts are rudimentary and require to be completed;
- In the transit of relief through countries not in war, which rules apply?
- IHL rules are a minimum, with many restrictions, but the Parties to the conflict can adopt more liberal rules for the victims, often negotiated by the ICRC;
- The United Nations can impose special rules in the relief operations they conduct or they order to be conducted;
- Mixed situations exist between war and peace, such as disturbances, when there is violence but not amounting to war. Which law applies in these situations? In practice, the dichotomy war-peace is not always present, the situation may become more complex than that prescribed by the law;
- In the case of economic sanctions imposed by the UN Security Council, which also affect humanitarian goods, both the rules of IHL and of IDRL are limited by the new rules enacted by the Security Council for a specific case.

These examples show the possibility of both legal regimes becoming applicable. The problem is that IDRL is not yet sufficiently structured and identified to offer precise rules always, as is the case of IHL. To overcome this, the progress of the initiative of the Federation to identify and develop IDRL, should be promoted to the maximum.

In case of overlapping or interplay between the two legal regimes, there could be different types of relations. Here are some examples. Either one of the regimes would prevail, not completely excluding the other. The application of one legal regime to certain consignments only, depending upon the origin of the donation (example: UN), and the category of beneficiaries (example: refugees). The application of rules of IHL but without the consent of the Party to the conflict concerned, or even against its will. The study of cases could bring to light other possible types of relations between the two legal regimes in a given area affected by the disaster.

The use of force to conduct or protect humanitarian assistance operations could be ordered by the UN Secretary-General, carried out by any combination of rules or legal regimes it decides. This could be done in case of great and urgent humanitarian need, where international peace is threatened.

11. As a sort of conclusion it may be said that these two legal regimes, separate, different, and each with its own field of application, in most cases are applicable in accordance with the qualification of the situation: IHL in armed conflict and similar events, IDRL in peacetime disasters.

In certain cases, however, these two legal regimes may be both applicable, as equal partners, because humanitarian assistance action does not always follow the dichotomy war-peace. In such cases, the bodies leading the disaster response action, or having a significant role in its conduct, should find practical, pragmatic solutions to the questions of applicable law which could be later developed into rules. These bodies may be the ICRC, or the Federation, or various UN bodies, in particular, specialised agencies, other

similar UN bodies like OCHA, but also important regional organizations or States. Further development of IHL and IDRL should permit to find solutions for the interplay of both systems of law, and their overlapping. The new rules to be developed should be based on the demand from all the actors in any disaster response operation, peacetime or wartime, to operate in the conduct of the relief operation. The rules should also be based on the best interests of the victims, as an ultimate goal. This is necessary because what is at stake are basic human rights, often the very survival of the victims, and their implied right to demand and to receive humanitarian assistance.

International Humanitarian Law – International Human Rights Law
Some proposals for improving dissemination

Miodrag STARCEVIC

Member of the IIHL, Serbia and Montenegro Red Cross Society,
Senior Adviser on International Humanitarian Law

There is no doubt, not even in theory, that international humanitarian law and international human rights law are complementary bodies of law rather than two separate ones. Although there are a number of differences (time, field and system of implementation, protected persons etc.), there are also many similarities between them. One is very important: they both strive to protect the lives, health and dignity of individuals.

There is a question, could or should those similarities be used in order to provide better implementation of these two bodies of law? It seems logical that the answer is yes, they could be used in many ways, but at least through the dissemination of knowledge.

The fact is that the knowledge of any law is a condition, or even a precondition for its implementation. Of course, lack of knowledge is not the only or even the main reason for violations of law, but definitely it is impossible to expect a high level of implementation without good knowledge. Even more, experience very clearly shows that many rules of human rights law have not been implemented because protected persons do not know that they have those rights. This is often the case, especially in so-called transition countries, where public opinion of human rights is not very developed or not developed enough.

Having this in mind as a starting point, the very reason for both bodies is to protect lives and dignity of individuals, it is not far from the conclusion that the lack of implementation of human rights in peacetime could very badly influence the implementation of international humanitarian law in wartime. The opposite is right as well; better development and implementation of human rights in peacetime, will improve the respect of international humanitarian law in wartime.

From this point of view, it would be difficult not to see the linkage between these two bodies and deny that they are complementary even at the level of implementation. It is easy to see that in an environment where human rights are highly respected in times of peace, international humanitarian law is less violated during times of war.

Because of that, it seems quite clear that there is a mutual influence between international humanitarian law and international human rights law. Improvement in knowledge and implementation of one will directly have a positive impact on the respect and implementation of the other.

If it is so, there are many reasons for better connection in the dissemination of both bodies of law. I advocate a position that dissemination of international humanitarian law should pay attention to human rights law as well. At least, attention should be paid to the rules which are the hard core of human rights, applicable in war, trying to make as close a connection as possible between the two of them.

There are several reasons and arguments for that position.

Firstly, both of them, as already mentioned, have the same purpose: to protect human dignity, lives and health. In that way, both bodies are intended to avert or to alleviate human sufferings. Even the very essence of many specific rules from both bodies of law are very similar or almost the same. That is the case, especially when we are comparing international humanitarian law and the so-called hard core of human rights, which cannot be denied even in wartime; protection of human life, prohibition of torture, prohibition of cruel treatment, prohibition of discrimination, providing basic legal guarantees, etc. are immanent to both bodies of law. It means that respect for those rules is at the same time the implementation of both; the only difference could be made according to the time of implementation (peace or war) or to the protected persons (specifically protected by the rules of international humanitarian law or the whole population).

Secondly, subjects who have the obligation to implement both bodies of law, in many cases are the same. That means that target groups of dissemination could be, in many cases also the same.

Usually, armed forces have the duty, but also opportunity to respect and to ensure respect for international humanitarian law. That is, first of all, the case in wartime. However, modern wars are more and more complex and armed forces are very often in the situation to deal with different tasks requiring the implementation of human rights law. For example, in different peacekeeping operations, in internal disturbances, etc. There is no doubt any more that officers and other responsible military persons have to be familiar with, not only international humanitarian law, but human rights law as well.

Almost the same can be said for the position of the police forces, but from another point of view. It is obvious that police forces have to respect human rights law in their regular police tasks. Nevertheless, in modern concepts of security and defense systems, the police could be used for military purposes as well, especially in some specific cases like internal disturbances or non-international armed conflicts. Putting police forces in such situations requires good knowledge of international humanitarian law as well.

There are also some other governmental and public officials who can be put into situations to implement or to ensure respect for both bodies of law, such as political leaders.

Last, but not least, it is important to provide public awareness about both legal bodies. This is perhaps the most important point, because in that way serious, public support and public control of implementation and respect for both international humanitarian law and human rights law could be ensured. Namely, it would be ideal to make respect for both bodies of law part of culture or, in other words, to create the culture of respect for both. Perhaps this could be the easiest way to see direct mutual influence of developed implementation and respect for human rights law on the implementation and respect for international humanitarian law. Being prepared for the implementation of international humanitarian law in war time requires some preparation: dissemination of international humanitarian law, clear instructions for armed forces and other forces which could be engaged in the conduct of hostilities and other combat procedures, good exercises in peace for the implementation, etc. All those measures should ensure appropriate behaviour in combat situation.

Good knowledge and implementation of human rights in peacetime will definitely contribute very much to reaching the above-mentioned goal. Everyday practice in respect and implementation of human rights law could create a good atmosphere for respect of the law in general, particularly the law of individuals and could create general respect for human lives, human dignity and other humanitarian values.

Once created, such culture will be a good base for the respect of humanitarian law in wartime. It is very easy to imagine that very well educated and trained persons in human rights law in peace will more easily recognize a war situation, requesting implementation of concrete international humanitarian law rules in protecting specific persons or certain rights of protected persons. For those military people, who are used to respecting human rights law in peace, it is more difficult to violate the same or very similar rules in wartime.

As is the case in international humanitarian law, the responsibility for spreading knowledge of human rights law belongs primarily to the state bodies, because human rights are, first of all, the international obligation of the States. Those bodies could use the same network for dissemination of international humanitarian law and human rights law due to already-mentioned similarities between the two legal bodies and due to existing experience in performing dissemination. Also, it implies that some NGOs, specifically those which are dealing with human rights law, could and should give a great contribution in the dissemination of that law.

The same may be said of international humanitarian law. NGOs engaged in the dissemination of that law, can contribute to spreading knowledge of human rights law. Firstly, in my opinion, the Red Cross/Red Crescent dissemination network could be used for the dissemination of human rights law and there are many reasons to do so, having in mind the already-mentioned mutual influence of the two legal bodies.

There is some cautiousness in using that among Red Cross/Red Crescent people. First of all, because human rights can be perceived as a political concept and one of the sources for legal confinement of the political will of the State. Such concerns should be understood and have to be kept in mind. However, it should not be an excuse for giving up the dissemination of human rights. The content of dissemination should be chosen in a way to avoid any misunderstanding in this sense. It could be done rather easily: the task of the Red Cross/Red Crescent in the dissemination of human rights law is to teach people that these rights exist, their specific meanings, and how they can give the individual human protection. However, the Red Cross/Red Crescent must not analyze concrete cases or take a position about concrete breaches of those rights. That is contrary to one of the fundamental principles of the International Red Cross and Red Crescent Movement, the principle of neutrality. The position is the same with regard to international humanitarian law; it is not the mandate of Red Cross/Red Crescent to judge about guilt or innocence.

It would really be a pity not to use all the experience of the Red Cross/Red Crescent, especially of national societies in spreading knowledge of international human rights law. Many national societies have good dissemination networks, well-educated trainers, capable of understanding and implementing all limitations in that process.

Finally, the dissemination of human rights in peacetime, for already-mentioned reasons, will contribute to the improvement of the implementation and respect for international humanitarian law in wartime. That is one of the basic ideals of the Red Cross/Red Crescent: to alleviate human sufferings.

Non-international Armed Conflict: Legal Qualifications and Parties to the Conflict *

Dieter FLECK

Director, International Agreements & Policy, Federal Ministry of Defence, Germany

Member of the IIHL

I. Open Questions

1. The legal status of conflicts

What legal and factual criteria must be satisfied for qualifying a situation as a non-international armed conflict, as opposed to internal disturbances and tensions or other forms of violence, such as the activity of national or transnational criminal groups?

Must all the factual criteria be confined to the territory of one country or can a non-international armed conflict be constituted on the basis of events occurring in different countries? Under what legal and factual conditions could the existence of an international armed conflict be assumed?

*Bibliography:

- T. MERON, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, 1989;
- L. MOIR, *The Law of Internal Armed Conflict*, Cambridge University Press, 2002
- D. FLECK, "Humanitarian Protection in Non-International Armed Conflicts: The New Research Project of the International Institute of Humanitarian Law", in *Israel Yearbook on Human Rights*, Vol. 30, 2000, pp. 1-16;
- D. KRITSIOTIS, "International Humanitarian Law and the Disintegration of States", in *op. cit.*, Vol. 30, 2000, pp. 17-35;
- M. VEUTHEY, "Remedies to Promote the Respect of Fundamental Human Values in Non-International Armed Conflicts", in *op. cit.*, Vol. 30, 2000, p. 37-77;
- G. K. WALKER, "Responses to Humanitarian Law Violations in Non-International Armed Conflict: Historical Perspectives and Considerations on Conflicts of Jurisdiction", *op. cit.*, Vol. 30, 2000, pp. 79-102;
- C. KRESS, "War Crimes Committed in Non-International Armed Conflicts and the Emerging System of International Criminal Justice", in *op. cit.*, Vol. 30, 2000, pp. 103-77;
- D. FLECK, "Towards a Code of Conduct for Internal Armed Conflicts: Current Efforts, Problems, and Opportunities", in *ASIL Proceedings*, N°96, 2002, pp. 25-32;
- *International Covenant on Civil and Political Rights*, "General Comment No. 29 States of Emergency (Article 4)", CCPR/C/21/Rev.1/Add.11 31 August 2001, <http://www.unhchr.ch/tbs/doc.nsf>;
- D. FLECK, "Humanitarian Protection Against Non-State Actors", in: Jochen Abr. Frowein/Klaus Scharioth/Ingo Winkelmann/Rüdiger Wolfrum (eds.), *Verhandeln für den Frieden/ Negotiating for Peace. Liber Amicorum Tono Eitel*, Berlin 2003, pp. 69-94;
- "San Remo Manual on the Protection of Victims of Non-international Armed Conflicts", Tentative Text , June 2003.

2. The legal status of the Parties thereto

What legal and factual criteria must be met in order to determine the existence of a "Party" to a non-international armed conflict? Can "terrorist" networks constitute a Party to the conflict? Considering that the Geneva Conventions require that States be involved in international armed conflicts, this issue is not related to such conflicts, unless situations other than those provided for in Article 2 common to the Geneva Conventions can be qualified as international armed conflicts under customary law.

II. Legal Assessment

Legal and factual problems may make it difficult to define non-international armed conflicts as opposed to international armed conflicts on the one side and internal disturbances on the other side.

International armed conflicts are characterised in Article 2 common to the Geneva Conventions as conflicts between States. The purpose of this provision is to define the range of application of the Geneva Conventions by expressly including:

- wars not formally declared,
- conflicts in which the state of war is not recognised by one of the Parties,
- cases of partial or total occupation even if it meets with no armed resistance and
- armed conflicts with a Power which is not party to the Conventions, but accepts and applies the provisions thereof.

Article 1 (4) of the 1977 Protocol I Additional to the Geneva Conventions includes "*armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination*" even if the conflict remains within the territory of one State. While this provision has been severely disputed in the past, there is no further example of an international armed conflict in conventional law.

Non-international armed conflicts are "*armed conflict[s] not of an international character occurring in the territory of one of the [...] Parties*" (see Art. 3 Common to the Geneva Conventions). They are characterized by intensity and duration of fighting efforts and organization of the warring parties. Additional requirements exist for application of the 1977 Protocol II Additional to the Geneva Conventions according to its Article 1 (armed conflicts "*which take place in the territory of a ... Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol*"). Generally speaking, however, control over territory by insurgents is not required for application of the law of non-international armed conflicts.

Asymmetric conflicts in which individual or collective self-defence is applied against non-State actors committing armed attacks against States in principle qualify as non-international armed conflicts. This principle applies in the ongoing Operation Enduring Freedom after September 11, 2001. Military operations against insurgent groups carried out on foreign territory with the consent and approval of the government of a recognized sovereign State, such as the Islamic Republic of Afghanistan after convening the Loya Kirga in

Kabul in June 2002 and the subsequent establishment of an Afghan transitional government on 19 June 2002 are governed by the law of non-international armed conflicts, whereas Afghanistan was Party of an international armed conflict from 7 October 2001 to 18 June 2002.

Events occurring in different countries may result in the existence of one or more international or non-international armed conflicts.

Activities referred to as the “*war against terrorism*” in political rhetoric are not *per se* to be considered as a “*war*” in the legal sense.

Internal disturbances and tensions or other forms of violence are excluded from the application of international humanitarian law (Art. 3 Common to the Geneva Conventions) and the regime of war crimes (Art. 8 para. 2 lit.d of the Rome Statute of the International Criminal Court).

The legal difference between armed conflicts and internal disturbances is practically limited by the fact that specific, but it is hardly larger in substance, human rights apply in all situations. Protection provided by international humanitarian law may be more The Universal Declaration of Human Rights of 1948 and the strict prohibitions of the ICCPR are widely concurrent with the obligations under the III Geneva Convention and customary law with respect to the treatment of prisoners. Torture or cruel, inhuman or degrading treatment or punishment is clearly prohibited under Art. 7 ICCPR. Procedural guarantees before courts and tribunals are specified in Art. 14 ICCPR. The General Comment No 29 on Art. 4 ICCPR further limits any tendency to derogate from these obligations in times of crisis and war. Many armed forces are used to operate in situations where crisis management and/or post conflict principles cannot be separated from the exercise of self-defense and rules of military combat. Human rights obligations represent values worth being defended and supported in military operations.

Human rights mechanisms are used in practice also to ensure compliance with principles of international humanitarian law. Even if violations of human rights by non-state actors do not figure in human rights instruments (and despite the fact that many have argued that human rights obligations were binding on governments only), the fact that human rights law was developed in a system of States, defining rights of the individual against the Government is not different from the law of armed conflict. There is a clear trend to subject non-state actors to human rights law, as it is accepted today for international humanitarian law.

Activities of national or transnational criminal groups are subject to national and international criminal prosecution, even if they amount to armed conflicts.

The contents of legal protection in international and non-international armed conflicts is in fact very similar: the legal obligation to protect civilians from hostilities (in particular from indiscriminate attacks) and to protect civilian objects (including cultural property) is the same in non-international as in international armed conflicts.

The same applies to the protection of all those who do not (or do no longer) take active part in hostilities (persons *hors de combat*).

Also prohibitions of means and methods of combat in non-international armed conflicts are not different from those applicable in international armed conflicts.

The progressive development of the law remains subject to a test of effective remedies to ensure compliance. While serious violations may paradoxically have the effect of extending rather than limiting existing obligations under international humanitarian law (as in Tadić), new and forceful efforts are necessary to ensure confidence in the law in this field. The fundamental character of humanitarian obligations as obligations *erga omnes* underlines that all States can be held to have a legal interest in their protection, and to confirm a responsibility of States to take appropriate steps to ensure respect, even if they are not directly involved in an armed conflict.

III. Policy Recommendations

In asymmetric conflicts in which individual or collective self-defence is applied against non-State actors committing armed attacks against States, all participants should be encouraged to ensure a wide application of the Geneva Conventions, even to the extent these conflicts do not qualify as international armed conflicts.

The law of non-international armed conflicts should be applied to any conflict of certain intensity and duration where military operations are conducted. Its range of application exceeds that of Protocol II Additional to the Geneva Conventions.

Activities referred to as the “*war against terrorism*” in political rhetoric are not *per se* to be considered as a “*war*” in the legal sense.

- The law of non-international armed conflicts is not limited to treaty law.
- Human Rights training of combatants and fighters should be encouraged.
- Non-state actors have not only rights but also responsibilities under human rights law.
- Remedies to ensure compliance with international humanitarian law and human rights law must be fully used and further developed in context.

Conflit armé non international: conditions juridiques et parties en conflit *

*Bibliographie:

- T. MERON, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, 1989;

Dieter FLECK

Director, International Agreements & Policy, Federal Ministry of Defence, Germany

Member of IIHL

I. Questions en suspens

1. Le statut juridique des conflits

Quels critères juridiques et factuels doivent être remplis pour qualifier une situation de conflit armé non international, par opposition à des troubles intérieurs et des tensions internes ou d'autres formes de violence, telles que les activités de groupes criminels nationaux ou transnationaux?

Tous les critères factuels doivent-ils être confinés au territoire d'un seul pays, ou un conflit armé non international peut-il trouver son origine dans des événements se produisant dans différents pays?

Sous quelles conditions juridiques et factuelles l'existence d'un conflit armé non international peut-elle être reconnue?

-
- L. MOIR, *The Law of Internal Armed Conflict*, Cambridge University Press, 2002
 - D. FLECK, "Humanitarian Protection in Non-International Armed Conflicts: The New Research Project of the International Institute of Humanitarian Law", in *Israel Yearbook on Human Rights*, Vol. 30, 2000, pp. 1-16;
 - D. KRITSIOTIS, "International Humanitarian Law and the Disintegration of States", in *op. cit.*, Vol. 30, 2000, pp. 17-35;
 - M. VEUTHEY, "Remedies to Promote the Respect of Fundamental Human Values in Non-International Armed Conflicts", in *op. cit.*, Vol. 30, 2000, p. 37-77;
 - G. K. WALKER, "Responses to Humanitarian Law Violations in Non-International Armed Conflict: Historical Perspectives and Considerations on Conflicts of Jurisdiction", *op. cit.*, Vol. 30, 2000, pp. 79-102;
 - C. KRESS, "War Crimes Committed in Non-International Armed Conflicts and the Emerging System of International Criminal Justice", in *op. cit.*, Vol. 30, 2000, pp. 103-77;
 - D. FLECK, "Towards a Code of Conduct for Internal Armed Conflicts: Current Efforts, Problems, and Opportunities", in *ASIL Proceedings*, N°96, 2002, pp. 25-32;
 - *International Covenant on Civil and Political Rights*, "General Comment No. 29 States of Emergency (Article 4)", CCPR/C/21/Rev.1/Add.11 31 August 2001, <http://www.unhchr.ch/tbs/doc.nsf>;
 - D. FLECK, "Humanitarian Protection Against Non-State Actors", in: Jochen Abr. Frowein/Klaus Scharioth/Ingo Winkelmann/Rüdiger Wolfrum (eds.), *Verhandeln für den Frieden/ Negotiating for Peace*. Liber Amicorum Tono Eitel, Berlin 2003, pp. 69-94;
 - "San Remo Manual on the Protection of Victims of Non-international Armed Conflicts", Tentative Text, June 2003.

2. Le statut juridique des parties impliquées

Quels critères juridiques et factuels doivent être remplis pour déterminer l'existence d'une "partie" impliquée dans un conflit armé non international?

Des réseaux terroristes peuvent-ils constituer une partie en conflit? Etant donné que les Conventions de Genève stipulent que les acteurs impliqués dans des conflits armés internationaux soient des "Etats", ce cas ne s'applique pas à de tels conflits, à moins que des situations autres que celles prévues à l'Article 2 commun aux Conventions de Genève ne soient reconnues comme des conflits armés non internationaux d'après le droit coutumier.

II. Aspects juridiques

Les problèmes juridiques et factuels peuvent rendre difficile la définition de conflits armés non internationaux, par opposition aux conflits armés internationaux d'une part, et aux troubles internes d'autre part.

Les conflits armés internationaux sont définis à l'Article 2 commun aux Conventions de Genève comme des conflits entre des Etats. L'objet de cette disposition est de définir le champ d'application des Conventions de Genève en y incluant expressément:

- les guerres non déclarées de manière formelle
- les conflits dans lesquels l'état de guerre n'est pas reconnu par l'une des Parties,
- les cas d'occupation partielle ou totale, même si elle ne rencontre aucune résistance armée, et
- les conflits armés avec une puissance qui n'a pas ratifié les Conventions, mais accepte et respecte les présentes dispositions.

L'Article 1 (4) du Protocole Additionnel I de 1977 aux Conventions de Genève inclut les "*conflits armés dans lesquels des peuples luttent contre la domination coloniale, l'occupation étrangère, et les régimes racistes dans l'exercice de leur droit à l'autodétermination*", même si le conflit se cantonne au territoire d'un seul Etat. Alors que cette disposition a fait l'objet de violentes controverses dans le passé, il n'existe plus d'exemple de conflit armé international dans le droit conventionnel.

Les conflits armés non internationaux sont des "conflit[s] armé[s] dépourvu[s] de caractère international, se déroulant sur le territoire de l'une des ... parties (voir Art. 3 Commun aux Conventions de Genève). Ils sont caractérisés par l'intensité et la durée des efforts de lutte et par l'organisation des parties en guerre. Il existe des restrictions supplémentaires à l'application du Protocole Additionnel II de 1977 aux Conventions de Genève en vertu de son Article 1 (conflits armés "*qui se déroulent sur le territoire d'une... Partie entre ses forces armées et des forces armées dissidentes ou d'autres groupes armés organisés qui, sous les ordres d'un commandement responsable, exercent un contrôle sur une partie de son territoire en vue de leur permettre de mener des opérations militaires planifiées et de longue haleine et de mettre en œuvre ce Protocole*"). Toutefois, d'une manière générale, le contrôle d'une partie du territoire par les rebelles n'est pas une condition nécessaire à l'application du droit des conflits armés non internationaux.

Les conflits asymétriques dans lesquels le principe d'autodéfense individuelle ou collective est appliqué à l'encontre d'acteurs n'ayant pas la personnalité juridique d'un Etat et qui perpètrent des attaques armées contre des Etats, sont en principe considérés comme des conflits armés non internationaux. Ce principe s'applique également dans l'opération "*Enduring Freedom*" qui a eu lieu à la suite des événements du 11 Septembre 2001. Les opérations contre des groupes de rebelles menées sur un territoire étranger avec le consentement et l'approbation du gouvernement d'un Etat souverain reconnu, tel que la République Islamique d'Afghanistan après la convocation de la Loya Kirga à Kaboul en juin 2002 et l'établissement d'un gouvernement transitoire afghan qui s'ensuivit le 19 juin 2002, tombent sous le coup du droit des conflits armés non internationaux, alors que l'Afghanistan était une partie d'un conflit armé international du 7 octobre 2001 au 18 juin 2002.

Des événements se produisant dans différents pays peuvent provoquer l'existence d'un ou plusieurs conflits armés internationaux ou non internationaux.

Les activités dénommées "*guerre contre le terrorisme*" en rhétorique politique ne peuvent pas être considérées en soi comme une "*guerre*" dans le sens juridique du terme.

Les troubles internes et tensions ou autres formes de violence sont exclus du champ d'application du droit humanitaire international (Art. 3 commun aux Conventions de Genève) et du régime des crimes de guerre (Art.8 §2 alinéa d du Statut de Rome sur la Cour Pénale Internationale).

La différence juridique entre des conflits armés et des troubles internes est limitée de manière pratique par le fait que les droits de l'homme s'appliquent dans toutes les situations. La protection fournie par le droit humanitaire international est peut-être plus spécifique, mais en substance elle est à peine plus étendue. La Déclaration Universelle des Droits de l'Homme de 1948 et les interdictions strictes du Pacte international relatif aux droits civils et politiques du 16 décembre 1966 ("*Pacte civil*") concordent parfaitement avec les dispositions de la III^e Convention de Genève et du droit coutumier en ce qui concerne le traitement des prisonniers. Les tortures ou traitements cruels, inhumains ou dégradants sont clairement interdits d'après l'Art. 7 du Pacte civil. Les garanties procédurales devant les courts et tribunaux sont spécifiées à l'Art. 14 du Pacte civil. Le Commentaire Général n°29 sur l'Art. 4 du Pacte civil limite plus avant toute tendance à se soustraire à ces obligations en période de crise et de guerre. De nombreuses forces armées sont employées pour intervenir dans des situations où la gestion des crises et/ou les principes d'après conflit sont indissociables de l'exercice de l'autodéfense et des règles du combat militaire. Les obligations vis-à-vis des droits de l'homme représentent des valeurs qui valent la peine d'être défendues et soutenues dans le cadre d'opérations militaires.

Les mécanismes des droits de l'homme sont appliqués dans la pratique afin d'assurer le respect des principes du droit humanitaire international. Même si les violations des droits de l'homme par des acteurs n'ayant pas la personnalité juridique d'un Etat ne figurent pas dans les instruments des droits de l'homme (et malgré le fait que beaucoup ont prétendu que les obligations vis-à-vis des droits de l'homme n'avaient de caractère contraignant que pour les Etats), le fait que le droit des droits de l'homme a été développé dans un système d'Etats qui définit les droits des individus par rapport au gouvernement, ne diffère pas du droit des

conflits armés. Il existe une tendance nette à soumettre des acteurs n'ayant pas la personnalité juridique d'un Etat au droit des droits de l'homme, comme cela est désormais accepté pour le droit humanitaire international.

Les activités des groupes criminels nationaux ou transnationaux sont sujettes aux poursuites nationales et internationales, même si elles tombent sous le coup des conflits armés.

Le contenu de la protection juridique dans les conflits armés internationaux et non internationaux est en fait très similaire:

L'obligation légale de protéger les civils des hostilités (en particulier contre les attaques aveugles) et de protéger les biens civils (y compris les biens culturels) est la même dans les conflits armés non internationaux que dans les conflits armés internationaux.

Il en va de même pour la protection de tous ceux qui ne prennent pas (ou plus) une part active dans les hostilités (personnes hors de combat).

L'interdiction de l'utilisation de moyens et modes de combat dans des conflits armés non internationaux ne diffère pas des dispositions applicables dans les conflits armés internationaux.

Le développement progressif du droit nécessite encore des tests de l'efficacité des remèdes efficaces permettant d'assurer son application. Alors que des violations graves pourraient avoir paradoxalement pour effet d'élargir plutôt que de limiter les obligations vis-à-vis du droit humanitaire international (comme pour Tadic), il faut entreprendre de nouveaux efforts soutenus pour garantir la confiance dans le droit dans ce domaine. Le caractère fondamental des obligations humanitaires en tant qu'obligations universelles met en exergue le fait que l'on peut partir du principe que tous les Etats peuvent avoir un intérêt juridique à les protéger, et qu'il faut confirmer la responsabilité des Etats dans la prise des mesures adéquates pour en assurer le respect, même s'ils ne sont pas directement impliqués dans un conflit armé.

III. Recommandations pratiques

Dans des conflits asymétriques où l'autodéfense individuelle ou collective s'applique à l'encontre d'acteurs qui, n'ayant pas le statut juridique d'Etat, perpètrent des attaques armées contre des Etats, tous les participants devraient être encouragés à assurer l'application large des Conventions de Genève, même dans le cas où ces conflits ne sont pas reconnus comme conflits armés internationaux.

Le droit des conflits armés non internationaux devrait s'appliquer à n'importe quel conflit d'une certaine intensité et d'une certaine durée, dans lequel sont menées des opérations militaires. Son champ d'application dépasse celui du Protocole Additionnel II aux Conventions de Genève.

Les activités dénommées "*guerre contre le terrorisme*" en rhétorique politique ne peuvent pas être considérées en soi comme une "*guerre*" dans le sens juridique du terme.

- Le droit des conflits armés non internationaux ne se limite pas au droit codifié dans des traités.
- Il faudrait encourager la formation des combattants dans le domaine des droits de l'homme.
- Les acteurs n'ayant pas le statut juridique d'un Etat ont non seulement des droits, mais également des responsabilités vis-à-vis des droits de l'homme.

Il faut employer tout l'attirail des remèdes pour garantir le respect du droit humanitaire international et des droits de l'homme et les affiner en fonction de chaque contexte.

***Legal Qualification and International Humanitarian Law as "lex specialis":
10 Basic Questions concerning International Armed Conflicts... and answers?***

Vitit MUNTARBHORN

Professor at the Faculty of Law, Chulalongkorn University, Bangkok

Introduction:

The terrorist attack on New York on September 11, 2001. The subsequent war in Afghanistan and the war against terrorists. The war in Iraq in 2003. These momentous events pose critical challenges to the scope and content of international humanitarian law, namely international law concerning armed conflicts, especially international armed conflict(s) (what the public often calls “*international war(s)*”) and non-international armed conflict(s) (what the public often calls “*civil war(s)*”).

It is well known that the international law concerning armed conflicts has evolved substantially from the 19th century. An essential backbone of this law was the adoption of various treaties at the end of the 19th century and the early 20th century to establish rules of conduct in times of war, especially by means of the Hague Conventions 1907. These were enriched after the Second World War by four Conventions adopted in Geneva in 1949, universally known as the Geneva Conventions 1949. They were supplemented in 1977 by two additional treaties in the form of Protocols additional to the four Geneva Conventions - known, in short, as Protocol I and Protocol II. The protection accorded under these treaties range from protection of fallen soldiers and prisoners of war to protection of civilians, the need to distinguish between military and civilian targets (attacks on the latter being illegal), and constraints imposed upon the use of arms (with prohibitions on the use of weapons which cause unnecessary suffering).

Conceptually and substantively, these rules pertain to the situation when wars/armed conflicts begin (*jus in bello*) rather than to the events leading to war (*jus ad bellum*). There is also a key distinction between international armed conflicts and non-international armed conflicts. Most of the rules inherent in the Geneva Conventions 1949 apply to international armed conflicts. Only Article 3 common to all four Conventions relates to “*armed conflict not of an international character*”; the rather concise protection accorded by that “*Common Article 3*” relates to prohibitions of various practices such as violence to life in particular murder and torture, hostage taking, and outrages on personal dignity such as degrading treatment. Protocol I expanded the rules concerning international armed conflicts and raised the status of wars of self-determination or national liberation to international armed conflicts, while Protocol II extended the rules concerning non-international armed conflicts with various criteria for application.

Basic Questions (and Answers):

From the angle of international armed conflicts, (at least) ten basic questions arise which may be addressed as follows:

What is an “armed conflict”?

The answer is not always clear. The four Geneva Conventions do not define the term. Article 2 common to all four Geneva Conventions merely States as follows:

“In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance [...]”

More recently, the Appeals Chamber of International Criminal Tribunal on Former Yugoslavia has asserted that an international armed conflict arises “whenever there is resort to armed force between States”.

Can a single incident involving the use of arms be classified as an “armed conflict” or should it be measured by the criteria of intensity rather than incidence? The Commentary to the Geneva Conventions states this position:

“It remains to ascertain what is meant by “armed conflict”. The substitution of this much more general expression for the word “war” was deliberate. It is possible to argue almost endlessly about the legal definition of “war”. A State which uses arms to commit a hostile act against another State can always maintain that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. Any difference arising between two States leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.”

On the basis of that Commentary, a single incident involving use of arms should suffice to be classified as an armed conflict. However, if it is a very small and insignificant incident, there may be room for claiming that it is not quite an armed conflict and there is a further need to see whether there is a protracted process to qualify as an “armed conflict”. On the other hand, if that single incident is intense (e.g. the push of a nuclear button), there is a possible and legitimate ground for claiming that it is tantamount to an “armed conflict”. The criteria for an armed conflict may thus arguably include: hostility (intention), use of arms and intensity, the measurement of such intensity depending on a significant event or a series of events leading cumulatively to that intensity.

What is an “international” armed conflict ?

The premise of the four Geneva Conventions in regard to their application to international armed conflicts is that those conflicts involve States (“inter-State”). However, the word “international”, when used in the context of armed conflicts, may encompass situations which are broader than conflicts between States. This is evidenced particularly by the expansion of the notion of international armed conflicts to cover wars of self-determination or national liberation under Protocol I. The seminal provision on this front is Article I of Protocol I which includes these stipulations:

“This Protocol, which supplements the Geneva Conventions of 12 August 1949, for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations ”.

Various caveats may be lodged here. First, unlike the case of the four Geneva Conventions, Protocol I has not yet been universally ratified. Second, particularly those countries which have not yet ratified Protocol I might claim that they do not recognise wars of self-determination as international armed conflicts. Third, while the substance of Protocol I concerns the application of international humanitarian law to wars of self-determination or national liberation, it does not (and does not aspire to) have bearing on the (il)legitimacy of the parties involved in the war of self-determination or national liberation, nor recognition thereof. Fourth, there is the sensitive issue of terrorism and the acts of terrorists. Granted that there is as yet no internationally accepted definition of terrorism or terrorists, this issue may pertain to wars of self-determination in that various violent acts in that war might be claimed to be an act of self-determination by one side so as to fall under the ambit of Protocol I, while the other side might counterclaim that they are merely acts of terrorism or terrorists falling outside Protocol I. The bottom line is that, in law, Protocol I can cover those violent acts where they fall under the scope of self-determination. However, if they are outside that scope, they do not fall under the notion of international armed conflicts which now covers (at least for the States Parties to Protocol I) wars of self-determination or national liberation.

Are there customary rules (beyond the treaty-based rules on international armed conflicts) which might expand the notion of “*international armed conflicts*”?

This question is particularly relevant today to the claim, on the part of some, that customary rules may extend the notion of “*international armed conflicts*” to cover the war on terrorism, even if the treaties are unclear on the subject. Such claim would advocate that even if there is no conflict between States, the conflict between one or more States and terrorists may be classified or qualified as an international armed conflict, bringing into play international humanitarian law in part or as a whole.

The quandary with this type of conflict is that while it is not “*inter-State*”, it may be transnational with international implications. Of course, the international humanitarian law treaties could not have foreseen the impact of today’s terrorism and terrorists. Should those treaties be stretched accordingly by customary rules of international law?

For the emergence of an international custom to take place, it is necessary to prove some uniformity of practice and the fact that the alleged rule is considered as legally binding (*opinio juris*). In this perspective, it is possible to argue that customary rules now cover wars of self-determination (even when linked with acts of terrorism/terrorists), and the principles/rules of Protocol I apply even to States which have

not ratified the Protocol - they apply as customary rules, evidenced by the fact that the majority of countries have ratified and abide by Protocol I. However, beyond that situation, to advocate that generally acts of terrorism/terrorists should be covered by customary rules extending the application of international humanitarian law to them as international armed conflicts is not only a dangerous argument but also not borne out by State practice. It is particularly dangerous because it may help its advocates legitimize countermeasures against (alleged) terrorists as military targets - without accountability and due process of law.

Do we need to qualify -formally, explicitly- a situation as an “international armed conflict”?

The implication from the Geneva Conventions is that even when there is no declaration of war, a situation may still be qualified as an international armed conflict. This provides the premise for us to answer the question above: formal qualification as a war or an international armed conflict is not a precondition for the application of international humanitarian law. However, it is the content of the situation which must be assessed to see whether international humanitarian law applies. This is witnessed by many situations in which the International Committee of the Red Cross (ICRC) has been involved to provide protection and assistance to the victims. Even when there is no explicit, overt or formal declaration or qualification that a situation is an international armed conflict, the ICRC has been willing to provide help on the basis that the content of the situation calls for help to access the victims in the context of an international armed conflict. Ultimately, whether or not to formally qualify a situation as an international armed conflict may depend on the circumstances: whether it is in the best interests of the victims to do so at a particular point in time, and which (?) entity or organization is initiating or being called upon to provide help.

Who defines or qualifies a situation as an international armed conflict?

There is no clear provision in the Geneva Conventions and its Protocols on this question. However, it is the implication from these treaties that the answer depends upon the States Parties.

Yet, that implication is incomplete for these reasons. First, it is not impossible to envisage the scenario of one or more States qualifying a situation as an international armed conflict, while other States deny it. Who then counts and who is the final arbiter? Second, in today's world, there are also other voices which matter beyond individual States. These include the United Nations system, particularly the Security Council, the only entity internationally entitled to make binding decisions on all countries. There is also the role of the international community in the form of international public opinion and civil society. Interestingly, in relation to the Iraq war in 2003, although there was no Security Council permitting the use of force against Iraq in 2003, Resolution 1483 passed by the Security Council after the occupation of Iraq by foreign forces implied that the armed conflict in 2003 was/is international -as an international *fait accompli*. Interestingly, Article 4 of the Resolution stipulates as follows:

“Calls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907”.

Third, there is the catalytic role of the ICRC -which is provided for in the Geneva Conventions and Protocols- in initiating the offer of protection and assistance for the victims which may imply action, in substance, in regard to an international armed conflict. This may thus be indicative of the status of a situation in a given context. Fourth, one or more Parties to the conflict might seek to tone down or dilute the situation by claiming that while it accepts the situation as in fact (*de facto*) an international armed conflict, it does not accept the situation as in law (*de jure*) an international armed conflict, thus exempting the Party from the scope of the Geneva Conventions or other relevant treaties. This distinction is contrary to the spirit of international humanitarian law and provides an unacceptable pretext for self-exemption from international humanitarian law. The preferred presumption should thus be to apply that law rather than to exempt oneself from it.

Thus the answer to the question “*who decides whether a situation is an international armed conflict?*” may depend upon a variety of actors and the weight of their responses to a given situation. What is clear is that subjective or unilateral interpretation by one or more States is not adequate to qualify a situation as (or not as) an international armed conflict. Greater objectivity is desired and this depends upon multilateral responses to and recognition of a given situation as (or not as) an international armed conflict.

What are the substantive rights emerging from qualification of a situation as an international armed conflict?

The various rights are listed in the key treaties on the subject, particularly the Geneva Conventions and their Protocols. Given the fact that in times of war, various rights which are enjoyed in times of peace are constrained or suspended, it is important to invoke and implement well the specific guarantees espoused by these Conventions. These range from the protection of fallen soldiers to the rights of prisoners of war (even though, unlike in times of peace, there is no prohibition against the military killing the military in combat, where they have not yet fallen or surrendered), to the rights of civilians in occupied territories, such as their right against forced displacements, and protection accorded to civilians from the attacks of the military.

Yet even in times of war or peace, some rights are non-derogable and should be enjoyed absolutely. These include, for instance, the prohibition of torture and slavery, and the right to recognition as a person before the law, implying that whether in war or in peace, all those who are detained are entitled to some access to the courts for the ascertainment of their status and protection of their rights as humans.

The pitfall in this respect is that in today’s environment of draconian actions against terrorism, many of these non-derogable rights are at times violated in the name of security, even by countries which claim that they personify the Rule of Law.

What is the status of persons in an international armed conflict and who are the beneficiaries of a situation qualified as an international armed conflict?

There are a number of beneficiaries of a situation qualified as an international armed conflict for the purpose of protection and assistance. The two major groups are: fallen soldiers and prisoners of war, on the one hand, and civilians, on the other hand.

The status of prisoners of war, in particular, has been the subject of debate particularly in relation to the war against terrorism/terrorists, exemplified by the military action which took place against Afghanistan after the attack on New York in 2001. If the various combatants from Afghanistan are captured, what is their status?

The answer depends upon which group of combatants is being assessed in relation to their status. The Afghan government forces under the Taliban regime which was toppled in 2002 would fall naturally under the status of prisoners of war. However, this status has been rejected unilaterally by the key occupying power of Afghanistan, which lists the captives as “*enemy combatants*” or “*unlawful combatants*”, a category not found in international humanitarian law. What of others, such as those belonging to a terrorist organisation such as Al Qaeda, which also fought for that regime? Even if they do not fall under the category of prisoners of war, could they still be treated as “*protected persons*” under the Geneva Conventions? This possibility has also been rejected by the occupying power which classifies all of the captives as “*enemy combatants*” or “*unlawful combatants*”.

Precisely because in reality, the status of the above are in doubt, it is necessary to have some access to the independent courts or a “*competent tribunal*” to ascertain or qualify their status, as stipulated particularly in Article 5 of Geneva Convention III which deals with prisoners of war. This stipulation has not been responded to yet, and there is a need for an expedited response in a transparent manner in keeping with the standards of international humanitarian law.

With regard to the other possibility which advocates that if the combatants are not prisoners of war, they could still be classified as “*protected persons*” under the Geneva Conventions, while the term “*protected persons*” sounds somewhat anomalous when used to cover those (allegedly) involved in terrorism, it is also important to note that the Rule of Law principle of “*innocent till proven guilty*” protects all persons. Moreover, international humanitarian law does not forbid the interrogation and detention of such “*protected persons*” on security grounds during the conflict, thus providing a sense of balance to the status accorded and the pre-occupation of national and global security.

What is the consequence of breaches of the law concerning international armed conflicts ?

The longstanding answer to that question is that grave breaches, such as the killing of prisoners of war and of civilians, give rise to responsibility and accountability. In the case of individuals, this is linked with war crimes and possibly three other crimes: crimes against humanity, genocide and the crime of aggression.

While traditionally, these breaches were prosecuted at the national level, since the Second World War, there has been progression towards international tribunals to overcome lacunae at the national level. With *ad hoc* tribunals at Nuremberg and Tokyo and more recently on Former Yugoslavia and Rwanda as precursors, the international community has now established a permanent International Criminal Court by means of the treaty known as the Rome Statute of International Criminal Court 1998. The Court was physically set up in 2002 and its mandate covers, *inter alia*, breaches in relation to international armed conflicts under the four crimes mentioned above. However, it is only the responsibility of individuals (not States) which is covered by the Court. The Court will only act if the national system is unable or unwilling to act (known as the “*complementarity*” principle), and its jurisdiction is not retroactive.

While the Rome Statute refers specifically to the four Geneva Conventions, interestingly it does not refer explicitly to the two Protocols, partly because several States have still not acceded to the latter. However, the court’s jurisdiction also covers customary rules of international law, and many elements of the two Protocols are recognised as part of those customary rules under the court’s jurisdiction, e.g. prohibition against military attacks on civilian targets.

How special and specific is international humanitarian law (as *lex specialis*)?

The claim of a *lex specialis* (special law) is based upon the premise that if there is a conflict with other (more general) laws, the special or specific law should prevail. International humanitarian law is special in that it is the law that applies in armed conflicts (*jus in bello*). While some practices are prohibited in peace, they are permissible in war if the rules of the game are followed. The classic case is that the military cannot kill the military in times of peace but they can do so in times of war - subject to international rules of conduct, especially for the protection of fallen soldiers and prisoners of war.

That special nature of international humanitarian law should be appreciated from the angle of how it is able to provide added value to international law as a whole. The comparative advantage of international humanitarian law is not only that it is special but also that it is specific - it provides the norms of specificity linked with situations which are not adequately dealt with by other laws. That is both the strength and the constraint of the *lex specialis*. It is special because it highlights the much needed rules of the game. Yet, it does not aspire to cover other situations beyond its specific domain of armed conflicts.

With regard to its potential conflict with other more general laws, is there really room for conflict ? The lawyer in his/her wisdom (and/or semantics and even polemics) will try his/her best to avoid a conflict between the various legal regimes. The easiest (and perhaps laziest) option as a response is to advocate that there is no real conflict because the norms of the various legal regimes operate on/in different jurisdictional planes. The other more humane response (and perhaps more difficult in terms of implementation) is to test the application of the various laws by means of rationalization answering to this key question: What is in the best interests of the victims ? By implication, therefore, we should apply the law that responds to those best interests.

In qualifying a situation as an international armed conflict, what is the relationship between international humanitarian law, human rights and other laws such as international criminal law and national criminal law?

As a starting point, there is the general premise that while respect for national law is important, if there is a conflict between national law and international law, the latter prevails, and as international humanitarian law is part of international law, it is part and parcel of this primacy.

With regard to the relationship between international humanitarian law and other elements of international law, such as human rights, the preferred approach is to promote their complementarity, granted that each has its own field of application under the broader umbrella of international law. This is particularly the case today when and where the banner of (anti-)terrorism and terrorists pervades the international mindset exponentially. The implications include the fact and law that even if international humanitarian law only covers armed conflicts and thus by implication only those terrorist acts linked with such armed conflicts, other rules can and do come into play to cover terrorist acts falling outside international humanitarian law. These include national and international criminal law which can be used against terrorist acts. For instance, while the word “*terrorism*” does not appear in the Rome Statute of International Criminal Court, the latter can cover those individuals involved in terrorism where they fall under one of the four crimes covered by the Statute. Where States are involved in terrorism, there are various international rules concerning State Responsibility which can be activated, and these have been concretized by the International Law Commission through its draft Principles on State Responsibility (2001).

Yet, while those who commit wrongs must be subjected to responsibility and accountability, they are also entitled to various rights under the national and international Rule of Law. That protection is based on non-discrimination and is found most prominently in international human rights law, such as the principle of “*innocent till proven guilty*”, the right of access to lawyers for representation and the courts for justice, the right of treatment as a person under the law, and prohibitions of inhumane practices such as slavery, torture and cruel treatment. The most important of these rights, such as the prohibition against torture, are non-derogable and absolute, and apply both in peace and in war.

In conclusion, the ultimate challenge is perhaps this quagmire. The danger today is not that the relationship between these various laws will lead to a conflict between them but rather that it is faced with two cruel faces/features of violence. On the one hand, terrorism and the acts of terrorists seek to impose a regime of anarchy steeped in lawlessness, and this must be countered not only by means of suppression but also prevention, especially to address the root causes of violence. On the other hand, regrettably some countries seek to make unilateral and tendentious use of various aspects of the law, steeped in subjective interpretation and selective application, tantamount to a rejection or manipulation of international humanitarian law.

Such features pose a great threat to the global Rule of Law in its totality. For those of us who are for that Rule of Law and against violence, the added value of international humanitarian law is surely to embody

and advocate a multilateral and humane approach based upon a degree of objectivity and non-selectivity - which, despite the limits of its remit, are at the heart of its universal appeal.

*The Historical Evolution of International Humanitarian Law, International Human Rights Law,
Refugee Law and International Criminal Law*

Michael BOTHE

Johann Wolfgang Goethe University, Frankfurt, Germany

1. Introduction: the development of international law.

A look back into history shall introduce the Round Table. Indeed, this introductory paper tries to show that in order to understand the current shape and functioning of international law, it is necessary to look into its development.

Thus, how does international law develop? International law is a man-made phenomenon. It is shaped by actors who are driven and brought together by the perceived need to solve certain problems existing at the international level, and to do so by creating legal norms addressing the problem. How is it, then, that a problem reaches a sufficient number of these problem solvers? It takes most often special events which trigger such activities. And it takes common ideas, common approaches to what we nowadays call “*governance*”. Finally, it takes opportunities for relevant actors to meet to address a problem.

Thus, triggering events, opportunities and ideas are key factors in the development of international law. This fact accounts for the fragmentation of international law into a great number of issue-related treaty regimes created on particular occasions, addressing specific problems created by certain events. But as everything depends on everything, these regimes overlap. Then, it turns out that the rules are not necessarily consistent with each other, but that they can also reinforce each other. Thus, the question arises whether there is conflict and tension or synergy between various regimes.

These regimes are, of course, not static. They develop over time. It is a history of making and breaking the law, of applying or not applying the law. In the course of this development, the overlap between these regimes, but sometimes also the empty spaces left between them, become apparent.

It is the purpose of my modest contribution to show this development for four types of regimes, in particular as they overlap in situations of violence. They simultaneously address the questions of rights and duties of the same individual actors, both victims and violators.

2. International humanitarian law

“*War*” is a phenomenon probably as old as the phenomenon of man living together in organised collectivities. These collectivities often fight each other. There have been remarkable changes in the concept of war throughout the ages. These changes have shaped perceptions which have given rise to a concept of war as a relationship between States (and like entities) governed by international law. War as a relationship of military violence between sovereigns (later: sovereign States), yet with limited means against limited targets: this is the result of political practice (cabinet wars) and the philosophical thought of the age of enlightenment in 18th century Europe. Geneva already played an important role at that time. The key ideas

were developed by Jean-Jacques Rousseau. This practice and philosophy is the origin of international humanitarian law. It is the origin of the fundamental distinction between combatants and non-combatants, between persons fighting and those *hors de combat*, between the military effort of a State and the civilian population. This concept inspired a law-making development which found its provisional conclusion with the Hague Peace Conferences.

This law-making started with bilateral treaties, dealing with the fate of prisoners, concluded in the late 18th and early 19th century. The first one was the treaty on friendship and commerce between Prussia and the United States of 1785 (negotiated between King Frederic II and Benjamin Franklin, both strongly under the influence of the French philosophical thought). The next examples are treaties between England and the United States in 1813 as well as between Spain and Colombia in 1820. A major step in the civilisation or rather nationalisation of warfare was the Paris Peace Treaty of 1856.

Later in the 19th and early 20th century, two major treaty regimes develop in parallel fashion. They then began to merge in 1929. They have been called the Geneva Law and the Hague Law. The distinction has no deeper substantive significance. It is simply due to the fact that a specific triggering event (the Battle of Solferino 1859), the recognition of a problem (the fate of the wounded) by an active mover (Henry Dunant) prompted the development of a treaty regime (the first Geneva Convention of 1864 on the protection of the wounded in the field) concentrating on that particular problem. That treaty regime was progressively adapted to new developments and expanded to new additional issues. Other issues of the laws of war were at the same time dealt with in different fora based on different initiatives (Petersburg Declaration of 1868, Brussels Declaration of 1874), a development which, rather due to a caprice of history, found a certain conclusion in the Hague Peace Conferences of 1899 and 1907. These conferences were meant to be what they were called: peace conferences, dealing with peaceful settlement of disputes and limitation of armaments. They were fairly unsuccessful in dealing with their main subject, but they provided a wonderful opportunity to produce a number of treaties on issues of the laws of war which at the time were ripe for codification, the central one being Geneva Convention IV, containing as an Annex the Hague Rules on Land Warfare.

Thus, it appeared that two separate regulatory regimes had been established. But it made no sense to keep them apart. The Geneva regime was better organised. The ICRC, the Red Cross movement as a whole, established itself as a moving force, which was supported by the Swiss Federal Council. This institutional back-up provided the opportunity for a continuous adaptation of the "*Geneva law*" based on the experience of the respective recent wars: 1929 after the 1st World War, 1949 after the 2nd World War, 1977 during and after Vietnam, the Middle East conflict and the armed conflicts of the decolonisation process. In each of these steps of treaty making, the Geneva conventions took aboard issues which had before been a matter of the Hague Law: prisoners of war in 1929, belligerent occupation in 1949, conduct of war in 1977, to mention only the most significant ones.

The constraint on violence established by this combined treaty regime, which is to a large extent also part of customary law, is based on the fundamental distinction between the military effort of the State and civilian objects, between combatants and the civilian population, between those in a position to fight and those which are not (wounded and sick, prisoners). Why do States accept and base their behaviour on this distinction? The moral value of respecting the well-being and dignity of victims is not to be underestimated. It is a body of law to a large extent designed to protect human beings. But the basic conflict of interest which is accommodated by this law is that between States engaged in an armed conflict. These States have the same interest, each in the opposite direction: to do as much damage as possible to the other party and to save one's own assets as far as possible. As an accommodation between these interests results indeed in restraints on violence, this benefits the individual. But is the individual more than a factual beneficiary, a holder of rights? A number of newer humanitarian law treaty provisions are formulated in this sense. It is this sharper focus on the individual which leads to the overlap with the law of human rights, the type of regime to which we turn next.

3. International legal protection of human rights

The development of a legal protection of human rights was, in its beginning, a matter of constitutional law. It started *grosso modo* at the same time as the development of international humanitarian law, as just described, namely in the American and in the French Revolution. It is from these two events that a kind of shock wave went around the world, exporting these ideas into the constitutions of many States. But this legal protection was strictly a matter of national law, it was an internal affair of the State. It was, thus, not a matter appropriate for international legal regulation. If international law was concerned with the question of how a State treated human beings, it was only where they belonged to another State, be they aliens doing business in another State, be they prisoners in the hands of an adverse party. The fact that both situations are regulated by one and the same treaty, as was the case in the Prussian-American Treaty of 1785, is a telling example of this situation.

The "migration" of human rights law from internal to international law is a result of a number of triggering events of the 20th century.

When international law first became concerned with the question of how a State treated its own citizens, this was due to the fact that there were groups of such citizens towards which the State was in some way hostile for historic reasons. This is the problem raised by the existence of minorities, which became crucial after the 1st World War as the redrawing of the political map of Europe, which took place at the end of this war, created a great number of new minorities. A number of treaties were concluded for their protection.

At the same time, there were also moves to develop a stronger international protection of the individual. But they did not lead very far in the '20s and '30s. It is under the shock of an additional triggering event, namely the atrocities which inhumane regimes in the '30s and '40s committed against foreigners and their own nationals alike, that the old concept of a *domaine réservé* ceded to the idea of international concern

for human rights. The steps of this development were the following: In the Atlantic Charter of 1941, the international protection of human rights was formulated as a war goal of the Allied Powers. This is reflected in a general way in the Charter of the United Nations, which then prompted a process of formulating programmatic instruments for the international protection of human rights and then of treaty making, both on the universal and the regional level. The programmatic formulations started with the Universal Declaration of 1948. This was the starting point for human rights bodies of the United Nations, but also for regional organisations providing a framework, an institutional back-up, an opportunity in the sense I have used the term for developing human rights law. In these decades after 1950, there is, at the universal level, the development of the two UN Covenants, the content of which corresponds to the Universal Declaration, but also a wide array of specialised human rights treaties. In addition, regional regimes were created. The first region to adopt its own treaty regime was Europe with the European Convention on Human Rights (ECHR) signed in 1950 and the European Social Charter of 1961. The Convention is inspired by the text of the Universal Declaration, but the fact that Europe adopted its own treaty regime so soon is rooted in genuine European political currents, in the idea that the Europe to be reconstructed after the War should be based on the values of democracy and human rights. This also explains the progressive character of the Convention.

Human rights treaty regimes differ as to content, but even more so as to enforcement. A common element is the right of the individual to a national remedy. Yet the European Convention, unprecedented and revolutionary at the time, also provided for an international remedy. The scope of this legal protection of the individual still is unparalleled. The communications under the Optional Protocol to the Covenant on Civil and Political Rights (CCPR) have developed as a valuable remedy, but its scope is much more restricted than that of the individual complaint under the revised ECHR.

It is mainly in this focus on substantive and procedural rights of the individual that the human rights regimes differ from international humanitarian law. But does that mean that the human rights approach does no longer apply once an armed conflict breaks out? Human rights treaties envisage the problem in the form of state of emergency derogation. The underlying assumption is that their scope of application does not exclude armed conflict.

Quite to the contrary: relevant actors maintain the position that human rights law continues to apply in situation of armed conflict and, thus, can strengthen the legal position of victims and create a synergy between human rights law and international humanitarian law.

As far as law making is concerned, a great deal of the impetus which pushed the development of international humanitarian law in the late '60s and the '70s of the 20th century is due to interest in promoting human rights. This was formulated by the Human Rights Conference in Teheran in 1968 and by the General Assembly a few months later in resolutions entitled "*human rights in armed conflict*". This was soon echoed by a resolution dealing with the same subject adopted by a conference organised by the Sanremo Institute, the first great and widely-noticed step of the Institute to promote the cause of international humanitarian law and human rights. At the political level, all this paved the way for the confirmation and development of international humanitarian law which was then undertaken by the diplomatic conference held in Geneva

from 1974 to 1977. The conference, by the way, paid back part of the debt it owed to human rights by adopting a number of clear cut human rights provisions, in particular by making some rights which are derogable under the Covenant non-derogable as far as the scope of application of international humanitarian law is concerned.

The synergies between international humanitarian law and human rights law, but also their limitations, have also become apparent in the case law of the institutions established by the European Convention on Human Rights. Already in the '70s, the Commission, then the first organ seized with alleged violations of the Convention, held that the Convention applied to, and was violated by the behaviour of Turkish troops in Northern Cyprus. Later the Court, in the *Loizidou* case, held that the taking of property by Northern Cypriote authorities was attributable to Turkey, and a violation by Turkey. This means, for all practical purposes, that in a situation of belligerent occupation the occupying power is not only bound by the Hague Regulations and the Fourth Geneva Convention, but also by the European Convention on Human Rights, because the inhabitants of an occupied territory are “*within the jurisdiction*” of the Occupying Power according to the terms of art. 1 of the ECHR which defines its scope of application.

It turned out that too much hope had been placed in this synergy between the European Convention and international humanitarian law when the victims of a bombardment on Belgrade, which took place during the Kosovo conflict in 1999, claimed to have been violated in their right to life. In the *Bankovic* case, decided in December 2001, the Court held that a bombarded area was not “*within the jurisdiction*” of the bombarding State, distinguishing this case from *Loizidou*, thus limiting the synergy between international humanitarian law and human rights.

4. International refugee law

The development of refugee law, too, is due to a series of triggering events.

The first one was the exodus of great masses of people in the wake of the 1st World War and the ensuing revolutions, in particular Russian and Armenian refugees. The President of the ICRC launched an appeal to the League of Nations, and measures of assistance were taken by the League in 1921. Nansen was appointed as the first “*High Commissioner*”. The emphasis of these measures lay on international assistance and on a regulation of the status of these persons (1928 Arrangement, 1933 Refugee Convention). It was a fear of destabilisation and an interest in burden sharing that prompted States to co-operate in this way.

The next triggering event was the flow of refugees from Germany after 1933, which, however, did not lead to an effective regime of assistance and protection.

The disasters causing masses of refugees continued: the massive displacement of persons during and after the 2nd World War. The 1951 Geneva Convention dealt with the treatment of *these* refugees. It is a specialised human rights treaty concerning the relationship between a State and specific aliens, namely the refugees as defined by the convention. In addition, international measures of assistance and support are undertaken under the auspices of the United Nations, first by the IRO (until 1952), then by the UNHCR (GA Res. 319(IV) of Dec. 3, 1949).

Yet the problem continues, new situations occur where people have to leave their countries. Thus the 1951 Convention is extended in a general way to all refugees by the Protocol of 1967.

Thus, international refugee law is a specific treaty regime, administered and supported by a specialised organ, relating to specific victims of man-made disasters (not only armed conflict). It consists of a human rights law component and an assistance component. It does not deal with the armed conflict itself, rather with specific consequences thereof.

5. International criminal law

The first event triggering an attempt to establish and administer international criminal law was the suffering caused by 1st World War, which was seen as a matter of personal criminal responsibility of relevant actors, in particular the German Emperor. The Versailles Treaty provided for criminal prosecution not only for violations of the laws of war, but also for an offence against the sanctity of treaties, thus targeting the violation of Belgian neutrality which happened at the beginning of the war, a violation of the rudimentary limitation of the *ius ad bellum* existing at the time. This attempt did not lead anywhere. Instead, a few prosecutions of war criminals took place before the German supreme court, the *Reichsgericht*.

The next triggering event was the suffering caused during and before the 2nd World War by the regimes in Germany and Japan. They, too, were seen as a matter of criminal responsibility of relevant actors of Germany and Japan. The International Criminal Tribunals were established in Nuremberg and Tokyo. The Nuremberg Tribunal had jurisdiction over three types of crimes: war crimes, crimes against humanity (criminal sanctions for massive violations of human rights) and crimes against peace (criminal sanction for the violation of a customary law prohibition to use force). International criminal law was, thus, established as a set of secondary norms for three different legal regimes: the law of armed conflict, human rights, prohibition of the use of force.

This new field of international law developed very slowly after the end of the 2nd World War. In 1948, the Genocide Convention was adopted by the UNGA as a development of the concept of crimes against humanity. Apart from that, nothing really happened. Attempts to codify the “*Nuremberg Principles*” were laid to rest. The grave breaches provisions of the Geneva Conventions of 1949 are not a question of international criminal law, but they establish a duty to punish violators of the Conventions under national law.

The next triggering events giving a new impetus to the development of international criminal law were the conflicts in the former Yugoslavia and in Rwanda. They led to an unprecedented move, namely the creation of two *ad hoc* criminal tribunals by the Security Council. Their jurisdiction extends to war crimes, crimes against humanity and genocide.

This laid the basis for the creation of a permanent international criminal court by the Rome Statute adopted in 1998, which entered into force in 2002. Its jurisdiction is defined according to Nuremberg triade: war crimes, crimes against humanity/genocide and crimes against peace. But the latter provision is not operational for the time being.

International criminal law, thus, constitutes a body of secondary norms the purpose of which is to enforce an important part of international humanitarian law and fundamental principles of human rights law.

6. Conclusions

Due to the internal necessities of its law-making process, the international legal order, except for a few general rules (the prohibition of the use of force, the law of state responsibility, the law of treaties) is a fragmented legal order. It is divided into different treaty regimes. But customary law, too, develops in a problem-oriented way. It does not change that fragmentation.

Most of these regimes have established their own institutions, which tend to protect the scope of application of the regime.

In concrete situations, these regimes overlap. This is when the institutions tend to assert the primacy of their respective regime. The technical argument for doing this is *lex specialis*. Quite often it can be heard from both sides, which shows that the problem is somewhat more complicated.

What has to be avoided, indeed, is a situation where an actor bound by the law receives conflicting commands from various parts of the legal order, each claiming precedence over the other. There are various ways of dealing with this problem. A definition of the respective scopes of application which avoid overlap is one way. Parallel or cumulative application is the other solution which may imply certain difficulties. It requires some type of practical concertation between regimes. To come back to the practical example: in the *Bankovic* case, the ECHR defined the scope of application of the European Convention in a way that excludes overlap with international humanitarian law. In the *Loizidou* case, in a situation of belligerent occupation, the Court defined the scope of application in a way which requires parallel application. This means, for example, that such measures as the deprivation of liberty, the taking of persons' lives, the destruction of property by a detaining power or an occupying power must be justified under both regimes, although the criteria for such justification are different.

This is the solution where there can be a synergy between international humanitarian law and human rights. This is important in both directions. Where human rights law is violated, *e.g.* rules relating to the deprivation of freedom, but the victims have no access to an international remedy because the detaining power is not a party to an instrument providing for such remedy, the ICRC, in its function to monitor the respect of international humanitarian law can – and by the way does - step in. On the other hand, the fact that an individual has a remedy under human rights law gives additional strength to the rules of international humanitarian law corresponding to the human rights norm alleged to be violated.

Like many things in the world, the fragmentation of international law involves risks and opportunities.

*Quelle interaction entre l'article 3 commun aux Conventions de Genève,
le deuxième Protocole Additionnel et le droit international des droits de l'homme
dans des situations de conflit armé non international*

Habib SLIM

Professeur à la Faculté de Droit et des Sciences Politiques de Tunis
Secrétaire Général Adjoint, Croissant Rouge tunisien

Au cours des conflits armés de type classique, la mise en œuvre du Droit international humanitaire était relativement aisée, du fait que la qualification des conflits était facilitée par le fait que la distinction était assez nette entre, d'une part, les conflits armés à caractère international auxquels s'appliquaient les Conventions de Genève ainsi que le Protocole Additionnel I et les conflits armés à caractère non international auxquels s'appliquait l'article 3 commun aux Conventions de Genève, ainsi que le Protocole Additionnel II. Encore faut-il ajouter que les dispositions de l'article 1 § 2 du Protocole excluent du champ d'application de celui-ci les situations de tensions internes ou de troubles intérieurs ou autres actes isolés et sporadiques de violence.

Depuis que nous avons vu apparaître et se multiplier sur de nombreux théâtres d'opération, en particulier en Afrique, de nouveaux types de conflits qu'on a appelé, faute de mieux, les conflits déstructurés, les frontières se sont beaucoup estompées tout d'abord entre les conflits armés à caractère international et les conflits armés à caractère non international, du fait que ces derniers ont souvent revêtu certains caractères marquants chez les premiers. Ensuite, les frontières sont devenues beaucoup plus floues entre les conflits armés à caractère non international et les situations voisines de violence dues notamment au terrorisme local ou au terrorisme international.

L'on se demande, aujourd'hui, si ce n'est pas l'une des caractéristiques de notre époque, liée peut-être au nouvel ordre mondial, que de sécréter un changement considérable dans la nature des conflits. Ces derniers, qu'ils soient de nature interne ou de nature internationale, sont marqués par l'action de nouveaux acteurs non étatiques qui sont des milices ou des groupes armés, ou même des civils agissant dans la clandestinité totale et utilisant, d'une façon aveugle, des moyens de plus en plus spectaculaires, pour impressionner la population et semer la terreur.

De ce point de vue, le dernier attentat perpétré contre la mission de l'ONU à Bagdad est intéressant à analyser. Même s'il s'agit d'un conflit à caractère international, se prolongeant par la présence de puissances occupantes sur le territoire irakien, le groupe islamiste clandestin qui a perpétré l'attentat, ne s'est pas attaqué à ces puissances occupantes, en l'occurrence, les forces américano-britanniques. Au contraire, après l'attentat perpétré, le 7 août, contre l'Ambassade de Jordanie (19 morts), il s'est attaqué, le 19 août, à la mission onusienne à Bagdad, constituée par des civils non combattants qui n'ont joué aucun rôle dans le conflit, bien au contraire. Les commanditaires de ces attentats voulaient, sans doute, profiter du chaos et de l'insécurité régnant dans le pays, du fait de l'effondrement des structures de l'Etat irakien, sans que les

puissances occupantes aient été, jusqu'ici, en mesure de les remplacer, pour faire régner l'ordre et la sécurité qui relèvent de leur responsabilité, malgré la constitution d'un gouvernement provisoire. Sergio Vieira de Mello et ses collaborateurs tués (23 morts), ont été, apparemment, victimes de l'action de l'un des réseaux islamistes infiltrés en Irak, très probablement "*Al-Qaïda*" dont l'objectif est de semer l'anarchie et la terreur, meilleur moyen de montrer l'échec des puissances occupantes, non seulement en Irak, mais aussi en Afghanistan.

Les carnages où ont été tués, quelques jours après (le 29 août) à Nadjaf, 125 victimes dont le chef religieux chiite, l'Ayatollah Saïd Mohamed Bakr Al-Hakim, considéré comme un élément de stabilisation, relève de la même logique. Or, ces attentats très meurtriers qui ne visent qu'indirectement les puissances occupantes, participent beaucoup plus de "*la dissémination du terrorisme*", selon le mot de Laurent Fabius¹. Et il faudrait en conclure que, comme l'affirme M. Joost, le directeur de l'"*International Crisis Group*", "*On est en train de tomber dans une nouvelle spirale qu'on a pu voir dans d'autres situations de conflit, comme le Liban, où l'utilisation des armes remplace la solution politique des problèmes*"². Dans ces conditions, la grande question déterminante qui se pose, en Irak, est de savoir comment les Américains vont arriver à "*reconstruire un Etat*" ("*Nation Building*") et avec quels irakiens, dans un pays en état de décomposition avancée, en dehors de la légitimité que seule la communauté internationale peut donner à leur action³.

I - DROIT APPLICABLE AUX SITUATIONS DE CONFLIT ARME NON INTERNATIONAL

A. DROIT COUTUMIER ET DROIT CONVENTIONNEL

L'on sait le rôle central joué, en ce qui concerne le statut des civils dans un conflit armé, par l'article 3 commun, ainsi que par les dispositions communes des articles 63,62,142,158 des quatre Conventions de Genève du 12 août 1949. Ces dispositions ont été tout d'abord établies par le Préambule de la Convention II de La Haye de 1899 et de 1907 concernant les lois et coutumes de la guerre qui fait référence au droit coutumier, en parlant des "*principes du droit des gens, tels qu'ils résultent des usages établis entre nations civilisées, des lois de l'humanité et des exigences de la conscience publique*".

Il faut rappeler que cette clause du préambule de la Convention a été établie sur la base de la déclaration lue par le professeur Frédéric de Martens, au cours de la Conférence de la paix de 1899, à la suite d'un désaccord "*sur le statut des civils qui prenaient les armes contre une force occupante*". Cette clause, appelée, depuis, "*clause de Martens*" a été reprise dans les dispositions communes aux articles 63, 62, 142, 158 des Conventions de Genève de 1949, en matière de dénonciation des traités, selon lesquelles la dénonciation "*n'aura aucun effet sur les obligations que les Parties au conflit demeureront tenues de remplir en vertu des principes du droit des gens tels qu'ils résultent des usages établis entre Nations civilisées, des lois de l'humanité et des exigences de la conscience publique*".⁴

¹ Le Monde, 28/8/2003, p. 6.

² Le Figaro, 30-31/8/2003, p. 3.

³ Le Monde, 29/8/2003, p. 12.

⁴ Isabel Vale MAJERUS, *Le droit international humanitaire et les dommages collatéraux*, Paris, 2002, pp. 123-124.

Encore faut-il ajouter que les Protocoles additionnels de 1977 ne contiennent plus de telles dispositions relatives à la dénonciation, dès lors que les Hautes Parties contractantes sont directement soumises aux dispositions de l'article 43 de la Convention de Vienne du 20 février 1969 sur le droit des traités, selon lesquelles *"la nullité, l'extinction ou la dénonciation d'un traité, le retrait d'une des parties ou la suspension de l'application du traité, lorsqu'ils résultent de l'application de la présente Convention ou des dispositions du traité, n'affectent en aucune manière le devoir d'un Etat de remplir toute obligation énoncée dans le traité à laquelle il est soumis en vertu du droit international indépendamment dudit traité"*.

Il faut noter, par ailleurs, que, dans son arrêt du 27 juin 1986 dans l'affaire des Activités militaires et paramilitaires au Nicaragua et contre celui-ci, la Cour internationale de justice a reconnu à la coutume un rang équivalent à celui du droit conventionnel en droit humanitaire, en affirmant que *"les règles du droit international coutumier conservent une existence et une applicabilité autonomes par rapport à celles du droit international conventionnel, alors même que les deux catégories de droit ont un contenu identique"*.⁵ Puis, la Cour en conclut, en ce qui concerne la réserve des Etats-Unis quant aux obligations imposées par le droit international humanitaire conventionnel: *"L'article 3 commun aux quatre Conventions de Genève du 12 août 1949 énonce certaines règles devant être appliquées dans les conflits ne présentant pas un caractère international [...] correspondant à des considérations élémentaires d'humanité. La Cour peut donc les tenir pour applicables au présent différend sans avoir à se prononcer sur le rôle de la réserve américaine [...]"*.⁶ En fait, au lieu de se prononcer sur les éléments constitutifs de la coutume, la Cour préféra se placer sur le terrain des principes généraux du droit humanitaire et déclara que: *"le comportement des Etats-Unis peut être apprécié en fonction des principes généraux de base du droit humanitaire dont [...] les Conventions de Genève constituent à certains égards le développement et qu'à d'autres égards elles ne font qu'exprimer"*.⁷

Analysant cette question dans un article publié à la *Revue Internationale de la Croix-Rouge*, en 1991, M. C. Bruderlein⁸ soulève le risque d'affaiblissement pour le DIH conventionnel de cette promotion de la coutume au rang de source du DIH, dès lors que le large pouvoir d'appréciation dont bénéficient les Etats laisse une large place au développement de coutumes abrogatoires. Cependant, il faut admettre avec le professeur Paul Reuter que le droit coutumier offre, tout de même, un double avantage: *"L'insertion dans un traité d'une règle coutumière n'empêche pas cette dernière de continuer comme règle coutumière et de régir notamment les rapports entre les Etats parties à ce traité et les Etats tiers. A l'inverse, en l'absence d'une règle coutumière, une règle conventionnelle qui ne lie en tant que telle que les Etats parties au traité, peut constituer un précédent pour la naissance d'une règle coutumière. En effet, comme toute autre pratique, la pratique conventionnelle peut conduire progressivement à la conclusion qu'une règle est nécessaire et qu'en l'insérant dans l'ensemble des traités conclus, les Etats expriment une conviction croissante qu'ils sont obligés par elle. L'insertion dans le traité de la disposition correspondante acquiert une portée déclarative"*

⁵ C.I.J., Recueil, 1986, p. 96.

⁶ C.I.J., Recueil, 1986, p. 114, § 179.

⁷ C.I.J., Recueil, 1986, p. 113, § 218.

⁸ C.I.J., Recueil, 1986, p. 113, § 218.

autant que constitutive. Dans ce cas, le traité a la portée juridique d'une reconnaissance, c'est à ce titre et non pas à titre d'engagement contractuel qu'il a des effets sur l'apparition de la coutume".⁹

Aujourd'hui, le risque souligné par M. Bruderlein semble moins évident, dans le domaine du DIH, du fait de la marche des Protocoles additionnels I et II vers l'universalité, ainsi que du fait de l'augmentation rapide du nombre des Etats parties au Statut de la Cour pénale internationale (90) qui va mettre fin à l'impunité pour les criminels de guerre.

Au demeurant, dans l'affaire Dusko Tadic relative à l'exception préjudicielle d'incompétence, la Chambre d'appel du Tribunal Pénal International pour l'ex-Yougoslavie a affirmé, dans sa décision du 2 octobre 1995, que *"les règles internationales régissant les conflits internes sont apparues à deux échelons différents: celui du droit coutumier et celui du droit conventionnel. Deux catégories de règles qui ne sont en aucune façon contraires ou incohérentes mais qui, plutôt, se soutiennent et s'étayent mutuellement, se sont ainsi cristallisées. En fait, l'interaction entre ces deux catégories est telle que certaines règles du droit conventionnel se sont progressivement intégrées au droit coutumier"*; c'est le cas de l'article 3 commun aux Conventions de Genève de 1949 et l'essentiel du Protocole additionnel II de 1977. En cherchant à mettre en lumière les facteurs ayant contribué à la formation de règles coutumières dans ce domaine, la Chambre d'appel a fait référence au comportement des Etats belligérants, des gouvernements et des mouvements rebelles, ainsi que l'action du CICR, certaines résolutions adoptées par l'Assemblée générale des Nations Unies, certaines déclarations d'Etats membres de l'Union européenne, enfin le Protocole II et certains manuels militaires.

Cependant, il n'y a pas ici que des situations clairement identifiables. Il y a aussi des zones d'ombre ou zones grises difficilement identifiables.

B. LES ZONES D'OMBRE OU "ZONES GRISES"

Il existe à la jonction des situations de conflit interne et de violences internes, des zones d'ombre ou des zones grises caractérisées par des violations des droits les plus essentiels de la personne humaine et pour lesquelles il y a un flou juridique quant à l'application du DIH et du droit international des droits de l'homme. Ce qui rend nécessaire l'identification de standards fondamentaux d'humanité applicables en tous temps, en toutes circonstances et à tous les acteurs, qu'ils soient étatiques, interétatiques ou non étatiques, ainsi qu'à tout individu. La nécessité de l'application de ces standards fondamentaux d'humanité apparaît dans quatre situations où la protection de l'individu est particulièrement faible:

1^{ère} situation:

- Non-ratification des instruments pertinents de DIH et des droits de l'homme par un Etat qui n'est plus soumis qu'aux obligations découlant du droit coutumier et des normes du *jus cogens*.

2^{ème} situation:

- Proclamation de circonstances exceptionnelles justifiant les dérogations à certaines garanties accordées à la personne humaine par les traités internationaux, notamment les deux pactes de

⁹ *Introduction au droit des traités*, Paris, PUF, 2^{ème} Edit., 1985, p. 94.

1966 relatifs aux droits civils et politiques et aux droits économiques, sociaux et culturels; Sauf en ce qui concerne certains droits intangibles, découlant de normes indérogeables.

3^{ème} situation:

- Troubles intérieurs ou émeutes ou autres actes isolés et sporadiques ne dépassant pas, selon l'appréciation de l'Etat concerné, le seuil d'applicabilité de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II; situation où ne sont protégés encore que les droits intangibles.

4^{ème} situation:

- Situation de violences internes dont la responsabilité incombe à des acteurs non étatiques et souvent non identifiés, qui recourent à la violence ou au terrorisme en temps de paix, sachant qu'ils ne sont pas tenus par les obligations des instruments internationaux relatifs au droit international humanitaire.

II - LES STANDARDS FONDAMENTAUX D'HUMANITE

A. PROCESSUS D'ELABORATION DES STANDARDS

Le concept de "*standards d'humanité*", proposé par la Suisse en 1996, offre l'avantage de se situer au confluent du droit humanitaire et des droits de l'homme dont il recouvre les principes fondamentaux. Il est inspiré de la "*clause de Martens*" figurant dans la Convention de La Haye de 1899, puis dans le Protocole additionnel II (§ 4 du préambule). Il faut préciser qu'il ne s'agit pas de nouvelles règles de droit international, mais simplement d'un corpus de principes fondamentaux reflétant le droit international existant en la matière et appelés "*standards fondamentaux*" pour assurer la protection de la personne humaine dans ses valeurs les plus vitales ¹⁰.

En pratique, une "*Déclaration sur les standards humanitaires minima*" a été élaborée, en décembre 1990 à Turku (Finlande) par un groupe d'experts internationaux. Elle a été révisée en 1994 pour tenir compte de certaines propositions et de développements nouveaux. Composé de 18 articles, ce texte contient des dispositions inspirées:

- du droit international humanitaire: interdiction des attaques contre les non combattants, proportionnalité dans l'usage de la force, interdiction de terroriser la population, libre accès des organisations humanitaires, interdiction de l'usage d'armes et de méthodes de guerre illicites ou non permises par le droit international, etc...

- du droit international des droits de l'homme et du droit international humanitaire: droit à la vie, droit à un procès équitable, respect de la personne, de l'honneur et des convictions de tout individu, liberté de pensée, de conscience et de religion, droit à un traitement humain, interdiction d'actes prohibés par le droit international tels que les meurtres, tortures, viols, punitions collectives, prises d'otages, pillage, disparitions forcées, privation délibérée d'alimentation et de soins de santé, etc...

¹⁰ J. D. VIGNY et C. THOMPSON, "Standards fondamentaux d'humanité: quel avenir?", in *Revue Internationale de la Croix Rouge*, N° 840, Vol. 82, Genève, décembre 2000, p. 921.

Après la déclaration de Turku, s'est poursuivi un processus de maturation de cette notion de "*Standards fondamentaux d'humanité*". Tout d'abord à travers deux autres séminaires d'experts internationaux organisés, successivement, au Cap en septembre 1996 et à Stockholm en février 2000 et dont les résultats ont été présentés à la Commission des droits de l'homme. Celle-ci a décidé de demander au Secrétaire général des Nations Unies de lui préparer, en consultation avec le CICR, un rapport analytique sur les standards fondamentaux d'humanité, dans lequel devraient être identifiées les règles communes du droit international humanitaire et du droit international des droits de l'homme, applicables en toutes circonstances. Dans cet esprit et à la demande de la Commission des droits de l'homme, trois rapports analytiques du Secrétaire général ont été élaborés par le Haut Commissariat pour les droits de l'homme et présentés à la Commission en 1998, en 1999 et en 2000¹¹.

Ce qui est intéressant, c'est que ces rapports ont été établis compte tenu des observations présentées par de nombreux acteurs concernés de la communauté internationale: Etats, organisations internationales, organisations régionales, organes de supervision des traités relatifs à la protection des droits de l'homme, organisation non gouvernementales, etc...

Sur la base de ces rapports, la Commission a pu examiner la question des standards fondamentaux d'humanité à travers tous ses aspects, comme elle a pu clarifier un certain nombre d'éléments qui restent en discussion, avant de retenir un certain nombre de principes issus du droit international humanitaire et du droit international des droits de l'homme.

Il reste à signaler que la question n'est pas seulement une question théorique. Sur le terrain et face à de nombreux conflits armés internes ou à des situations de violence, en Somalie, en Afghanistan, au Liberia, au Burundi, en Sierra Leone, au Soudan, en République démocratique du Congo, en Angola, plusieurs protagonistes internationaux (agences interétatiques, ONG) ont éprouvé la nécessité de conclure avec des autorités étatiques locales ou des acteurs non étatiques ou des autorités de facto, des accords informels appelés codes de bonne conduite ou "*Memorandum of understanding*" ou "*Ground rules*" dont l'objectif est de régler les responsabilités de chacun dans l'action humanitaire tendant à protéger les droits fondamentaux de la population civile, issus du droit coutumier et des instruments universels de protection des droits de l'homme, du droit humanitaire et du droit des réfugiés.

B. SOURCES DES STANDARDS FONDAMENTAUX D'HUMANITE

Dans ce processus en cours, visant à identifier, à travers les règles reconnues du droit international, les standards fondamentaux d'humanité, applicables en toutes circonstances et en particulier dans les situations d'urgence internes où la protection est la plus faible, on peut se référer à plusieurs sources déterminantes qui sont en train d'imprimer des avancées remarquables au progrès du droit international en la matière. Parmi ces sources, il faut citer en particulier:

¹¹ Doc. E/CN.4/1997/77/Add. 1 et Rés. 1997/21, "Règles humanitaires minimales"; Doc. E/CN.4/1998/87 et Add. 1 et Rés. 1998/29, "Règles humanitaires minimales"; Doc. E/CN.4/1999/92 et Rés. 1999/65, "Règles fondamentales d'humanité"; Doc. E/CN.4/2000/94, Doc. E/CN.4/2000/145 et Rés. 2000/69, "Règles fondamentales d'humanité".

1. Le Statut et la jurisprudence des Tribunaux pénaux internationaux pour l'Ex-Yougoslavie et le Rwanda: ont déjà permis d'identifier la plupart des droits protégés par les droits de l'homme et par le droit international humanitaire en toutes circonstances. Ainsi, si l'incrimination d'actes considérés comme des crimes contre l'humanité a été liée à l'existence d'un conflit armé dans le Statut du Tribunal pénal international pour l'Ex-Yougoslavie (article 5), cette condition a disparu dans le Statut du Tribunal pénal international pour le Rwanda (article 3), en raison du contexte historique de ce conflit. En effet, le Statut du T.P.I.R. n'exige plus qu'un lien avec une attaque généralisée et systématique d'une population civile pour punir les crimes contre l'humanité. Encore faut-il ajouter que le TPIY (Chambre d'appel) a corrigé cette restriction, dans sa jurisprudence, en affirmant que *"l'absence de liens entre les crimes contre l'humanité et un conflit armé (international ou interne) est maintenant une règle établie du droit international coutumier"*.¹² Enfin, la dernière étape de cet élargissement a été imprimée par le Statut de la Cour pénale internationale dont l'article 7 n'a exigé, pour punir les crimes contre l'humanité, qu'une condition alternative et non plus cumulative, à travers le lien avec une attaque généralisée ou systématique contre une population civile.

2. Le Statut de la Cour pénale internationale: A ouvert, pour la première fois, une nouvelle piste intéressante, par la reconnaissance au niveau universel de la responsabilité pénale individuelle d'acteurs non étatiques, en criminalisant les actes perpétrés par des individus ou par les membres d'un groupe qui, jusque là, relevaient de la responsabilité d'un Etat ou de ses représentants. Ainsi, le Statut de la CPI constitue, sans aucun doute, une avancée considérable, en criminalisant les actes perpétrés par des acteurs non étatiques, en temps de guerre ou en temps de paix, au cours d'un conflit armé international ou interne, qu'il s'agisse de crimes de génocides ou de crimes contre l'humanité ou encore de crimes de guerre. Il est vrai qu'au cours des travaux de la Conférence de Rome relative au Statut de la CPI, en 1998, certains Etats parmi lesquels l'Inde, l'Indonésie, l'Iran, le Nigéria, le Pakistan s'étaient opposés à ce que les conflits armés non internationaux relèvent du champ de compétence de la Cour pénale internationale, du fait que le droit humanitaire applicable à ces conflits et notamment le protocole additionnel II ne faisait pas encore partie du droit coutumier et ne s'imposait donc pas aux rédacteurs du Statut de la Cour. A quoi plusieurs Etats, ainsi qu'une délégation du CICR ont répliqué que si le Protocole II n'était pas entièrement intégré dans le droit coutumier, une bonne partie de ses dispositions l'était certainement. Enfin de compte, comme le dit William Bourdon, *"le bon sens l'a emporté sur les considérations de politique nationale et les conflits internes ont été intégrés au Statut de la Cour pénale internationale"* ¹³. Au demeurant, la jurisprudence du TPIY, a rappelé à plusieurs reprises, notamment dans l'affaire Tadic, que les Etats avaient clairement souhaité criminaliser les violations graves des règles et principes coutumiers relatifs aux conflits internes.

3. Le Pacte international relatif aux droits civils et politiques: notamment l'article 4 § 2 qui affirme que les droits protégés par les articles 6, 7, 8, 11, 15, 16 et 18 sont des droits indérogeables en toutes

¹² Affaire IT-94-I-T *"Tadic"*, du 2 octobre 1995, condamné à 20 ans de réclusion criminelle pour crimes contre l'humanité et violation des lois et coutumes de la guerre.

¹³ W. BOURDON, *La Cour pénale internationale, Le Statut de Rome, Commentaire article par article*, Paris, Ed. du Seuil, Essais, 2000, pp. 64-65.

circonstances: droit à la vie, interdiction de la torture, de l'esclavage, de l'emprisonnement pour dettes, non rétroactivité des lois, reconnaissance de la personnalité juridique de chacun, droit à la liberté de conscience et de religion, etc... Au surplus, dans son observation générale 24 (52), § 8, le Comité international des droits de l'homme a affirmé que certaines dispositions matérielles du pacte établissent des droits intangibles, dès lors qu'elles ne peuvent pas faire l'objet de réserves.

4. Les normes coutumières du DIH, ainsi que les normes conventionnelles: en particulier l'article 3 commun aux Conventions de Genève et le Protocole additionnel II.

5. Les Principes directeurs relatifs au déplacement de personnes à l'intérieur de leur propre pays: principes regroupant les normes du droit humanitaire, du droit international des droits de l'homme et du droit des réfugiés, applicables à ces personnes en toutes circonstances, y compris les situations de trouble et violence internes.

6. La Déclaration adoptée par l'OIT le 14 octobre 1998 à Istanbul: cette Déclaration est relative aux principes et droits fondamentaux au travail, en particulier les principes les plus essentiels tirés de huit Conventions internationales du travail, à savoir les Conventions 29, 87, 98, 100, 105, 111, 138 et 182, établissant les principes suivants: liberté syndicale, reconnaissance effective du droit à la négociation collective, élimination de la discrimination en matière d'emploi et de profession, élimination de toutes les formes de travail forcé ou obligatoire, abolition effective du travail des enfants, etc...

Grâce aux standards fondamentaux d'humanité, il est possible de refuser de s'enfermer dans le dilemme de l'identification des situations qui ne sont pas claires et du régime juridique qui leur serait applicable: celui des conflits à caractère international ou celui des conflits à caractère interne ou celui des violences et troubles internes ou encore celui du terrorisme local ou international. Et surtout, ces dernières situations ne sont plus des situations de non-droit. Qu'on les considère comme des situations de conflit interne ou non -peu importe leur qualification- ce sont des situations qui relèvent du champ d'application d'un minimum de règles du droit international qui constituent un dénominateur commun au droit international humanitaire, au droit international des réfugiés et au droit international des droits de l'homme. De sorte que l'on peut affirmer qu'il existe une espèce de corpus commun de règles, issues à la fois du droit conventionnel et du droit coutumier, qui régit toutes les situations, en tous temps et qui est applicable à tous les acteurs, quels qu'ils soient, c'est à dire qu'ils aient un caractère étatique ou non étatique. Ce corpus est constitué par des standards minima d'humanité qui sont des principes indérogeables du droit international.

International Armed Conflict: Legal Qualification and IHL as lex specialis

Frits KALSHOVEN

University of Leiden

Introduction

To begin with a trite observation: the Second World War has been an international armed conflict, and so were the wars between Iran and Iraq, 1980-1988, and, even more recently, between Eritrea and Ethiopia. There was never any doubt about the qualification of these conflicts: the Second World War was officially declared, and even if the others were not (as may have been the case) they were recognized by all concerned as armed conflicts between States, all of whom were High Contracting Parties to the core conventions on international humanitarian law (or IHL). Clearly, therefore, these cases are of no interest to us. Instead, we may save our time and energy for those situations which in the eyes of some participants and observers qualify as an international armed conflict, whereas others regard them, perhaps, not even as an armed conflict, or as an internal armed conflict at most.

Rather than discuss our subject of qualification in abstract terms, I intend to focus on some actual cases and on the attitudes of the actors involved: governments and other authorities, as well as international agencies and institutions. Three cases did not (yet) become the object of judicial scrutiny: Chechnya, Kosovo, and Guantanamo Bay. Two others were dealt with by judicial bodies: Nicaragua, and Bosnia-Herzegovina. A last situation is a case apart in every respect: it is the *"war on terror"*.

Chechnya

Chechnya is one of the many territories that in the course of history were brought under Russian dominance. Like several other of those territories, it also is the theatre of prolonged and cruel armed conflict, with serious violations of applicable rules of IHL being alleged on both sides but without the international community doing much about it. Was there anything Chechnya could do itself? One theoretical option was for the authorities to recognise the situation as an internal conflict of the Protocol II type, claim that it was sufficiently virulent to pose a threat to international peace and security, and, on that basis, formally ask for Security Council intervention. Given the Russian veto power, this was indeed a purely theoretical possibility, and it does not seem likely that the Chechen authorities would have spent much time and energy on it.

Another option was for the authorities to claim that the Chechen people were fighting a war of self-determination. On that basis they might have attempted to get the war recognised as an international armed conflict in the terms of Article 1(4) of Protocol I.¹⁴ As set forth in Article 96(3) of the Protocol, this would have required a unilateral declaration of the *"authority representing the Chechen people"* by which the

¹⁴ Article 1(4) refers to *"armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."*

authority undertook to apply the Conventions and the Protocol. The declaration would have to be addressed to the Swiss Government as depositary of the Geneva Conventions and the Protocol, and it would then have the effects spelled out in Article 96.¹⁵

All of this may be true, and of course, Russia is a party to the Conventions and Protocol I. Yet, the precise language of Article 1(4) makes it very doubtful, to say the least, that a Chechen claim might have succeeded. The war is not against a racist regime, nor does it present a clear-cut case of colonial domination or alien occupation. Given the drafting history of Article 1(4) and the specific reference to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,¹⁶ even a team of particularly brilliant lawyers might have had a hard time concocting a *prima facie* convincing brief. Had they tried and succeeded, that would have represented the first actual application of Article 1(4). In this respect, while it may be too early to declare the provisions in Protocol I on wars of self-determination a dead letter, these provisions are not "*alive and kicking*" either, let alone that they might have entered into the realm of customary law.

Chechnya actually did not try either of these options. Rather, the "*Chechen Republic of Ichkeria*" declared itself an independent, sovereign State and, hence, a party to an international armed conflict, with Russia as its opponent. In 2000, the president of this Republic sent a letter to his colleague in Switzerland, explaining that the republic was a successor to the former Soviet Union and, as such, a High Contracting Party to the four Geneva Conventions and Protocol I. The Republic also claimed successor status with respect to the declaration under Article 90 of Protocol I by which the Soviet Union in 1989 had accepted the competence of the International Humanitarian Fact-Finding Commission, and it invoked this declaration against Russia, itself doubtless a successor to the Soviet Union.¹⁷ On these grounds, the president asked the Swiss president to order the Fact-Finding Commission to instantly start an inquiry into the serious violations of the Conventions and Protocol I allegedly committed and being committed by the Russian armed forces.

The Fact-Finding Commission is an independent body. Yet, the Swiss federal department acts as its secretariat.¹⁸ Given this symbiosis, the letter of the president of the "*Chechen Republic of Ichkeria*" was deemed to 'have reached' the Commission -under its rules, a prerequisite for any activity of the Commission. This confronted the Commission with the need to determine whether the "*Chechen Republic of Ichkeria*" actually existed as an independent State. In view of that Republic's almost total lack of international recognition, the Commission concluded that the Republic did not so qualify. It therefore could not be

¹⁵ The effects would be the following: (a) the 1949 Conventions and the Protocol would be brought into force for the authority as a Party to the conflict, with immediate effect; (b) the authority would assume the same rights and obligations as those assumed by the adverse party; and (c) the Conventions and the Protocol would be equally binding on both Parties to the conflict.

¹⁶ The Declaration is contained in the Annex to UNGA Res. 2625 (XXV) of 24 October 1970. One of the principles it proclaims is the principle of equal rights and self-determination of people. This contains a paragraph cautioning that "[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States [...] possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

¹⁷ The Soviet Union made the declaration under Article 90 simultaneously with its ratification of Protocol I. In 1991, Russia succeeded to the Soviet Union, continuing its recognition of the competence of the Fact-Finding Commission.

¹⁸ Information about the Commission is available on its website: <http://www.ihffc.org>.

regarded as an independent Party to the Geneva Conventions and Protocol I, nor could it avail itself of the Russian declaration under Article 90. In my capacity as president of the Commission, it was my task to convey this negative message to their representative for international legal affairs (who happened to be our colleague Professor Francis Boyle, in Illinois, United States of America). Our letter added that if so requested, the Commission would be willing to try and find out whether Russia accepted to have certain allegations of serious violations of IHL investigated by the Commission, but then on the assumption that they might have occurred in a situation of internal, rather than international, armed conflict. This obviously being the opposite of what Chechnya had hoped to achieve, Professor Boyle's reply confined itself to an expression of thanks for our reaction, adding a long catalogue of alleged violations. The only thing the Commission could do, was place the correspondence in the archive.

Kosovo

An affair of a totally different order was the so-called Operation Allied Force: the series of attacks from the air on targets in the territory of Yugoslavia, carried out by 10 NATO member States from 24 March 1999 to 9 June 1999 – unfortunately, coincident with the worldwide celebration of the Centennial of the Hague Peace Conference of 1899. What kind of operation was it, and what law was applicable? Much has been written about these questions. Just to sum up: it was a NATO operation, not entirely disengaged from the Security Council but not officially condoned by it either, and the operation was launched when president Milosevic had rejected a series of peremptory demands relating to the treatment of the Kosovar population.

Neither NATO nor any of its member States regarded themselves as being 'at war' with Yugoslavia in the classical sense: they envisioned the operation as an intervention to protect a population threatened in its fundamental human rights, nay, its very existence: an act of humanitarian intervention, in other words. Not agreeing with that assessment, Yugoslavia on 24 March 1999 declared a state of war. And on 29 April 1999, with the aerial bombing actions going on unabated, it applied to the International Court of Justice, requesting the Court to condemn the participating NATO members for their violation of its territorial sovereignty as well as for a long catalogue of violations of international humanitarian law (or IHL). It also requested the Court to indicate preliminary measures; a request the Court rejected by its Order of 2 June 1999, for want of *prima facie* jurisdiction.¹⁹ The Court remained seized of the case, however, and this situation persists to this day, with Yugoslavia now dragging its feet in the procedure.

The Court's order rejecting the request for preliminary measures emphasises the obligation of "*all parties appearing before it [to] act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law*"²⁰. This is an interesting point. IHL is a body of law applicable in situations of armed conflict. Obviously, by including IHL in this paragraph the Court indicated that in its perception, Operation Allied Force brought about a situation of international armed conflict, no matter what names parties wished to attach to it. Nor could there have been any doubt about this

¹⁹ Order, para.s 30, 41.

²⁰ *Ibid.*, para. 19; (author emphasis).

qualification of the situation from the moment Yugoslavia had declared war, on 24 March 1999: Common Article 2 of the Geneva Conventions specifies that the Conventions apply “*to all cases of declared war [...] even if the state of war is not recognised by one of [the parties].*”

This being the case, our question is: what rules of IHL were applicable? Here, one should distinguish between the participating member States. For the overwhelming majority, Protocol I was the primary source of their obligations. For the United States, which is not a party to that Protocol, it was customary law. Fortunately, this has largely been codified in Protocol I; but unfortunately, not everybody agrees on the customary character of the same rules. The attack of 23 April 1999 on the TV and communications centre in Belgrade is a case in point. Both the choice of this object as a target of attack and the number of civilian casualties it entailed have been a bone of contention ever since.

In effect, this and other questionable incidents were brought up in several other international forums as well. As mentioned, the actions were coincidental with the Centennial of the Hague Peace Conference, and this was officially celebrated on 18 and 19 May 1999 in The Hague, at the Peace Palace, and from 22 to 25 June 1999 in St. Petersburg. Especially on the latter occasion, a large number of Russian and other likeminded speakers denounced Operation Allied Force both as an act of aggression in violation of the United Nations Charter, as well as for its many alleged violations of IHL.²¹

Again in The Hague, at a stone’s throw from the Peace Palace, the International Criminal Tribunal for the former Yugoslavia has its seat in a building that is known to the local populace as the Aegon building (after the insurance company that was its previous occupant). The tribunal has had jurisdiction over serious violations of IHL that occurred in the territory of the former Yugoslavia since 1 January 1991, a period that includes 1999. In effect, on 24 May 1999, with Operation Allied Force still in progress, the Prosecutor of the ICTY issued a first indictment against Milosevic, for crimes against humanity and violations of the laws or customs of war that were asserted to be happening under his responsibility in the autonomous province of Kosovo.

The Prosecutor was equally keenly interested in NATO’s activities: from the outset, she and her staff paid close attention to the events of the bombing campaign. This, of course, not with a view to the possible responsibility of NATO or any of the participating member States for any violations of IHL that might occur: the tribunal has no jurisdiction over matters of state responsibility.²² In the end, the Office of the Prosecutor had collected enough information to warrant a serious internal discussion about possible further steps in relation to certain incidents, including the intentional attack on the TV station. Obviously, this issue was fraught with political danger. The attack had been carried out by American planes, and any attempt to start a procedure that might involve American personnel could be expected to meet with strong opposition, if not disbelief and outright rejection, in that country.

²¹ On the Centennial, see F. KALSHOVEN (ed.), *The Centennial of the First International Peace Conference: Reports & Conclusions* (2000).

²² Responsibility of a State “*for all acts committed by persons forming part of its armed forces*” is already expressed in Article 3 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land (Convention IV). The provision is repeated in Article 91 of Protocol I.

To sort matters out, the Prosecutor in May 2000 established from among her staff a committee to review the NATO bombing campaign, and this committee on 8 June 2000 published its final report. “*On the basis of information available*” it recommended “*that no investigation be commenced by the [Office of the Prosecutor] in relation to the NATO bombing campaign or incidents occurring during the campaign.*”²³ Crucial to arrive at this recommendation had been the conclusion that the level of criminal intent required for a serious violation of IHL was not *prima facie* apparent in any of the incidents, including the attack on the TV station. Accepting this recommendation, the Prosecutor decided that no investigations would be opened in the matter of Operation Allied Force.

The attack on the TV station once again became the subject of legal scrutiny when on 29 October 1999, victims and relatives of deceased victims of the attack lodged a complaint with the European Court of Human Rights, at Strasbourg. The complaint was addressed against all European NATO countries, and, obviously, it was not about violations of IHL but of human rights. In view of its importance, the *Bankovic* case (named after the first applicant) was decided by the Grand Chamber of the Court.²⁴ The case hinged on jurisdiction. The damage might have been done by NATO and, with that, plausibly under the responsibility of its member States, but it was the result of bombs dropped on the territory of Yugoslavia, not itself a party to the European Convention on Human Rights. While in an earlier case (*Loizidou*), the European Court had held a State responsible for events outside its territory because that State was deemed to have had “*effective control*” of the locality where the events had occurred,²⁵ this time it argued that the Convention “*was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.*” Since Yugoslavia clearly fell outside “*the legal space (espace juridique)*” of these States, the Court found that it was not persuaded that there was any jurisdictional link between the persons who were victims of the act complained of and the respondent States. Accordingly, it is not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question.²⁶

By its decision of 12 December 2001, the Court unanimously declared the application inadmissible.

The decision in *Bankovic* does not determine whether the fact that IHL was applicable to the attack on the TV station precluded application of human rights law. The most one can say is that, fortunately, the European Court does not rest its decision on incompatibility of the two regimes. In effect, this point was at issue in the next affair on my list.

Guantanamo Bay

In 2001, in instant response to the terrorist attacks of the 11th of September, the United States and its allies launched a massive attack on the forces of the Taliban government and Al Qaeda in Afghanistan.

²³ Final Report to the Prosecutor by the committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia, June 8, 2000, 39 ILM 1257 (2000), para. 91. See also W.J. FENRICK, “The Law Applicable to Targeting and Proportionality After Operation Allied Force: A View from the Outside”, in *Yearbook of International Humanitarian Law*, N° 3, 2000, pp. 53-80.

²⁴ *Bankovic, et al., v. Belgium et al.*, Application no. 52207/99, decided on 12 December 2001.

²⁵ *Loizidou v. Turkey*, Judgment of 23 March 1995 (preliminary objections), Series A no. 310.

Thousands of Taliban and Al Qaeda combatants surrendered or were captured. The captives deemed most dangerous were transferred to the United States Naval Base at Guantanamo Bay, Cuba.

This time, the qualification of the situation as an international armed conflict might seem obvious. No-one outside the United States doubted for a moment that an invasion of the type and scale as carried out by the U.S.-led coalition amounted to an international armed conflict. Yet, the U.S. authorities were initially inclined to reject this classification. I recall a TV news item where we saw President Bush making a statement to this effect, only to be followed instantly by a spokesperson for the ICRC who, standing in front of headquarters in Geneva, solemnly proclaimed that the conflict was international, the Geneva Conventions applicable, and all combatants entitled to prisoner-of-war status.

Soon, however, the U.S. authorities too acknowledged that the situation amounted to an international armed conflict and that IHL, including the Geneva Conventions, was applicable. Yet, this made no difference for the detainees at Guantanamo Bay: on the argument that they were unlawful combatants, they were deemed to fall outside the scope of application of the Prisoners of War Convention.

In American jurisprudence, "*unlawful combatant*" is a magic term: combatants so qualified are beyond the pale and, although the ICRC may be admitted to visit them, they should not expect any protection from the U.S. courts. In respect of the detainees at Guantanamo Bay, this matter was settled when a federal appeals court on 11 March 2003 opined that all U.S. courts lacked *habeas corpus* jurisdiction in regard of these people: while they might be in the power of the United States, they happened to be outside U.S. sovereign territory and within the sovereign territory of Cuba.²⁷

That might be the position according to American jurisprudence, but the Inter-American Commission on Human Rights thought otherwise.²⁸ On 12 March 2002, it wrote the U.S. Government that after careful deliberation it had decided during its 114th regular period of sessions to adopt precautionary measures, according to which we ask Your Excellency's Government to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.

Needless to say, the response of the Government was negative. By its letter dated 12 April 2002, it rejected the request of the Commission. One argument, of particular interest for us here, is that the Commission lacked "the requisite jurisdictional competence to apply international humanitarian law, including the 1949 Geneva Convention on prisoners of war (Geneva Convention), as well as customary international humanitarian law".

For this argument, the Government sought reliance in the fact that the Inter-American Court of Human Rights in a case brought by Colombia had accepted that State's preliminary objection against the fact that the Commission in a contentious case involving an individual complaint had not merely referred to certain rules of IHL as means to interpret provisions of the American Convention, but had directly applied those rules against Colombia.²⁹ Clearly, however, the scope of the Court's judgment in that case is limited to

²⁶ *Bankovic*, para. 82.

²⁷ *Al Odah et al. v. Bush et al.*, Court of Appeals for the District of Columbia Circuit.

²⁸ Information about the Commission's attempts and the U.S. Government's response is on file with the author.

²⁹ *Las Palmeras*, Preliminary Objections, 4 February 2000, Series C, No. 66.

the competence of the Commission in contentious cases (which may end up at the Court) and does not affect the broad powers of the Commission. It was these broad powers that were at issue in the Guantanamo Bay case. So, the U.S. argument was flawed from the outset. However, in the Government's line of thinking, the next step was the argument that the Commission by its decision had actually applied IHL. As it wrote, the case was not about human rights:

Rather this case is about the detention of captured enemy combatants who took part in hostilities during an armed conflict – an armed conflict that continues at this time. It involves solely the interpretation and application of specific articles of the Geneva Convention and related customary international humanitarian law, neither of which lies within the scope of the Commission's competence. In order to request provisional measures in this case, the Commission necessarily has had to interpret and apply humanitarian law, specifically Article 5 and other provisions of the Geneva Convention – a body of law separate and distinct from the American Declaration and the body of human rights law.

Two comments. First, it is incorrect to read into the Commission's request a direct application of IHL. Another and more important point is that while for the Commission, interpretation of applicable human rights law (such as the prohibition on arbitrary detention) in situations of armed conflict requires looking for guidance to the adjacent and partially overlapping body of IHL, the U.S. Government regards IHL as *lex specialis* rigorously separated from human rights law. To revert to the Government's argument: ***“this case is about the detention of captured enemy combatants [...]. It involves solely the interpretation and application of [...] international humanitarian law.”*** (my emphasis)

To me, the Government's line of argument is antiquated. Half a century ago, Jean Pictet, famous top lawyer of the ICRC, defended the separate existence of the two bodies of law for fear of contamination of IHL with the pernicious political influences at work in the sphere of human rights law. But even at the time, some of his colleagues, with Claude Pilloud in the forefront, co-operated actively with Sean McBride, the then Secretary-General of the International Commission of Jurists – geographically not that far from the Committee's headquarters in Geneva. A simple comparison of the Universal Declaration of Human Rights, of 1948, with Article 3 common to the Geneva Conventions, of 1949, will suffice to prove the point. And since those early days, the awareness has grown that in the substantive field, there is much that binds the two bodies of law together. It has become obvious as well that in matters of compliance, human rights organs can contribute a great deal to the enforcement of international humanitarian law. In effect, the IACHR is an early and outstanding example of this modern co-operation. To the U.S. Government, on the other hand, to pass from humanitarian law to human rights law appears to present an insurmountable hurdle. It is a cause of serious regret that a leading country like the United States takes such a retrograde position in a matter of such vital importance for the implementation and enforcement of international humanitarian law.

Nicaragua, Tadic, Blaskic

Next on my list are some cases where international judicial bodies had to determine whether a *prima facie* internal armed conflict could be regarded as international as a consequence of the involvement of another State.

The International Court of Justice in *Nicaragua* asked itself “*whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.*” Having examined the available evidence, it answered the question in the negative. It added that to hold the United States legally responsible for the *contras*’ violations of IHL “it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”³⁰

Wrong, opined the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadic* case: the proper standard is not effective but overall control. It presents this as a less exacting standard than the ‘effective control’ standard of the ICJ: it does not require “*the issuing of specific orders by the State, or its direction of each individual operation*”, and it is content when that State “*has a role in organising, co-ordinating or planning the military actions*” of a given armed group.³¹

The ICJ in *Nicaragua* did not discuss the involvement of the United States with an eye to the possible internationalisation of the *prima facie* internal armed conflict; and apart from that, the outcome of its deliberations was negative. For the Appeals Chamber in *Tadic*, on the other hand, the point at issue was precisely whether for its purposes, it could regard the *prima facie* internal armed conflict between Bosnian Muslims and Bosnian Serbs as an international armed conflict on account of the level of involvement, or control, of Belgrade; and this question the Chamber answered in the affirmative.

The ICTY Appeals Chamber has since applied the same standard in its judgment of 20 February 2001 in the *Celebici* case.³² Although the setting was the reverse from *Tadic*, with Bosnian Muslims and Croats on trial for the maltreatment of Bosnian Serb prisoners, the involvement of Belgrade in the conflict once again led to the same conclusion that the conflict could be regarded as international. And a Trial Chamber has applied the same standard in *Blaskic*, where on the face of it, the armed conflict was between Bosnian Croats and Muslims but Zagreb’s overall control was deemed to have turned it into an international armed conflict. I particularly like the way that Trial Chamber, in its judgment of 3 March 2000, addresses the matter of who calls the shots here: “[...] *the Parties to the conflict may not agree between themselves to change the nature of the conflict, which is established by the facts whose interpretation, where applicable, falls to the Judge. [But] it is this Trial Chamber which is responsible for evaluating the facts before it and determining the true nature of the conflict*”.³³

³⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, para.s 109, 115.

³¹ Judgment of 15 July 1999, para.s 131, 137.

³² Judgment, para. 50.

³³ Judgment, para. 82.

So far so good. Yet, several questions remain. First, does this ICTY jurisprudence add a new category to the situations recognised in Common Article 2 as constituting "*international armed conflict*"? Second: has the overall control standard achieved the status as customary law? Third, and most importantly, what is the true nature and scope of this jurisprudence?

My answer to the first question is negative: the ICTY jurisprudence has not created a new category of international armed conflicts. Logically, recognition of a given level of third-party intervention as grounds for turning a *prima facie* internal armed conflict into an international one, implies regarding that third party as an effective Party to the conflict. In other words, what the ICTY is doing is defining, for the purposes of its procedure, a level of involvement that makes a State qualify as a Party to an armed conflict even though this is being waged outside its territory. This matter of "*internationalised internal armed conflict*" had remained unresolved in Protocol I, due to the unwillingness of the negotiating Parties of the 1970s to address the issue. Although aware of the problem, the overwhelming majority of the delegates were more interested to discuss the matter of wars of national liberation.

Then, has overall control become a standard of customary law? We have the arguments of just one international tribunal, in relation to part of just one theatre of armed conflict, and all of this in the face of the earlier dictum of the ICJ, which has not yet had an opportunity to respond in kind: it certainly is not bound by ICTY precedent, as the ICTY was not bound by the ICJ dictum. Perhaps in future, for example in a case before the International Criminal Court, the issue may arise again. The ICC may then examine the facts of the case, conclude whether for purposes of application of one or other article of its Statute it wants to regard the intervening State as a Party to the conflict, and define an appropriate standard accordingly.

This leads me to the third question: what is the scope of the ICTY jurisprudence? Let's have a look at what exactly the Chambers were doing. On trial were Bosnians, for acts done in Bosnia-Herzegovina and against Bosnians. No nationals of Yugoslavia or Croatia were on trial, nor, obviously, any State Party to the conflict. Nonetheless, it was the Trial Chamber's assertion that while the States Parties to the conflict might be quibbling about their status, it was for this Chamber to evaluate the facts and "*determin[e] the true nature of the conflict*".

In my assertion, the ICTY Chambers have done no more (and no less) than express a well-reasoned opinion on the effects of one State's behaviour on the criminal liability of non-nationals on trial for acts done outside that State's territory. The effect of their dicta is limited to the confines of the criminal procedures. Within those confines, they may have determined the nature of the armed conflict they were examining as international (and thus were able to apply provisions that require a situation of international armed conflict), but this is a far cry from asserting that the ICTY could establish, with outside effect, that Yugoslavia and Croatia have actually been Parties to the armed conflicts in Bosnia-Herzegovina.

In this respect, it will be interesting to see if any other jurisdictions will rely on the ICTY jurisprudence, *e.g.*, if someone started a civil action for damages against Milosevic or Mladic. I do not see this happening any time soon in my country, the Netherlands. The New York court, applying the Alien Tort Act, might be a more plausible forum. Or what about the case of Bosnia claiming damages from Yugoslavia

for genocide: do we believe that if ever it comes to a judgment, the ICJ will simply accept that the ICTY has determined the true nature of the conflict?³⁴

Then, outside the Yugoslav context: do we expect that henceforth, our political leaders, or the Security Council, will fine-tune their policies in relation to situations of *prima facie* internal armed conflict in light of their assessment whether a third party exerts overall, or merely effective, control over events in the country that is the theatre of the conflict? Just a few questions: in my estimate, the answer in each case will be negative.

War on terror

A situation that raises far more questions is the "*war on terror*", declared by President Bush a day or so after 9-11. That there is a war on is beyond doubt; it actually appears to grow in intensity by the day. It displays many of the features of traditional war, *e.g.* psychological warfare, dissimulation, disinformation (or lying), measures like the seizure of enemy capital, etc.; even, violent action, but this only sporadically and unpredictably. But completely lacking are, on one side, an identifiable State Party, and territorial definition of the conflict. The war on terror therefore appears to be not just an aggravation but a sort of institutionalised version of the Lockerbie-type terrorist activities of earlier decades.

If it is correct to regard the war on terror as an institutionalised version of human action and reaction, our automatic reaction is that some legal regime should be applicable to it. Maybe so: I need not solve this riddle. The one point I feel confident to make is that IHL, whether in its treaty or customary manifestation, is unsuited to cover other than isolated incidents of the "*war on terror*". Thus, when in the course of their pursuit of the perceived enemy, the United States and its allies undertook massive military action against the regime in Iraq, resulting in the occupation of that country, that episode was governed by IHL, notably by the rules applicable to international armed conflict. The invading parties, which since have turned into reluctant occupying powers, were and are bound to respect the Geneva Conventions of 1949 and the rules of customary IHL applicable in international armed conflict. They may largely have done that, with the blatant exception of the apparent total lack of preparation for the phase after what was styled the liberation of the Iraqi people. The disastrous effects of this utter disregard of the obligations of an occupying power are now visible every day.

The many other overt or covert actions undertaken in the name of the "*war on terror*" do not fit very well under the heading of IHL, and they may more properly be dealt with under headings such as (international or domestic) criminal law, and human rights law. I leave it at that.

Conclusion

A few words in conclusion. Apart from the "*war on terror*", I do not seem to have uncovered anything new or customary. Yet, there is one development in the sphere of IHL that is unmistakably new, and it points in a direction diametrically opposed to the one we are considering here. It is the tendency to

³⁴ These last few years, the case has not been making any noticeable progress.

look at the body of IHL as one whole that is applicable in any situation of armed conflict. This may be an application *mutatis mutandis*, but basically, it implies the abandonment of the various distinct types of armed conflict the international legislators had so cleverly devised. A glimpse of this tendency could already be noted in *Nicaragua*, where the ICJ held the principles set forth in Common Article 3 of the 1949 Conventions applicable as customary law in any armed conflict. In a similar vein, the ICTY on several occasions has applied certain sets of rules without determining first whether the particular situation qualified as internal or international armed conflict.

In international lawmaking as well, this is the new trend. It is especially noticeable in the area of weapons. Already in 1972, article 1 of the Bacteriological Weapons Convention provides that states parties shall never have “*weapons, equipment or means of delivery designed to use [microbial or other] agents or toxins for hostile purposes or in armed conflict*”. Under the Chemical Weapons Convention of 1993, not only possession, production etc. are prohibited, but specifically also the *use* of such weapons (Article 1(1b), thus reaffirming the obligation embodied already in the 1925 Geneva Gas Protocol). Again, Article 1 of the Ottawa Convention of 1999 provides that no state party shall ever, under any circumstances, “*use anti-personnel mines*”. And, last but not least, a review conference has decided that article 1 of the Conventional Weapons Convention will be amended, to the effect that the Convention and its Protocols shall be applicable in all situations of armed conflict.³⁵

No trend without counter-trend: there is of course the abominable ICC Statute, with its Article 8 on war crimes rubbing in that the distinction between international armed conflicts, Protocol II armed conflicts and Common Article 3 armed conflicts is very much alive. Oh well, we will live with that, and hope that the ICC in the course of time finds a way to circumvent this rigid posture.

³⁵ By virtue of the twentieth, Norwegian ratification of the amended text, this will enter into force in May 2004.

Extra-Territorial Self-Help: Between Pragmatism and Legal Doctrine

Yuval SHANY

Concord Research Center, Law School, College of Management, Academic Studies Division, Israel

I was asked by the organizers of the conference to cover the subject of extra-territorial self-help or law-enforcement by States under *jus ad bellum*, *jus in bello* and other relevant legal regimes. I am afraid that I will be able to accommodate this request only to some extent, as essentially every use of force undertaken without Security Council authorization has self-help characteristics: the unilateral remedying of a perceived wrong. So the first task we face is to try and define what do we mean when we discuss extra-territorial self-help or law-enforcement operations? The literature and the case law on this topic is far from clear and obviously more analytical work needs to be done. I will try to offer some initial thoughts on the topic and to develop certain paradigms of potential self-help operations.

A. Modalities of extra-territorial self help operations

i) *Extra-territorial self-help military operations against non-State actors* - I believe that the most volatile contemporary self-help situation involves cross-border military operations directed against non-State actors. The relevance of this scenario increases as more and more armed conflicts involve nowadays non-State actors, operating from the territory of one or more States. Under the classic scenario, which dominates this paradigm, State A encounters armed resistance from militias operating from within the territory of State B and conducts operations in the territory of the latter which are directed against the non-State entity. The Israeli 1982 invasion of Lebanon, directed against the PLO presence in that country, serves as a good example for such self-help operation. So are perhaps the 1998 US attacks on alleged Al Qaeda facilities in Afghanistan and Sudan and Israel's operations against militant groups in areas controlled by the Palestinian Authority (PA)(that is assuming that the latter enjoys a right to territorial integrity analogous to that of a sovereign State).

It should be emphasized, however, that one of the qualifications of self-help under this modality is that one cannot attribute the conduct of the militias to the host government under the existing conditions for State responsibility.³⁶ This is because such attribution would transform the situation into an ordinary inter-State use of force case, and would enable the defending State to act in self-defense against all military targets within the host State (either belonging to the host government or the non-State actor affiliated with it). Consequently, it is questionable whether the US operation in Afghanistan in 2001 against Al Qaeda and the Taliban government falls under this self-help paradigm, and not under the scope of ordinary self-defense. This is because the acts of the first group could be arguably attributable to the latter government.³⁷

³⁶ Articles 8, 11 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (New York, 2001) 43 reprinted in International Law Commission, Report of the Work of its Fifty-third session, U.N. GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001). Cf. *Prosecutor v. Tadic*, judgment of 15 July 1999 (ICTY Appeals Chamber) <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.htm>.

³⁷ See e.g. S.D. MURPHY, "Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter", *Harvard International Law Journal*, N°43, 2002, pp. 50-51.

ii) *Extra-territorial military self-help operations against State actors* - A second scenario, also raising self-help issues, is one in which State A's military actions are directed against State B in an attempt to correct a perceived violation of law attributable to the latter State, other than a typical act of aggression giving rise to self-defense under article 51 of the UN Charter. Drawing again from Israel's experience of hostile confrontations, this might encompass the 1966 bombing of installations in Syria designed to divert the upstream sources of the Jordan River, which Israel considered to violate international law principles on sharing transboundary water resources. The British-French Suez military operation in 1956 in response to the nationalization of the Canal by Egyptian President Nasser (an operation which Israel joined, citing the first type self-help justifications – the need to curb Fadyeen militia raids from Egyptian Territory) could also be cited as an example for this kind of self-help action. Finally, military rescue operations designed to save foreign nationals from abuse by agents of the State in whose territory they are present (or by private elements whose acts are attributable to the host government) might also be considered as extra-territorial law-enforcement operations falling under this paradigm. The botched American attempt to release the Teheran hostages in 1980 and the more successful Israeli 1976 Entebbe operation are perhaps good examples of such military operations.

This second self-help scenario raises difficult issues concerning the outer limits of self-defense, the lawfulness of armed reprisals and the relations between the doctrine of necessity and the use of force. I believe that these issues largely exceed the mandate of this paper. I will only comment that I generally regard such self-help operations as unlawful under UN Charter law, as they involve a military response to a provocation which does not arise to the level of an armed attack, without Security Council authorization. Consequently, I believe that such acts are generally prohibited under existing international law.³⁸ Still, notwithstanding the question of legality of such self-help operations, *jus in bello* rules governing inter-State conflicts would generally apply.

iii) *Extra-territorial law-enforcement operations* - A third and last scenario which raises its own particular legal complexities, is one in which State A engages not in a military operation, but rather in what is essentially a small scale law-enforcement operation (*e.g.* police operation), usually against non-State actors, in the territory of State B, without the latter's consent. Here too the purpose of the operation is to correct, by way of unilateral, though limited use of force, a perceived breach of international law. The kidnapping of Eichmann by Israeli Mossad agents in Argentina in 1960 is perhaps the paradigmatic case, although there are other examples (such as the kidnapping of Alvarez-Machain by DEA agents in Mexico or the targeting in Europe of senior Palestinian terrorists by the Israeli Mossad in the 1970s). The main question one ought to discuss with relation to this particular scenario is whether it falls at all under the laws of armed conflict. I will argue that it does not. However, the picture grows more complex when one attempts to categorize operations situated somewhere along the continuum between non-military law-enforcement and military action. While small scale military operations designed to evacuate foreign nationals (such as the

³⁸ On the exclusive nature of the exceptions to the prohibition against the use of force found in the UN Charter, see generally, Y. DINSTEIN, *War, Aggression and Self-Defense*, Cambridge, 2nd ed., 2001, pp. 80-91.

evacuation of French citizens from Ivory Coast in 2002 by French troops) could probably still be viewed as operations in which military forces are utilized for a law and order type self-help mission, falling under the present paradigm, the 1989 US invasion of Panama in order to facilitate the arrest of General Noriega in Panama was in fact a full scale military operation, which involved active combat resulting in the death of more than 500 persons . Hence, it should fall under one of the two first scenarios described here.

I will devote most of my subsequent comments to the first type of cases, as this modality seems to be most intimately related to the theme of the present conference. Further, military conflicts involving non-State actors present an increasingly serious challenge to international peace and security and to the ability of international law to effectively regulate crisis situations and to prevent human rights abuses. On a more theoretical level, the study of such conflicts highlights the inadequacy of some international norms primarily designed to address inter-State relations to a world in which non-State actors wield more and more power and influence.

As we shall see, extra-territorial self-help military operations directed against non-State actors raise unique *jus ad bellum* issues. Specifically, the involvement of more than one State and, at least, one non-State actor, raises difficult policy questions concerning the proper balance that ought to be struck between the right of self-defense and the principle of State sovereignty. The clash between the two principles is particularly powerful in such situations, as the initial aggression perpetrated against State A by the non-State actor cannot be directly attributed to State B – a fact which removes a potential justification for compromising the latter’s territorial integrity. In addition, doctrinal problems also arise under *jus in bello* and other relevant legal regimes, *e.g.* whether one should view extra-territorial law enforcement operations as international or non-international armed conflicts, a distinction which still carries significant practical implications.

B. The "jus ad bellum" governing self-help military operations against non-State actors

In *War, Aggression and Self Defense*, Dinstein correctly points to the potential unlawfulness of State B’s conduct in paradigm (1) situations.³⁹ Toleration of armed forces using one’s territory as a base for operations against other States is generally a violation of the State’s due diligence obligation to protect, within its territory, the rights of other States. This obligation was elaborated upon by the ICJ in the *Corfu Channel* case, with regard to the mining of territorial waters constituting an international waterway,⁴⁰ and restated in the *Diplomatic Staff in Tehran* case, which upheld a State’s obligation to actively protect foreign diplomatic personnel and facilities within its territory.⁴¹

The same notion also finds support in General Assembly Resolution 3314 (XXIX) on the Definition of Aggression.⁴² That Resolution provides in Article 3(f) that an act of aggression includes: “*The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State*”. While the Resolution does not specifically

³⁹ DINSTEIN, *supra* note 3, at pp. 214-215.

⁴⁰ “Corfu Channel” case (*U.K. v. Albania*), 1949, I.C.J. Report 4, p. 22.

⁴¹ “Diplomatic Staff in Tehran” case (*U.S. v. Iran*), 1980, ICJ Report 3, pp. 32-33.

⁴² GA Res. 3314 (XXIX) on the Definition of Aggression, UN GAOR 29th Sess., Supp. No. 31 (1974).

allude to toleration of attacks perpetrated by non-State actors, there is no strong policy rationale that would justify absolving the host State from its legal obligations if it allows its territory to be used for an act of aggression undertaken by such actors. In fact one could argue that the uncertain international legal personality of non-State militias would further support assigning international responsibility to the host State, which is arguably the international actor with the strongest connections to the militias.

A more difficult situation arises when State B steadfastly objects to the operations of the non-State actor from within its territory - there might even be a state of conflict between the two entities - however, State B is powerless to bring the non-State actor's operations to a halt. To a large degree this is what happened in Lebanon during much of the 1970s when militias aligned with the Lebanese government were fighting against the PLO and the government was unable to stop PLO attacks against Israel. Since the concept of due diligence entails a relative and not an absolute obligation, one could argue that State B has breached no obligation toward State A in circumstances in which it is genuinely unable to assert its authority over its entire territory. Still, in response, it could be maintained that refusal by State B to sanction military operations by State A (or an alternative international force) against armed groups operating from within its territory is inconsistent with its customary and Charter obligations to good neighborliness and with the prohibition against *abus de droit*. The insistence upon the right to sovereignty over State B's national territory in disregard from the legitimate interests of State A could be viewed as abusive and, as a result, unlawful. In short, it is seriously questionable whether State B can object in good faith to military self-help operations by State A in the territory of State B, if State B is unwilling or unable to suppress through other means acts of aggression originating from its territory.

However, even if one can safely conclude that State B has acted unlawfully by failing, willfully or unintentionally, to suppress attacks against State A, and perhaps has even engaged in unlawful use of force against State A, this does not automatically entitle State A to use counter-force and to violate the territorial integrity of State B. Under UN Charter law, which the ICJ has held to be reflective, by and large, of international customary law,⁴³ only violations which constitute an armed attack justify resort to counter-force. This concept is clearly narrower than the prohibition against threat or use force used in Article 2(4).⁴⁴ In the next section I analyze the conditions, which need to take place in order to meet the requirements of Article 51, and examine their application to self-help military operations.

The concept of armed attack

Article 51 permits the employment of defensive force, without Security Council authorization, if such force applied in response to an armed attack. There is an emerging consensus that the concept of armed attack might also encompass resort to force by non-State actors. This is evidenced by invocation of Chapter 7 of the UN Charter by the Security Council in response to the September 11 attacks,⁴⁵ and perhaps more dramatically, by the unprecedented invocation of Article 5 of the NATO Treaty in the aftermath of the same

⁴³ "Military and Paramilitary Activities in and against Nicaragua" Case (*Nicaragua v. U.S.*), 1986 I.C.J. 14, 103.

⁴⁴ B. SIMMA (ed.) *The Charter of the United Nations – A Commentary*, Oxford, 2nd ed., 2002, pp.796.

⁴⁵ S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., UN Doc. S/RES/1368 (2001).

attacks, defining them as an armed attack directed against all the members of the alliance.⁴⁶ The Israeli invocation of the principle of self-defense in response to terrorist acts, in order to justify incursions into Palestinian held territories in the latest *intifada* serve as another incidence of practice supporting such a rule.⁴⁷ There are other examples as well (*e.g.* Turkey pursuing guerillas in Northern Iraq)

I believe that the corollary of the right of self-defense must include the possibility of armed action against the perpetrators of the armed attack, even if they are present in the territory of another sovereign State. A different conclusion, leaving the attacker unhindered in its State of refuge, would simply render the right to self-defense in these circumstances meaningless. In other words, it is logically inconsistent to maintain that non-State actors can engage in cross-border armed attack but that they cannot subject to counter-attacks.

I would submit, therefore, that the right to self-defense encompasses the right to take extra-territorial forceful actions against non-State militias operating from within the territory of States, which are unwilling or unable to suppress such activities. This conclusion is confirmed by the survey of enforcement action cases analyzed by Prof. Franck in his latest book on the use of force.⁴⁸ Franck argues that there are strong indications that the international community does not object in principle to self-enforcement actions, and that the response of the community to the use of force in such cases is mainly dictated by the specific factual and political circumstances of the case in question.⁴⁹

Note that the proposed approach does not initially differentiate between the unwilling and the unable host State. The interests of the attacked State to protect itself and the interests of the international community to punish aggression through legitimizing resort to counter-force, must – and generally do prevail. This is especially justified since the line between lack of will and lack of ability is often very thin and hard to identify. According to this view, after the September 11 attacks, the US was legally entitled to target Al Qaeda forces in Afghanistan– whether or not the Taliban government was willing or able to suppress Al Qaeda’s activities within its territory. Similarly, if we accept the premise that suicide bombing attacks within Israel constitute an armed attack against the State,⁵⁰ then Israeli forces may strike against Hamas and Islamic Jihad targets in areas controlled by the Palestinian Authority (PA) whether they have the ability to curb Hamas activities or not. Such acts could be viewed as permissible acts of self-defense (assuming that customary law on the use of force applies in the relations between Israel and the PA). I would submit that any other rule of law, introducing severe limitation upon the right of self-defense in situations of mortal danger to a State’s national security and to the lives of its citizens, would be unrealistic and probably immoral.

⁴⁶ Statement by the North Atlantic Council, 12 Sept. 2001, <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

⁴⁷ See *e.g.* Ministry of Foreign Affairs, Israel, the Conflict and Peace (2003), <http://www.mfa.gov.il/mfa/go.asp?MFAH0i9o0#target>.

⁴⁸ T.M. FRANCK, *Recourse to Force: State Action against Threats and Armed Attacks*, Cambridge, 2002,

⁴⁹ *Ibid*, at pp. 131-134.

⁵⁰ This premise is controversial, as some have argued that the prolongation of the Israeli direct and indirect occupation over the West Bank and Gaza Strip is, by itself, an act of aggression, justifying counter-force. See *e.g.* J. QUIGLEY, “The Oslo Accords: More than Israel Deserves”, in *American University International Law Review*, Vol. 12, N° 2, 1997, pp. 285, 292.

However, the right to use force in self-defense is not unrestricted. It is subject to numerous conditions pertaining to the threshold of violence – i.e., what degree of violence would be considered an armed attack, giving rise to the right of self-defense; the necessity of applying force in response to armed attacks (involving also questions of immediacy); and the requirements of proportionality. My argument is that the application of these conditions in military self-help operations involving non-State actors might be different to their application in classic inter-State conflicts.

The threshold of violence

In *Nicaragua* the International Court of Justice (ICJ) had commented that the phrase armed attack denotes a certain threshold of intensity. For instance, it does not encompass mere frontier attacks.⁵¹ Prof. Dinstein criticizes this aspect of the decision.⁵² He submits that small scale incidents do justify self defense, which might be defined as unit self-defense or on-the-spot reactions. However, he adds, the scope and duration of self defense operations should be circumscribed by the famous *Caroline* principles, including the principle of proportionality. While I believe the ICJ's reading of Article 51 is consistent with a commendable worldview according to which unilateral recourse to force should only be permitted in exceptional circumstances, I would argue that such rigid interpretation of the Charter is unattainable in a world managed by a largely dysfunctional Security Council.⁵³ In fact the toleration of low-intensity incidents might encourage their continuation, increasing, rather than decreasing the likelihood of spill-over effects and of their deterioration into full-scale war. It is therefore more sensible, from a policy perspective to maintain, as does Dinstein, that any use of force attributable to a State could be responded to with force, provided that the *Caroline* conditions (including immediacy) are strictly met. However, isolated border incidents would not normally meet these conditions (except in specific situations justifying on the spot reactions). In other words, I would accept the proposition that the concept of a minimal threshold of violence could be useful in creating a *presumption* against the fulfillment of the *Caroline* conditions. It should not, however, serve as a bar against the use of force in all circumstances⁵⁴.

⁵¹ See "Military and Paramilitary Activities" Case, *supra* note 8, at p. 103. This has recently been reaffirmed in the "Oil Platforms" Case, *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. (not yet published), at para. 51 ("As the Court observed in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, it is necessary to distinguish 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'). But see *ibid*, Separate Opinion of Judge Simma, at para.s 12-13 ("I would suggest a distinction between (full-scale) self-defence within the meaning of Article 51 against an "armed attack" within the meaning of the same Charter provision on the one hand and, on the other, the case of hostile action, for instance against individual ships, below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally short of the quality and quantity of action in self-defence expressly reserved in the United Nations Charter").

⁵² DINSTEIN, *supra* note 3, at pp. 192-194.

⁵³ The record of the Security Council in authorizing recourse to force is dismal. In fact, never has the Council authorized States to resort to counter-force in situations falling short of a full-scale war (and even in such cases, authorization was often vetoed). For a different view, C. GRAY, *International Law and the Use of Force*, Oxford, 2000, p. 87.

⁵⁴ While an isolated low-intensity incident would probably fail to meet the threshold, a series of low-intensity attacks, could justify a proportional response. The reaction of the US to isolated terrorist attacks attributed to Libya in the 1980s, and to Al Qaeda in the late 1990s (mainly, the blowing up of the US Embassies in Nairobi and Dar-es-Salaam) is consistent with this line of thinking. When viewing the world's critical reaction to these occasional resorts to force, it should be noted that the controversy surrounding these operations mostly revolved around attribution, target selection, necessity and proportionality and not upon the legitimacy of extra-territorial counter-force *in abstracto*.

Applying this approach to military self-help operations directed against non-State actors, I would submit that the threshold of violence justifying recourse to counter-force should be higher than in inter-State self-defense situations. There are three principal reasons supporting this conclusion.

First, the level of threat posed by non-State actors is presumably lower than that presented by sovereign States, who often have vast resources, a comfortable territorial base and solid international support. This affects their respective military capabilities and, in particular, their access to manpower and weaponry, and their level of organization. Of course, this presumption might be refuted, especially in the case of non-State actors which manage to acquire weapons of mass destruction.

The proposition that non-State actors might constitute a lower threat than States is supported to some degree by the aforementioned UN Declaration on the Definition of Aggression,⁵⁵ which implies that only acts of State-sponsored armed bands, groups, irregulars or mercenaries which are of a comparable *gravity* to acts of aggression directly imputable to States would be deemed acts of aggression. This perhaps suggests that hostile acts by non-State actors are *a priori* less grave than hostile acts committed by States.

Second, the inability to impute the attacks by the non-State actor to the host State from which they originated seems to militate against trigger happy retaliation policies in response to sporadic cross-border violence. The low magnitude of the threat generally supports the choice of non-violent means, such as pressure upon the host State to comply with its international obligations and to suppress the activities of the armed militias (with or without the help of other States). Violation of the national sovereignty of the host State, when there is minimal delinquency on its part, might also be viewed as unjust and as a recipe for instability. Arguably, only threats of a serious magnitude should justify such consequences.

Finally, the fact that the initial attacks in question are not attributable to any State, perhaps increases the willingness of the international community, acting through the conduit of the Security Council to intervene in the conflict. This is because intervention will not compel Council members to choose sides between two UN member-States. At the same time, the host State – especially if it is willing but genuinely unable to curb the aggressive activities - might welcome such international intervention as an alternative to unilateralist action by a single State (the State targeted by the original aggression).

Given the availability of a number of policy alternatives to unilateral employment of force in potential extra-territorial self-help cases, the necessity of counter-force is generally more uncertain - it is more difficult to prove that force is justified in such circumstances than in ordinary self-defense cases. As a result the normative threshold of violence which warrants recourse to defensive force ought to be higher. Indeed, it has been suggested in a recent article that the requirement that the countered threat will be imminent, introduced by the correspondence that followed the *Caroline* incident⁵⁶ was intended to apply *only* in extra-territorial military self-help situations (the *Caroline* incident, in which the British army invaded the territory of the U.S. in order to strike against military targets belonging to non-State actors, being a classical

⁵⁵ See *supra* note 7, art. 3(g).

⁵⁶ See J.B. MOORE, “*Digest of International Law*”, Washington, 1906, p. 412.

example of such an operation).⁵⁷ Hence, the author argues that customary international law does not support the full application of the exacting conditions introduced in the *Caroline* case to ordinary self-defense situations.

The proposed dichotomy between inter-State and State/non-State threshold levels of violence also conforms to the well-known dichotomy between the definitions of international and non-international armed conflicts under international humanitarian law (IHL). While every use of force at the inter-State level is covered by IHL, conflicts between two armed groups, at least one of which is not a State, are governed by IHL only if conflict-related violence reaches a high level of intensity.⁵⁸ While the policy considerations are somewhat different here, it still would be odd if cross-border military actions which are not covered by *jus in bello* were permitted under *jus ad bellum* (however, it is possible to imagine circumstances in which a low-intensity attack, countered by proportional counter-force could, cumulatively, cross the minimal threshold of violence intensity required by IHL rules on non-international armed conflict). In other words, *jus in bello* could help us in drawing the outer limits of permissibility of the use of force under *jus ad bellum*.

So, I am of the view that, generally speaking, only high-intensity attacks by non-State actors permit self-defense under the extra-territorial military self-help paradigm. However, a prolonged campaign of organized lethal violence (even if comprised of a number of distinct low-intensity attacks) should be viewed as an armed attack which could justify recourse to use of force as a last resort. The same conclusion should be reached with regard to a campaign of violence which has just begun, but there are compelling indications that it will continue in the near future with growing force,⁵⁹ and with regard to a single deadly blow, in the magnitude evinced on September 11. In all events the response must be proportional and directed only against the aggressor *-i.e.* the non-State actor. The host State's institutions and military forces cannot be targeted unless they join the fighting.

I agree with Dinstein that unit self-defense would be permissible even in response to attacks of a limited scope and intensity. Hence, if sporadic shots are fired from one side of the border across to the other side, soldiers from the attacked State may return fire and direct it at the perceived source of the initial shootings. The question becomes more complicated if an armed pursuit after the aggressive militia members is called for. If the pursuit takes place entirely within the territory of the attacked State there is no problem. In fact, *jus ad bellum* does not prohibit at all use of force in these circumstances. But what if the militias hit and run? *-i.e.* attack and then take refuge in the host Country? In such circumstances, I believe one could argue that there is no longer an immediate threat, which would automatically support the use of force under the *Caroline* conditions (provided that the threat remains at a low-level). In fact, this situation can be

⁵⁷ See M. BENVENUTA OCCELLI "Sinking" the *Caroline*: Why the *Caroline* Doctrine's Restrictions on Self-Defense Should Not Be Regarded as Customary International Law", in *San Diego International Law Journal*, Vol. 4, 2003, p. 467.

⁵⁸ T. MERON "The Humanization of Humanitarian Law", *American Journal of International Law*, Vol. 94, N°2, 2000, pp. 260-261.

⁵⁹ For support of the cumulative approach towards the issue of proportionality, see "Military and Paramilitary Activities" Case, *supra* note 8, at p. 120. But see "Oil Platforms" Case, *supra* note 16, Separate Opinion of Judge Simma, at para. 14 ("there is in the international law on the use of force no "qualitative jump" from iterative activities remaining below the threshold of Article 51 of the Charter to the type of "armed attack" envisaged there").

compared to the customary rules governing hot pursuit of vessels at sea. Such pursuits can continue to take to the high seas but not within the territorial waters of a neutral coastal State.⁶⁰

In sum, a restrictive approach should be adopted with relation to the inclination to use force in extra-territorial law enforcement type cases, although clearly there are situations in which such operations would be deemed legal. The 2001 US operation in Afghanistan, if seen as a self-help operation, would generally seem to meet the advocated standard: In the aftermath of the 9/11 armed attack, President Bush presented an ultimatum to the government of Afghanistan to take action against the Al Qaeda terrorist infrastructure within its territory and to arrest and extradite the Al Qaeda leadership.⁶¹ U.S. forces attacked Afghanistan only following the rejection of the ultimatum by the Taliban government.⁶² In the same vein, some of Israel's operations in Territories subject to the rule of the PA could be justified under *jus ad bellum*, at least with respect to actions directed against terrorist suspects whom the PA refused to arrest after being asked to do so by Israel.

Anticipatory Self-Defense

The final *jus ad bellum* question I want to address is the question of anticipatory self-defense. Once again, I believe that a dynamic and effective interpretation of Article 51 of the UN Charter is necessary, and that in situations where the Security Council is unable to act promptly and effectively, States should be allowed to engage in what are essentially measures of interception, directed against an impending attack, which is unlikely to become reversible. Dinstein overcomes the textual inadequacy of Article 51 by adopting a broad definition of what constitutes an armed attack -the crossing of the Rubicon or the taking of an irreversible action.⁶³ This might offer a reasonable interpretative alternative (although the test of irreversibility is almost never met in today's warfare where even flying missiles have self-destructing mechanisms, which can be activated minutes, and sometimes seconds before impact). Another possibility is to maintain the continued applicability of anticipatory self-defense as customary law operating side-by-side with Charter law.⁶⁴

In any event, the application of the doctrine to extra-territorial law enforcement must be restricted to the most serious and imminent types of threats. Unilateral force ought to be used exclusively as a last resort, and only if and when it becomes evident that the host State will not authorize the anticipatory use of force nor will it intervene itself in order to bring the non-State actor's operations to a halt.

C. *Jus in bello* principles governing military self-help operations

⁶⁰ United Nations Convention on the Law of the Sea, 1982, 10 Dec. 1982, art.111, 1833 U.N.T.S 3.; *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 12 June 1994, art. 16. The theory of "hot pursuit" as justifying incursions into neighboring States was explicitly rejected by the Security Council, in Resolution 568 (1985), S.C.O.R., 40th Sess., UN Doc. S/RES/568 (1985), dealing with South Africa.

⁶¹ It is however questionable whether the demand to extradite *Al Qaeda* operatives is supported by international law, as the latter might, at most, impose an *aut dedere aut judicare* obligation.

⁶² Presidential Address to the Nation, 7 Oct. 2001, <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html>.

⁶³ DINSTEIN, *supra* note 3, at pp. 169-173.

We will now move on to discuss the body of IHL applicable to military self-help operations directed against non-State actors. The characterization of the applicable legal standards turns again on the nature of the relations between the host State and the non-State actor. According to the 1999 *Tadic* judgment of the International Criminal Tribunal for the Former Yugoslavia (ICTY), a conflict involving a State and militias acting on behalf of another State (the standard of imputability being overall control) should be viewed as an international armed conflict governed by IHL norms covering inter-State hostilities.⁶⁵

However, where the standard of imputability has not been met, it would seem that the rules governing the hostilities between the State and the non-State actor would be the rules governing a *non-international armed conflict* – as the rules governing international armed conflict were primarily designed to govern inter-State conflicts. My position on this question is not impacted by the fact that the military operations take place across borders, including in the territory of the host State, without that State's consent. The decision of the ICJ in *Nicaragua* with regard to the different characterization of U.S. and contras activities against the Nicaraguan State is a formidable authority for the proposition that international and internal armed conflicts can persist side-by-side, generating different legal responsibilities for the involved parties.⁶⁶ Thus, even if inter-State clashes occur, the relations between the non-State actor and the State fighting it can be isolated from other legal interactions and be subjected to the appropriate legal regime.

The application of rules governing non-international armed conflict, rather than international armed conflict, is supported by a number of policy considerations. The decisive factor, in my view, is that the law of non-international armed conflict is better attuned to the differences in the capacity of the rivaling parties to observe IHL. By and large, non-State actors are ill-situated to observe IHL in its entirety. This is because many IHL norms were developed with a regular organized army in mind. Irregular militias often do not have the resources, facilities and training required to strictly comply with the law - *e.g.* to run Geneva III type prisoner camps; to provide prompt and acceptable judicial oversight for detainees etc. In these circumstances it would be unrealistic and quite unfair to require government forces to maintain standards, which the other Party would not realistically be expected to observe. There is also an undeniable link between the perceived legitimacy of one Party's involvement in the conflict and the willingness of the other Party to the conflict to confer privileges upon enemy combatants -most importantly, POW status. In this respect members of irregular forces involved in self-help scenarios are often viewed by their adversaries as rebels or terrorists unworthy of lawful combatant status. A normative order granting members of militia groups POW status would probably not enjoy the political support of a number of key States, and is unlikely to be respected. Of course, if the Parties to the conflict so choose, they may expand the scope of their reciprocal obligations and

⁶⁴ SIMMA, *supra* note 9, at 806.

⁶⁵ *Tadic*, *supra* note 1, at para. 162. The ICTY rejected in its decision the more demanding standard of imputability (effective control) introduced by the ICJ in *Military and Paramilitary Activities*.

⁶⁶ "Military and Paramilitary Activities", *supra* note 8, at p. 114. This has been confirmed also by the 1995 *Tadic* decision. *Prosecutor v. Tadic*, Decision of 2 Oct. 1995, para. 73 (ICTY Appeals Chamber)[<http://www.un.org/icty/tadic/appeal/decision-e/51002.html>].

embrace additional obligations under IHL, including obligations drawn from the body of rules governing international armed conflicts.⁶⁷

However, several caveats to the proposition that the rules of non-international armed conflict govern enforcement operations ought to be emphasized. IHL would apply, in the first place, only if the conflict is characterized by high-intensity of violence⁶⁸ (assuming that it is impossible to impute the militia's actions to the host government). This position seems to be uncontroversial and supported by a considerable body of authority.⁶⁹ However, even then, it is questionable whether Protocol II would apply to military self-help operations, as the Protocol conditions its application on control by the non-State party over some of the belligerent State's territory (whereas in the cases discussed here the non-State actor potentially controls part the territory of *another* State). Still, it ought to be accepted that most of its key provisions (and some key provisions of Protocol I) now reflect customary international law, applicable to all non-international armed conflicts.⁷⁰

A second caveat goes to the issue of wars of national liberation. A non-State actor that represents a people fighting against colonialism, foreign occupation or apartheid, arguably falls within the scope of coverage of Protocol I. One should recall, however, that the U.S, Israel, India and a few other influential countries, which have been involved in recent years in self-help operations are not parties to the Protocol, and it is questionable whether its application to such conflicts (as opposed to most of its substantive provisions) reflects customary international law, given the opposition of the aforementioned States.⁷¹

Of course, if during the self-help operation directed against the non-State actor military forces of the host country become involved, the interaction between the self-defending State forces and the host State's forces would be covered by IHL rules governing international armed conflict. Such a situation took place during the 1982 Israeli invasion of Lebanon. While the Israeli operation was mainly directed against PLO forces in Southern Lebanon, it also involved armed clashes with Syrian forces stationed in Lebanon. The situation could get even more complicated if the host State and the non-State forces are fighting side-by-side, as was the case in the 2001 U.S. operation in Afghanistan. If no control by the host State over the irregular forces can be shown, then there is no escaping from applying the two bodies of law on the same battlefield. While this is not ideal, from a legal point of view, it is not much of a problem if Protocol I applies with

⁶⁷ This is, in essence, what happened in the Former Yugoslavia, where the rivaling factions had agreed throughout 1991-1992 to apply many provisions of the Geneva Conventions (originally designed to govern international armed conflict) to the conflict (although some parts of the conflict were arguably still of a non-international character).

⁶⁸ Again, when reviewing the intensity of the conflict, one should take into consideration not only past events, but also potential future events. Hence a military campaign against a terror group which committed a string of lethal bombing attacks, is well organized, and is likely to continue its attacks in the foreseeable future, could be viewed as falling within the realm of armed conflict law, even if the casualty toll is not yet very high. This is particularly so, if the declared official policy of the organization is the continuation of the attacks – in the name of *jihad*, liberation struggles, etc.

⁶⁹ See e.g., *Tadic* (1995), *supra* note 31, at para. 70; *Prosecutor v. Akayesu*, judgment of 2 Sept. 1998, para. 174 <http://www.ictt.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Art. 1, 1125 U.N.T.S. 609; Statute of the International Criminal Court, 17 July 1998, art. 8(2)(d), 8(2)(f), U.N. Doc. A/CONF.183/9 (1998).

⁷⁰ *Tadic* (1995), *supra* note 31, at para. 117.

regard to the non-State actor (as that Protocol applies many classical inter-State IHL norms to wars of national liberation). Still, even if it does not formally apply, one could assert that the Hague law – the customary and treaty law governing armed hostilities – moves more and more in the direction of harmonizing the standards applicable in international and non-international armed conflicts.⁷² There would be, however, significant differences under Geneva law between the two parallel legal regimes, especially with regard to the treatment of enemy prisoners. Whereas the host State's soldiers would be generally entitled to POW status, the militiamen might be viewed as unlawful combatants not entitled to POW status. The differentiation in the legal status accorded to Taliban and Al Qaeda detainees in Guantanamo Bay,⁷³ problematic as it is, serves as an indication of the practical feasibility of this approach.

D. Human Rights in self-help operations

As for the question of the applicability of human rights in self-help operations, the proposition I would like to advocate is that all exercises of governmental power directly influencing individuals is subject to human rights law. Extra-territorial military operations are no exception.⁷⁴ This position has been upheld by the Human Rights Committee (HRC) with respect to Israel and Yugoslavia, and areas subject to their *de facto* control.⁷⁵ It is also consistent with the HRC's rather extensive case law on extra-territorial application of governmental authority (kidnapping of individuals from foreign States; issuance of passports, etc.).⁷⁶ The same position was embraced by the I/A HR Commission with respect to US operations in Haiti and Grenada.⁷⁷ Still, the ECHR's position is more complicated. While there have been cases in which the Court was willing to review extra-territorial police and military operations under the European Convention – e.g. the operations of Turkey in Northern Iraq,⁷⁸ and Northern Cyprus⁷⁹ and the arrest of Ocalan in Kenya⁸⁰ – in the recent and well known *Bankovic* case,⁸¹ the Court refused to exercise power of review over bombing operations executed in the territory of Yugoslavia – a non-Convention country. The ECHR would therefore seem to require an intensive level of control over individuals in foreign land, as a precondition for the

⁷¹ GA Res. ES-10/14, *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, preamble, UN Doc. A/ES-10/L/16 (2003) (reaffirming the applicability of Protocol I to the Occupied Palestinian Territories).

⁷² See e.g., *Tadic* (1995), *supra* note 31, at para. 100-125.

⁷³ U.S. State Department, Fact Sheet: White House on Status of Detainees at Guantanamo (Washington, 2003) <http://usinfo.state.gov/topical/pol/terror/02020700.htm>.

⁷⁴ See O. BEN-NAFTALI and Y. SHANY “Living in Denial: The Application of Human Rights in the Occupied Territories”, in *Israel Law Review*, Vol. 37, N° 1, Spring 2003-2004.

⁷⁵ *Concluding Observations of the Human Rights Committee: Israel*, 5 Aug. 2003, para. 11, UN Doc CCPR/CO/78/ISR (2003); *Concluding Observations of the Human Rights Committee: Yugoslavia*, 28 Dec. 1992, para. 8, UN Doc. CCPR/C/79/Add.16 (1992).

⁷⁶ See e.g. Comm. R.12/52 *Lopez Burgos v. Uruguay*, UN Doc. A/36/40 (1981) 176; Comm. 56/1979 *Casariago v. Uruguay*, UN Doc. CCPR/C/OP/1 (1984) 92 (Views adopted in 1981); Comm. 77/1980 *Lichtenstein v. Uruguay*, UN Doc. CCPR/C/OP/2 (1990) 102 (Views adopted in 1993); Comm. R.13/57 *Vidal Martins v. Uruguay*, U.N. Doc. Supp. No. 40; A/37/40 (1982) 157; Comm. 106/1981 *Montero v. Uruguay*, U.N. Doc. CCPR/C/OP/2 (1990) 136 (Views adopted in 1983); Comm. 108/1981 *Varela Nunez v. Uruguay*, UN Doc. CCPR/C/19/D/108/1981 (1983) 225.

⁷⁷ Report No. 109/99, *Coard v. the United States*, 29 Sept. 1999, <http://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStates10.951.htm>; Report No. 51/96, *Haitian Centre for Human Rights v. U.S.*, 13 March 1997, [<http://www.cidh.oas.org/annualrep/96eng/USA10675.htm>].

⁷⁸ *Issa v. Turkey*, Dec. no. 31821/96, 30 May 2000 (ECHR).

⁷⁹ See e.g. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser A)(1995) 23.

⁸⁰ *Ocalan v. Turkey*, Judgment of 12 March 2003 (ECHR).

⁸¹ *Bankovic v. Belguim*, 123 I.L.R. (2003).

application of the Convention. Perhaps, most problematic is the Court's reluctance to accept the proposition that the State may exercise limited degrees of control, entailing limited responsibilities over the concerned individuals. This reluctance seems to be inconsistent with earlier case law of the Strasbourg mechanism on extra-territorial jurisdiction.⁸²

I believe that the ECHR's position, as articulated in *Bankovic* is misguided and that the universality of human rights necessitates a broad interpretation of the scope of application of human rights treaties, including in times of war and other emergency, encompassing the battlefield, as well as all other fields in which governmental power is exercised. This position also seems to be supported by a number of renowned scholars⁸³ and in essence also by the ICJ in the *Nuclear Weapons* case, which did not negate the applicability of human rights standards to the examination of the lawfulness of the threat or use of nuclear weapons.⁸⁴ Hence, I believe all self-help operations – whether involving the application of non-military or military force - are governed by human rights standards.

This of course does not mean that armies should meet in their operations the ordinary peacetime human rights standards. Clearly, derogation clauses may be invoked. Further, the ICJ had accepted in the *Nuclear Weapons* case the proposition that humanitarian law is *lex specialis* and that the contents of human rights is influenced therefrom. The implications of reversing *Bankovic* would therefore be rather minimal. The main practical implication being that the ECHR would be competent to review whether fundamental human rights such as the right to life, which is the right to be deprived *arbitrarily* of one's life - *i.e.* in violation of IHL standards - had been observed.

Non-military self-help operations

I would like to devote a few words to the third self-help paradigm, which involves *inter alia* police-like operations in the territory of foreign States.⁸⁵ While Prof. Franks views operations such as the *Eichmann* kidnapping as forms of use of force,⁸⁶ a view that is somewhat supported by Security Council Res. 138 (which viewed the kidnapping as a threat to international peace and security),⁸⁷ I believe this is not necessarily the best way to characterize such incidents. While such exercises of extra-territorial power normally violate international law, as they constitute an impermissible interference in domestic affairs and violation of sovereignty, and can jeopardize international peace and security (as implied by the Security Council in the *Eichmann* affair), it is questionable whether they conflict with Article 2(4) of the Charter. If

⁸² See *e.g.* Application no. 1611/62, *X v. F.R.G.*, Yearbook of European Convention on Human Rights, Vol. 8, 1965.

⁸³ See *e.g.* Human Rights Committee Draft General Comment on Art. 2 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), 5 May 2003, UN Doc. CCPR/C/74/CRP.4/Rev.3. (General Comments)(2003)(Statement by Prof. Higgins); T. MERON "The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties" 89 A.J.I.L. (1995), p.78.

⁸⁴ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. 226, 240.

⁸⁵ One can find some support to the proposed distinction between military and police-like use of force in a recent judgment of the Israeli Supreme Court which held that the State of Israel would enjoy immunity from tort claims concerning IDF acts only if the injurious conduct occurred in the context of a military operation, characterized by the 'special risks' of the battlefield. Police like operations – even if undertaken by the army, would not be qualified as 'acts of war'. C.A. 5964/92 *Benni Udah v. State of Israel*, 56(4) P.D. 1.

⁸⁶ See FRANCK, *supra* note XX, at pp. 112-114.

⁸⁷ S.C. Res. 138, S.C.O.R. 15th Sess. at 4, UN Doc. S/INF/15/Rev.1 (1960)

one views the 1970 UN Declaration on Principles of International Law⁸⁸ and the 1974 Definition of Aggression as a more or less authoritative interpretation of Charter law on these matters, one would have to note that these instruments do not view police-like enforcement acts as forms of prohibited use of force – certainly not armed attacks.

If that is the case, then such self-help operations are not covered by *jus ad bellum* and the proper legal frameworks to view the justification for their performance are the defense of necessity or the law of counter-measures. Of course, given the dramatic potential of such measures to undermine international stability the perceived threat or need justifying the act must be overwhelming in order to justify their execution.

As I believe that police-like acts are not forms of exercise of force – their lawfulness does not depend on IHL or *jus ad bellum*. They raise a number of other legal issues, most notably under human rights law. As already indicated, there is a solid body of authority that kidnapping operations and other forms of extra-territorial law-enforcement are covered by human rights norms. Still, human rights standards draw inspiration from IHL norms which would have applied in analogous circumstances. A notable theory of such cross-fertilization is the development of minimum or fundamental standards of humanity⁸⁹ -a core of humanitarian principles applying in all levels of conflict.

Conclusion

In conclusion, I believe the right to self-help exists under international law. However, its existence is highly circumscribed. It mostly lives within the narrow confines of Article 51 of the UN Charter, adapted to modern challenges. Hence, non-State actors perpetrating aggression from the territory of a State unwilling or unable to prevent such hostile acts cannot expect to enjoy immunity from counter-force. Sovereignty should not be the physical refuge of the aggressive scoundrel. However, the volatile nature of the situation merits the conclusion that force ought to be resorted to only as a last alternative, and that it should strive to inflict minimal damage upon the host State. In all events, use of force in self-help is restricted by norms of IHL, governing non-international armed conflicts, and by human rights law . While neither the strict follower of doctrine nor the believer in *realpolitik* would be fully satisfied by this solution, I believe it heeds the call of both legalism and pragmatism. The pessimist could argue that it represents the worst of both worlds. I, myself, prefer to stick to the maxim that "*the good (and feasible) is the enemy of the (utopian) best*" and in these imperfect times we should aim primarily for what is within our reach.

⁸⁸ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, Annex to G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970), reprinted in 9 I.L.M. (1970) 1292.

⁸⁹ See e.g. Declaration of Minimum Humanitarian Standards, 2 Dec. 1990, UN Doc.E/CN.4/Sub.2/1991/55 (1990).

***Non-International Armed Conflict:
legal qualification and Parties to the conflict.***

Titus K. GITHIORA,
Brigadier, Chief of Legal Services, Department of Defence

Legal and factual criteria for qualification as non-international armed conflict;

Legal and factual criteria to determine existence of a “party” to a non-international armed conflict - any confinement to territory or on basis of events in different countries.

HISTORICAL BACKGROUND

The normative framework provided by the laws of war today consists of constraints on the violence of war and safety nets for those not taking part in hostilities in internal, non-international or civil war situations that only got recognition after the 1948 Genocide Convention and 1949 Geneva Convention. Before then laws of war in customary international law only applied to civil war situations when the Government of the State where a civil war was taking place or a third state recognised the belligerent status of insurgents and thus acknowledged the applicability of the laws of war.

Efforts, which had then been on going from the beginning of the century to allow aid to civil war victims, had been resisted by many States which considered insurgents as criminals under domestic law. The 1948 Genocide Convention which was said to apply “*in time of peace or in time of war*” was a significant step in broadening the scope of application of basic humanitarian rules. The 1949 Convention which came next involved much debate on inclusion of provisions for internal conflicts. Common Article 3 was the compromise after rejection of the notion that laws of war should apply to internal wars. The Article became the first important safety net for victims of internal wars binding all Parties to observe a limited number of fundamental humanitarian principles in “*armed conflicts not of an international character*”. Problems of application, however, continued including denials that the Article applied at all due to a situation not amounting to an armed conflict. Further problems included absence of codification of any laws of war for non-international armed conflicts and generally the rules were not an adequate guide for the conduct of belligerents.

PROTOCOL II

But the broadening of applicability scope has continued. The 1954 Hague Cultural Property Convention in Art. 19 said the Convention applied to non-international conflicts.

In 1977 States agreed to Protocol II. It was also a compromise (after doing away with anything implying recognition of insurgent parties) with the following features:

- it develops and supplements Common Article 3 of 1949 Geneva Conventions without modification of conditions of application;

- it applies to all armed conflicts which are not international (interstate, State of occupation, wars of national liberation, wars against alien occupation or against racist regimes) and which take place within the territory of the State between: armed forces and organised armed groups under responsible command which have sufficient control of part of the territory, able to carry out sustained and concerted military operations and willing to implement Protocol II.

Like Common Art. 3 and the Hague Convention there was no application to internal disturbances and tensions (such as riots, isolated and sporadic acts of violence and other similar acts) which are not termed armed conflicts.

Though problems of application continue (e.g. in conflicts in South America, Africa, former Yugoslavia) applicability continues to broaden :

- 1994 ICTR Statute of the International and Criminal Tribunal for Rwanda (Art. 4 power to prosecute violations of Common Article 3 and Second Additional Protocol to the Geneva Conventions, GPII);
- The 1996 amended Protocol II on Mines to the 1980 Weapons Convention;
- 1997 Ottawa Anti-Personnel Mines Convention;
- ICC Statute;
- 1999 Second Hague Cultural Property Protocol.

This growth is practical recognition that internal armed conflicts have been more common than international conflicts. International law has clearly been increasingly involved in the regulation of non-international armed conflict; practice has been to disregard the distinction between international and non-international conflict; to ensure applicability of humanitarian standards. Both the Nicaragua case and Tadic decision have already been mentioned as significant milestones in this continuing development.

The foregoing setting thus helps to identify factual criteria for the qualification of a conflict as non-international as follows:

Its definition – within terms of GPII and Common Art. 3 by way of distinguishing them from international armed conflict defined in Common Art. 2 and First Additional Protocol to the Geneva Conventions (GP I) (4) interstate, undeclared or unrecognised (by one state war); occupation (with or without armed resistance), conflicts involving a power not Party to the Conventions, but accepts them, wars of national liberation, against alien occupation, etc.

- Violence and tactics
- Military or police type of operations;
- Co-ordination of the fighting;
- Organisation of armed groups;
- Numbers (fighters or victims);
- Command, disciplinary control.

Whether the violence is protracted or is not relevant. Control of territory is a high threshold but may not be necessary when other criteria are applied.

Territorial requirements in GPII, are that the armed conflict takes place in the territory of a contracting party. The qualification of States being Party to the Conventions remains important and tends to show preference to exclude conflicts of non-state Parties. What is the nature of an armed conflict within the territory of a State between government forces and insurgents when a second State or more States join:

- On the side of the government? (non-international)?
- On the side of insurgents (international)?
- What about transnational groups? (note GPII, 4 (2) (d) prohibits acts of terrorism.

The ICTR statute extends jurisdiction to violations committed by Rwanda citizens in territory of neighbouring States and in Art. 7 territorial jurisdiction is specifically extended to the territory of neighbouring States.

Situations of internal disturbances and tensions do not qualify as armed conflict. HRL mechanisms help a great deal to control violations by both sides as levels of violence escalate from internal disturbances to internal armed conflict. The protection of human rights values must at all times be upheld by both regular government forces and armed insurgents

Judicial guarantees must be provided. GPII than goes further than Common Art. 3 (in Art.6) to describe those essential guarantees of independence and impartiality in relation to penal prosecutions and punishment of criminal offences related to the armed conflict.

CONCLUSION

Dissidents or insurgents qualify as Parties to the conflict by virtue of the legal characterisation of hostilities they are engaged in. Respect for IHL rules is crucial if such groups are to be distinguished from criminal gangs. The IHL obligations to protect civilians from hostilities, protect those *hors de combat*, and to observe methods and means of combat allowed by IHL will, if observed, afford such groups the recognition necessary. Punishment for violations will remain an important motivation for all sides in a conflict.

*La relation entre le droit international humanitaire, le droit international des droits de l'homme
et le droit international des réfugiés dans les situations de conflit armé*

Yves Sandoz

Membre du CICR et de l'Institut International de Droit Humanitaire

Introduction

L'historique de la question ayant été brillamment fait par mon prédécesseur, j'aimerais me contenter, dans la mesure de mes moyens, de donner quelques impulsions au débat qui va suivre en commençant, pour ce faire, par situer le cadre et le but de l'entreprise: face à la réalité des conflits armés actuels, comment améliorer le sort des victimes? Cette question me paraît centrale et l'on se doit de la garder à l'esprit pour éviter que les discussions sur le droit international humanitaire ne soient plus qu'un jeu de société pour diplomates et juristes spécialisés.

Il est vrai que l'amélioration du sort des victimes dépend pour beaucoup du respect du droit international humanitaire et qu'il est parfaitement légitime de se poser la question des moyens de faire mieux respecter ce droit, d'augmenter l'efficacité de ses moyens de mise en œuvre. Il est vrai aussi, tant au niveau de leurs dispositions juridiques que de leur mise en œuvre, que d'autres droits visent également à protéger les personnes affectées par des conflits armés, notamment le droit international des droits de l'homme et celui des réfugiés. Comment faire fonctionner au mieux ces droits, comment assurer leur complémentarité, faut-il les réformer, faut-il introduire de nouveaux moyens de mise en œuvre ?

Ces questions sont tout à fait pertinentes même s'il faut rappeler qu'on se les pose depuis fort longtemps. Il est important, de ce fait, que de nouvelles générations s'y penchent car je vous avouerai que les gens de la mienne ne peuvent pas s'empêcher d'éprouver une certaine lassitude à faire face aux violations du droit international humanitaire avec les mêmes interrogations indignées et avec des suggestions qui leur paraissent souvent éculées tant peu d'entre elles sont vraiment nouvelles.

L'on n'a cependant pas le droit de baisser les bras et l'on ne peut jamais se satisfaire de l'acquis. C'est pourquoi même le plein succès des idées lumineuses qui ne manqueront pas d'éclairer nos débats n'empêcherait pas que l'on s'interroge, dans dix ans ou plus, sur la manière d'améliorer encore la situation. On ne pourra jamais, et l'on ne doit jamais, se satisfaire des souffrances provoquées par les guerres et cette insatisfaction est inhérente à celles-ci. Elles sont une forme honteuse, obsolète et, aujourd'hui plus que jamais, dangereuse pour l'humanité tout entière de régler les conflits et il faut chaque fois le dire haut et fort avant de parler néanmoins, sous le poids d'une réalité que l'on ne peut pas ignorer, de la meilleure manière d'améliorer dans l'immédiat le sort des victimes de la guerre.

Je dis cela pour deux raisons. La première est que la lutte pour faire mieux respecter le droit international humanitaire n'est pas sans lien avec les efforts entrepris pour régler les conflits autrement que par les armes; la seconde est que l'on doit inscrire la réflexion de ce jour dans un processus permanent et

sortir de l'illusion que l'on trouvera une solution définitive et satisfaisante au problème de la mise en oeuvre du droit international humanitaire.

L'on m'a demandé de vous parler de l'interaction entre le droit international humanitaire et d'autres corps de droit ainsi que des mécanismes de mise en oeuvre du droit international humanitaire, des droits de l'homme et du droit des réfugiés. Je m'en voudrais, devant un auditoire aussi relevé et dans le temps qui m'est imparti, de me lancer dans une approche descriptive. Il y a suffisamment de Manuels qui traitent de ces questions. Je me contenterai donc de quelques réflexions propres, je l'espère, à lancer le débat.

La question essentielle que nous voulons aborder se résume ainsi : face aux violations du droit international humanitaire, peut-on chercher des remèdes efficaces non seulement dans ce droit mais aussi dans les droits de l'homme et dans le droit des réfugiés. Cette première question se subdivise en deux autres : les mécanismes de ces corps de droit peuvent-ils être utilisés efficacement pour la protection des victimes de conflits armés; peut-on s'inspirer de ces mécanismes pour en introduire des semblables dans le droit international humanitaire?

Question préalable

Comme je suis très indiscipliné, j'aimerais toutefois, avant d'aborder ces questions, en ajouter une troisième: faut-il, et peut-on vraiment, rechercher dans les seuls droits à vocation humanitaire la réponse aux questions posées par les violations du droit international humanitaire ? Je crois que cette question préalable est indispensable pour écarter certains malentendus. Je suis d'ailleurs surpris qu'on ne la pose pas plus systématiquement en préalable à des interrogations sur la pertinence du droit international humanitaire. Sur le plan interne, pourtant, elle va de soi dans des circonstances comparables. Face à l'augmentation de la criminalité dans un pays, l'on ne va pas *a priori* incriminer la qualité du code pénal. De la même manière, je pense que la réflexion sur l'adéquation du droit international humanitaire aux problèmes actuels doit s'inscrire dans une réflexion plus large sur les raisons profondes des violations de ce droit, sur l'origine et le coeur des problèmes.

Certes, les remarques qui suivent mériteraient d'être approfondies et complétées. Il me paraît toutefois qu'elle ne doivent pas être étrangères à notre débat.

Je me limiterai, face à cette question, à vous faire partager trois interrogations :

Peut-on espérer améliorer le respect du droit international humanitaire:

- si l'on ne fait que très peu de cas du droit international en général?
- si la morale et les valeurs qui sous-tendent ce droit ne sont plus universellement acceptées?
- si le respect de ce droit paraît nuire à la cause défendue?

Expliquons-nous:

a) influence négative de la perte de crédibilité du droit international

A notre époque, les conflits armés sont provoqués, le plus souvent, par la volonté de renverser un ordre établi que l'on juge injuste. L'on n'avait pas besoin de cette justification autrefois, le prince n'ayant

pas à justifier le bien-fondé de ses ambitions. Mais sous le régime universellement accepté de la Charte de l'ONU, dont les fondements sont la paix et la justice, il est difficile de susciter une adhésion à une cause sans partir de ce prémisses. Si l'on excepte les conflits qui sont engagés pour des raisons ou sous des prétextes de sécurité (on se bat pour conjurer une menace à la paix) la seule raison que l'on peut en effet donner pour justifier une action militaire est celle de l'injustice. C'est cette raison qui a justifié, notamment, les guerres de libération coloniale ou celles entreprises pour renverser des dictatures. Certes, en allant plus en profondeur, l'on découvrira que derrière ce motif honorable généralement annoncé et ainsi présenté au bon peuple, il en est souvent d'autres moins honorables, liés à la soif de pouvoir de certains dirigeants ou à des intérêts économiques. Il n'en reste pas moins que le motif annoncé reste important car c'est de lui que dépend l'intensité du soutien populaire dont on a généralement besoin. Or deux facteurs facilitent l'abus de cette justification fondée sur la justice.

L'un est le manque de clarté qui subsiste sur certains concepts : chacun admet le principe du droit des peuples à disposer d'eux-mêmes mais l'on ne s'est toujours pas mis d'accord sur ce qu'est un peuple et sur la manière d'appliquer le principe dans des cas concrets. Il reste, de même, beaucoup de flou dans la notion de minorités et dans les droits de celles-ci. L'on peut donc s'appuyer sur le droit des peuples ou sur la protection des minorités sans qu'il soit établi clairement que c'est, ou que ça n'est pas, à bon escient.

L'autre facteur, plus grave encore, est le mépris dans lequel est tenu le droit international en général. Le Conseil de sécurité prend des résolutions qu'il ne fait pas respecter, des membres permanents agissent contrairement à la Charte sans aucune sanction véritable: comment prétendre que le droit international est au service de la justice si tout le monde le méprise, comment faire la leçon si l'on ne respecte pas soi-même les règles?

Mais, me direz-vous, quel rapport cela a-t-il avec le droit international humanitaire? Certes, on a toujours souligné l'indépendance que devait garder ce droit et l'on connaît sa place particulière dans l'ordre international, qui n'est pas dans la logique de celui-ci mais constitue une sorte de sécurité supplémentaire en cas de dysfonctionnement, à l'image des canots de sauvetage placés sur les navires. Cela n'empêche pas - c'est en tout cas mon avis mais c'est aussi une question que je vous pose - que se développe avec plus ou moins d'acuité, à tous les niveaux, le sentiment que le droit international n'a que peu poids dans les relations internationales. Or je suis convaincu que ce sentiment, qui traduit une réalité, nuit aussi à la crédibilité du droit international humanitaire. Ceux qui ont construit le navire sont aussi ceux qui ont fabriqué les canots de sauvetage et si l'on n'a plus confiance dans le navire, l'on ne va pas aveuglément s'embarquer sur les canots de sauvetage.

b) Remise en cause des fondements moraux du droit international humanitaire

Osons le dire. Ce qui est aujourd'hui remis en cause par certains, c'est l'idée que les valeurs et principes sur lesquels le droit international humanitaire est construit ne sont pas intangibles. Relisez le fameux débat sur le terrorisme dans la pièce d'Albert Camus, *"les Justes"*, qu'il situe dans les milieux révolutionnaires russes du début du XXème siècle, mais qui fait allusion à la guerre franco-algérienne: on en

est à nouveau là aujourd'hui. Que peut-on espérer si l'on ne parvient pas à mettre au ban de l'humanité le massacre d'innocents? Ce sont les autorités politiques, morales, religieuses qu'il faut appeler à la rescousse. S'ils ne sont pas accompagnés d'une condamnation universelle, unanime et sans nuance de ces pratiques, tous les nouveaux outils que l'on peut imaginer pour faire mieux appliquer le droit international humanitaire seront de bien peu d'utilité.

Certes, il y a peu d'espoir d'influencer directement ceux qui sont à l'origine d'actes terroristes, les véritables inspirateurs de ceux-ci. Mais des prises de position sans ambiguïté des leaders ci-dessus mentionnés diminueront le large cercle des populations qui soutiennent ou "*comprennent*" les actes terroristes. Avant de finasser aux confins du droit international humanitaire, il s'agit de consolider les principes qui en sont l'essence même. Quand on a un corps gravement malade, on s'occupe du cœur et des poumons avant de réfléchir à la qualité de la coupe de cheveux et à un nouveau brushing.

Je dois malheureusement, faute de temps, me contenter de cette affirmation bien légère pour vous transmettre l'opinion que je ne pense pas qu'il soit utile de se lancer dans une lourde entreprise de révision du droit international humanitaire. Certes, des clarifications sont nécessaires dans beaucoup de domaine, notamment en ce qui concerne la question de la participation directe aux hostilités et la définition de certains paramètres concernant la conduite des hostilités, tels que les objectifs militaires et le principe de proportionnalité. Mais pour des raisons qui ont déjà été longuement débattues ailleurs, je ne pense pas que la situation actuelle - et notamment le concept brumeux de "*guerre au terrorisme*" - justifie une telle révision. Je tenais à le dire sans ambiguïté et on trouvera facilement d'autres sources qui développent des arguments dans ce sens.

c) Incidence du droit international humanitaire sur la cause défendue

A côté du *credo* qu'il est l'émanation de principes universellement reconnus et acceptés, le droit international humanitaire repose aussi sur l'idée - même si elle n'a pas été expressément mentionnée - qu'il est utile à tous les combattants sans pour autant avoir d'incidence négative sur l'issue de la guerre. C'est la raison principale pour laquelle les dispositions de ce droit concernant la conduite des hostilités (cette partie du droit international humanitaire que l'on connaît sous l'appellation de "*droit de La Haye*") ont été difficilement négociées et posent plus de problèmes que les autres, tant il est vrai que les militaires, on peut le comprendre, répugnent à se voir imposer des règles qui réduiraient leur chance de gagner la guerre. Les compromis trouvés lors de la Conférence diplomatique de 1974-1977 pour parvenir à introduire des dispositions dans ce domaine l'ont parfois été au prix de la clarté de celles-ci. L'on est aujourd'hui, de ce fait, confronté à des problèmes d'interprétation que l'on ne peut plus éluder vu la dynamique actuellement donnée aux dispositions pénales du droit international humanitaire, notamment par la création d'une Cour pénale internationale. Une incrimination pénale doit reposer sur des règles claires et l'absence d'une interprétation universellement agréée de dispositions essentielles du droit international humanitaire pourrait peser lourdement sur la crédibilité de la Cour pénale internationale.

Mais au-delà même de ces questions d'interprétation, un des graves problèmes auxquels il nous faut faire face dans les circonstances actuelles est précisément la contestation du fait que l'application du droit international humanitaire ne nuit pas au succès militaire. Cette contestation est avant tout fondée sur le déséquilibre flagrant et sans précédent des forces en présence dans certaines situations, notamment sur la suprématie incontestée des forces américaines sur toutes les autres. Dans ces situations, les Parties dont les forces armées n'ont aucune véritable chance de gagner une guerre à la régulière risquent indéniablement de voir dans le terrorisme - qui est la négation même du droit international humanitaire, on ne le soulignera jamais assez - leur seule planche de salut, leur seule manière de nuire véritablement à leur adversaire, de créer le trouble et d'obtenir gain de cause par lassitude. Le grand défi qui est devant nous - défi qui dépasse lui aussi largement du cadre du droit international humanitaire - est de réhabiliter l'idée que le respect de ce droit sert, et ne nuit en aucun cas, à la cause que l'on défend. Mais pour pouvoir s'en convaincre vraiment, il est nécessaire:

- d'abord, comme nous l'avons relevé ci-dessus, que tous les leaders respectés s'engagent pour défendre les principes fondamentaux du droit international humanitaire et dénoncent sans ambiguïté les actions terroristes, afin de diminuer le soutien populaire rencontré par leurs auteurs et, donc, l'impact politique des actes terroristes;
- ensuite, que l'on ne donne pas de primes au terrorisme en finissant par céder à ses exigences enfin,
- il faut le dire aussi, que l'on se penche avec équité même sur les revendications qui sont à la source des actes terroristes. Je sais que je vais susciter des réactions hostiles avec cette troisième affirmation, mais je l'assume et je m'en explique. Une bonne fin ne justifie pas de mauvais moyens et c'est précisément pourquoi on ne saurait jamais accepter de tels actes. Mais de mauvais moyens ne doivent pas occulter de justes fins. Je dis cela non pas pour prétendre que toutes les causes qui sont à la base d'actes terroristes sont bonnes - c'est bien loin d'être le cas - mais pour que l'on n'oublie jamais d'examiner les problèmes de fond sous le prétexte du terrorisme. Car c'est bien la frustration suscitée par des sentiments de profonde injustice qui fait naître dans des couches toujours plus larges de la population un soutien aveugle à des actions aussi intolérables que des attentats terroristes.

Les trois composantes de ma question préalable sont donc liées entre elles : le respect du droit international encadrant un ordre international juste et solidaire renforcerait la voix sans retenue que pourraient alors faire entendre les leaders moraux de notre monde pour soutenir le plein respect du droit international humanitaire. L'écho rencontré dans la population par des actes terroristes - et de ce fait la fréquence et l'efficacité de tels actes - serait alors considérablement réduit.

Vous voudrez bien m'excuser d'avoir beaucoup insisté sur ces questions préalables et de m'être ainsi quelque peu écarté du sujet que l'on m'avait assigné. Je l'ai toutefois fait délibérément pour éviter que l'on ne fasse du débat prévu lors de cette table ronde un miroir aux alouettes. J'ai très fortement le sentiment que c'est de la réponse aux différents aspects du problème que je viens d'évoquer que dépend la possibilité d'une amélioration sensible de la situation: la marge de manœuvre qui existe au sein du droit international

humanitaire et des autres branches du droit international à vocation humanitaire pour améliorer le sort des victimes de la guerre est étroite et c'est une questions d'honnêteté intellectuelle que de le reconnaître.

Cela dit, l'étroitesse de cette marge de manœuvre ne saurait être un prétexte pour ne pas explorer tout ce qui est possible : il n'y a pas de petit gain dans le domaine humanitaire. En ce sens, les exercices entrepris, notamment par le CICR, d'une part pour clarifier les dispositions du droit international humanitaire qui doivent l'être, d'autre part pour lancer le dialogue dans diverses régions du monde sur le moyen d'améliorer la mise en oeuvre du droit international humanitaire, sont tout à fait louables, comme l'est aussi l'initiative prise par l'Institut de San Remo de procéder à une analyse critique des instruments existants, basée sur la pratique.

Interaction du droit international des droits de l'homme et du droit international des réfugiés avec le droit international humanitaire

Je ne serai pas très long en ce qui concerne l'interaction des droits eux-mêmes. Pour moi elle est indéniablement positive. N'oublions pas que le droit international humanitaire est souvent confronté à des problèmes d'applicabilité: on peut contester l'existence d'un conflit armé. Il est donc essentiel d'avoir ce garde-fou que sont les droits de l'homme indérogables en tout temps, pour le respect desquels aucune échappatoire n'est possible.

Par ailleurs, même s'il a étendu son champ d'application par l'introduction à l'article 75 du Protocole I de l'obligation de respecter des garanties fondamentales pour les personnes détenues qui ne sont pas mieux protégées, le droit international humanitaire ne couvre ces personnes que "*dans la mesure où elles sont affectées par le conflit armé*", ce qui pose tout de même une limite. En d'autres termes, tous les prisonniers de droit commun qui sont détenus dans un pays en conflit ne sont pas couverts par cette disposition. Il est donc essentiel que les droits de l'homme continuent de s'appliquer: l'état et la gestion des prisons, et donc le sort de ces prisonniers, sont un terrible problème dans une multitude de pays, y compris ceux qui sont en guerre.

Bref, il ne fait aucun doute pour moi que le système actuel est pertinent et que le recoupement de ces deux corps de droit est bien préférable à un système qui verrait le droit international humanitaire se substituer, en tant que *lex specialis*, au droit des droits de l'homme.

En ce qui concerne le droit international des réfugiés, les points de recoupement sur le plan formel sont moins nombreux. Il y a néanmoins la question des réfugiés qui se trouvent dans un pays en conflit et il est clair là, vu l'approche différente des deux droits, que la complémentarité est également préférable. La question des réfugiés qui se trouvent à la frontière de pays en conflit soulève par ailleurs aussi de nombreux problèmes, mais personne ne nie l'applicabilité du droit des réfugiés et la responsabilité du HCR à cet égard, le droit international humanitaire ne s'appliquant pas directement, à moins que des activités militaires fomentées à partir de ces camps ne deviennent un *casus belli* et ne provoquent un conflit armé avec l'état hôte. Mais dans ces cas, l'utilité d'une approche complémentaire reste indiscutable. C'est ici aussi beaucoup plus dans la coordination opérationnelle qu'il faut travailler.

Un exemple à cet égard est la prise en charge du problème des disparitions et des réunions de famille - ce problème que le CICR a souhaité à juste titre mettre en priorité à l'agenda de la prochaine Conférence internationale de la Croix-Rouge et du Croissant-Rouge - dans les camps de réfugiés à la frontière congolaise après le génocide rwandais, ainsi que dans d'autres circonstances. La présence du CICR dans le pays en conflit et son expérience dans le domaine lui donnent indiscutablement un motif d'accomplir cette tâche et chacun le comprend.

La question des personnes déplacées à l'intérieur de leur pays dans une situation de conflit interne a donné lieu à des discussions un peu plus serrées dans la mesure où ces personnes ne sont pas couvertes par le mandat initial du HCR mais que les Etats lui ont demandé de s'en occuper dans certaines circonstances. Le CICR a insisté sur l'importance de s'occuper de la population civile dans sa globalité mais l'on a admis une certaine spécificité des besoins des personnes déplacées et une certaine similitude avec les problèmes de réfugiés. Je ne vais pas résumer en dix secondes un débat tout de même assez complexe mais, là aussi, le but recherché a été de trouver des solutions pratiques à des problèmes concrets et non pas de construire des cloisons juridiques.

Il est vrai que la même personne peut intéresser le CICR parce qu'elle est une personne civile, le HCR parce qu'elle est une personne déplacée, le Haut Commissariat des droits de l'homme parce qu'elle est victime de violations de ces droits, l'UNICEF parce qu'elle est un enfant, l'OMS parce qu'elle présente un problème de santé publique et diverses ONG parce qu'elle est une femme. Et même, si c'est une artiste, l'UNESCO pourrait aussi s'en mêler. Mais doit-on dire pour autant que dans les zones de conflit l'OMS ne s'occupera pas de santé publique ou l'UNICEF pas des enfants ? Bien sûr que non. C'est au niveau de la coordination, et peut-être aussi de la définition des priorités que le débat doit avoir lieu tant il est vrai que la réalité nous montre bien qu'il n'y a pas surabondance de protection et d'assistance, mais encore, bien souvent, des manques cruels. Une institution qui a un mandat aussi large que le Haut Commissariat des droits de l'homme, par exemple, doit tout particulièrement être attentive à engager ses moyens au service des personnes les moins bien protégées de la planète et pas forcément dans des régions qui font la une de l'actualité.

Complémentarité ou concurrence nuisible des moyens de mise en oeuvre

La question de la complémentarité positive ou d'une concurrence nuisible se pose aussi au niveau des instruments de mise en oeuvre. Il convient d'en dire quelques mots et je me concentrerai sur la question qui me paraît la plus intéressante à cet égard, celle du système des rapports qui est au coeur de la Commission des droits de l'homme. Est-il utile que de tels rapports traitent de situations de conflit armé ? Je laisse cette question à votre appréciation car je n'ai pas d'opinion arrêtée à ce sujet: je pense pour cette raison que l'évaluation entreprise par l'Institut de Sanremo sera particulièrement intéressante à cet égard. *A priori* je dirais que de tels rapports paraissent utiles dans la mesure où ils mettent en lumière des situations à problèmes dans un cadre politique qui permet de faire pression sur les Etats. Mais on ne peut pas non plus ignorer les critiques acerbes qui ont été adressées au travail de la Commission, notamment du fait des

compromis trouvés entre Etats pour ne pas traiter de certains sujets ou pour adoucir des rapports. Le résultat de tels compromis pourrait avoir l'effet négatif de conforter dans ses pratiques coupables un Etat qui serait passé entre les gouttes ou qui aurait fait l'objet d'une résolution trop modérée. Je laisse donc cette question ouverte et serais heureux d'entendre l'appréciation de personnes mieux à même que moi-même de faire cette évaluation.

En ce qui concerne le droit international des réfugiés, je ne vois pas de raison de s'y attarder. Je pense néanmoins qu'il serait utile de comparer la manière dont le HCR joue son rôle de "*gardien du droit des réfugiés*" avec celle dont le CICR joue celui de "*gardien du droit international humanitaire*". Il s'agirait notamment de comparer les contraintes qui pèsent sur ces Institutions, notamment le contrôle direct des Etats pour le HCR et la sécurité des délégués sur le terrain pour les deux Institutions.

Faut-il de nouveaux instruments de droit international humanitaire?

J'aborderai maintenant une dernière question avant de conclure : faut-il introduire de nouveaux instruments de mise en œuvre du droit international humanitaire, notamment en s'inspirant d'instruments existant dans d'autres droits. Cette question, parmi d'autres, a fait l'objet de discussions dans la série de séminaires régionaux organisés par le CICR que j'ai déjà évoquées et il sera intéressant de connaître les conclusions que l'on peut en tirer. Puisque nous avons le privilège d'être dans un cadre informel, je vais me permettre de donner quelques avis personnels pour permettre à des contradicteurs, dont je soupçonne qu'ils seront fort nombreux, de me sauter à la gorge et d'animer ainsi nos débats.

Une suggestion souvent faite et qui est encore dans l'air est celle d'instituer dans le droit international humanitaire un système de rapports comparable à celui des droits de l'homme. Certaines négociations préliminaires ont conduit à centrer cette idée sur des rapports concernant les mesures préventives prises par les Etats, notamment dans le domaine de l'instruction et de la diffusion du droit international humanitaire. La discussion doit rester ouverte mais puisqu'il faut se lancer à l'eau, je vous avouerai que je n'ai personnellement pas beaucoup de sympathie pour cette idée qui risque à mon avis - je n'ai pas le temps d'élaborer davantage - d'engendrer une bien lourde bureaucratie pour des résultats d'autant moins certains que l'on ne voit guère quelle sanction pourrait frapper les Etats qui ne feraient pas les rapports, ni ceux dont les rapports révéleraient les insuffisances.

La suggestion de créer un Haut Commissariat au droit international humanitaire ne rencontre pas davantage mon enthousiasme. Pour être efficace, une telle Institution devait être d'une grande ampleur et avoir un pouvoir d'investigation considérable. Elle se heurterait ensuite à d'inévitables problèmes de coordination, tout particulièrement avec le Haut Commissariat aux droits de l'homme, et serait enfin soumise, pour ses rapports, à la même pression politique que celle qui existe dans le cadre de la Commission des droits de l'homme. Je ne vois donc pas qu'elle puisse être un meilleur gardien du droit international humanitaire que le CICR.

Une autre idée est celle d'une commission de sages, qui avait été lancée par Médecins du Monde. La question clé est celle de savoir qui désignera les sages. Si c'est le monde politique, il y aura tant de contraintes dans la désignation que les élus risquent fort d'en perdre une bonne partie de leur sagesse, d'autant plus s'ils sont rééligibles. Il faudrait en outre à ces sages un appareil considérable pour pouvoir fonctionner intelligemment, même si, je l'admets volontiers, l'utilisation d'infrastructures existantes au sein de l'ONU pourrait faciliter la solution de ce problème.

Cela m'amène toutefois à une réflexion plus générale. Les instruments formellement prévus par les Etats sont-ils finalement plus efficaces que d'autres? Je crois là aussi qu'il serait utile de comparer l'efficacité de rapports d'Organisations comme Amnesty International ou Human Rights Watch avec ceux de la Commission des droits de l'homme. En l'occurrence, je pense qu'il y a indéniablement une complémentarité positive, mais j'hésiterais malgré tout fortement à préconiser la création de nouveaux instruments formels. Si, donc, de véritables sages s'en sentent la vocation, qu'ils créent un Comité chargé de veiller au droit international humanitaire. Leur efficacité dépendra beaucoup plus de leur autorité morale et du sérieux de leur rapport que du caractère formel ou informel d'un tel Comité.

Cela me conduit à une autre constatation, celle que, dans le droit international humanitaire, ce sont les instruments les plus souples qui ont le mieux fonctionné. Les deux instruments les plus soigneusement élaborés pour mettre en œuvre le droit international humanitaire, soit les Puissances protectrices et la Commission internationale d'établissements des faits, sont ceux qui ont le plus mal fonctionné, alors que des Institutions qui agissent avec souplesse, tel le CICR en général et ses Services consultatifs en particulier, ou même l'Institut de Sanremo dans lequel nous siégeons et qui n'a pas d'ancrage dans le droit international, ont réussi à jouer un rôle important pour la défense du droit international humanitaire. Cela, je crois, doit nous faire réfléchir à l'opportunité de se lancer dans de longues négociations pour construire formellement de nouveaux et lourds instruments.

J'irai un pas plus loin. Une question que l'on peut légitimement se poser à mon avis est celle de l'utilité de garder des moyens qui n'ont pas été utilisés. Je me souviens d'un fameux slogan publicitaire qui disait: *"la pile Wonder ne s'use que si l'on s'en sert"*. J'étais enfant et ce slogan m'avait interpellé car j'aurais été beaucoup plus sensible à une pile qui ne s'use jamais ou à des lacets incassables. Mais cette publicité passait bel et bien un message, celui que cette pile pouvait rester des années dans un placard et qu'elle resterait comme neuve jusqu'au jour où l'on en aurait besoin pour l'introduire dans une lampe de poche ou tout autre appareil.

Peut-on en dire autant des Institutions du droit international humanitaire? Je n'en suis pas certain et comme on me l'a dit récemment, une institution qui n'est pas utilisée se dégrade et sa crédibilité diminue. C'est certainement le cas des Puissances protectrices, dont il me paraîtrait honnête de reconnaître qu'elles ne servent plus à rien, pour mille raisons, dont la première est qu'elles ne peuvent fonctionner que dans le cadre de conflits armés internationaux et la deuxième que les Etats, ou en tout cas leur grande majorité, ne souhaitent vraiment ni les utiliser, ni jouer ce rôle difficile et coûteux. La tentative de renforcer cette institution moribonde lors de la Conférence diplomatique de 1974-1977 n'a pas abouti et même le CICR n'a

pas essayé sérieusement de mettre en marche le processus de désignation prévu dans le Protocole I de 1977, dans lequel il aurait pourtant un rôle spécifique à jouer. Bien sûr, je ne suggère pas de se perdre dans une procédure coûteuse et incertaine de révision du droit pour enterrer solennellement l'institution. Mais il s'agit de tirer honnêtement les conséquences d'un tel constat pour éviter de disperser son énergie.

De manière beaucoup plus nuancée, la même question pourrait se poser pour la Commission internationale d'établissement des faits, qui n'a pas jusqu'ici répondu aux attentes placées en elle puisqu'elle n'a jamais fonctionné. Sa crédibilité en souffre. Je n'irai certes pas jusqu'à préconiser son enterrement car elle n'a qu'une dizaine d'années et mérite donc indéniablement encore une chance. Par ailleurs, même si elle a également la tare de ne servir en principe que lors des conflits armés internationaux, ses membres ont, avec sagesse, surmonté cet obstacle en annonçant que la Commission était prête à agir également lors des conflits armés non internationaux, pour autant que toutes les Parties à ceux-ci le veuillent bien.

Ce qu'il faut retenir, c'est que le mode consensuel est inhérent à cette Commission. C'est logique, car il est pratiquement impossible de faire une enquête sérieuse sur des violations alléguées du droit international humanitaire si l'on n'a pas la possibilité d'enquêter sur le terrain. Or l'on ne voit guère comment la Commission pourrait imposer sa présence sans totalement changer de nature. Il n'est pas prévu, par ailleurs, que la Commission fasse grand bruit puisqu'elle doit se limiter à remettre ses conclusions aux parties concernées.

L'action de la Commission serait-elle donc finalement utile ? C'est une question qui mérite elle aussi d'être posée et sur laquelle on ne peut faire que des spéculations, faute de cas pratiques que l'on puisse analyser. Personnellement je continue de penser qu'elle pourrait contribuer utilement au respect du droit humanitaire si elle agissait avec doigté, soit si elle profitait de son enquête pour établir un dialogue et une relation de confiance avec les deux Parties concernées. Plus que par ses rapports - qui risqueraient fort d'être dénigrés ou exploités à des fins politiques si leur remise n'était pas précédée d'un dialogue approfondi - c'est, je crois, par cette manière d'agir que la Commission pourrait jouer un rôle modérateur important. Encore faudrait-il qu'elle soit acceptée, et c'est bien là aujourd'hui le noeud du problème.

On ne saurait pourtant nier le fait que la Commission, particulièrement par ses présidents successifs, a fait des efforts méritoires pour se faire connaître. On pourrait penser au premier abord que ces efforts se sont concentrés excessivement sur les *fora* de la diplomatie multilatérale et pas assez directement auprès des parties engagées dans des conflits armés. Mais ce serait ignorer que, en tout cas par un de ses anciens présidents présents dans cette salle, le professeur Frits Kalshoven, la Commission a aussi essayé d'approcher directement des Parties en conflit. Le professeur Kalshoven pourrait certainement nous en dire plus à ce sujet. Il serait dès lors peut-être utile, pour renforcer cet aspect du travail, de faire du président de la Commission un poste à plein temps, soutenu par un secrétariat renforcé. Ce serait là une manière de donner une nouvelle chance à cette Commission car il est indéniable que si elle ne réussit toujours pas à fonctionner dans les années qui viennent, il s'agira d'en tirer les conséquences et de renoncer à ce qui deviendrait de l'acharnement thérapeutique. Pour elle non plus, il ne s'agirait pas alors de procéder à un enterrement en grandes pompes, mais de la laisser dormir quelques années, comme la Belle au Bois dormant, sans plus

perdre d'énergie à la soutenir. Nous n'en sommes toutefois certainement pas encore là et mon vœu le plus cher est que cette sombre perspective agisse au contraire comme un stimulant pour tous ceux qui la soutiennent, et tout particulièrement ses membres et son secrétariat.

Cela me conduit à une dernière réflexion. L'histoire du droit international humanitaire a été marquée par une évolution qui, partant du simple énoncé des obligations des troupes combattantes, a tendu à inclure toujours davantage des dispositions concernant la mise en oeuvre de ce droit, soit en s'adressant directement aux Etats (obligation de traduire les Conventions, de les diffuser auprès des forces armées et du grand public, de se doter de conseillers juridiques, etc.), soit par l'introduction de mécanismes internationaux comme les Puissances protectrices ou la Commission internationale d'établissement des faits.

Une question que l'on peut aujourd'hui légitimement se poser est celle de savoir si, plutôt que de compléter encore les instruments introduits dans cette deuxième phase, il ne faudrait pas idéalement aller encore un pas plus loin dans une troisième phase qui fixerait l'intensité des actions prévues dans la deuxième. En d'autres termes, il s'agirait de déterminer des critères plus précis sur le contenu d'une obligation telle que celle de diffuser le droit humanitaire, en définissant les moyens qu'il convient au minimum de lui consacrer pour que l'on puisse prétendre qu'elle est remplie.

Je fais cette suggestion sans trop la prendre au sérieux car je crois qu'il serait ardu et peu productif de prétendre élaborer des normes conventionnelles dans ce sens. Je pense néanmoins que l'on devrait travailler davantage, de manière informelle, sur une définition plus précise du cadre dans lequel s'inscrivent de telles obligations. Elles n'ont en effet de sens que si on leur donne un contenu d'une certaine intensité et si l'on ne peut pas trop facilement prétendre les remplir en agissant "*au rabais*". C'est vrai pour l'obligation de diffuser le droit humanitaire, mais aussi pour de nombreuses autres règles, telle la fameuse obligation de "*faire respecter*" ce droit, qui lie toutes les Parties aux Conventions de Genève.

En conclusion sur ce point, j'aimerais simplement dire ma conviction qu'il est utile de soigneusement trier ce qui est valable de ce qui ne l'est pas, autant dans les instruments existant que dans de nouvelles suggestions, pour éviter de se disperser. Ignorons ce qui est mauvais et renforçons ce qui est bon. N'oublions pas en effet aussi l'aspect financier de ces questions et avant de se lancer dans de nouvelles aventures aléatoires, il convient de se demander si les instruments qui ont fait leur preuve disposent des moyens suffisants et pourraient être consolidés. Si vous posez la question au Haut Commissariat des réfugiés ou à celui des droits de l'homme, au CICR ou même à l'Institut de San Remo, je suspecte qu'aucun d'entre eux ne vous dira qu'il dispose de trop d'argent pour accomplir pleinement sa tâche.

Remarques finales

Mesdames, Messieurs, il est temps de conclure et je résume ma pensée en quatre points :

Il n'y aura pas de solution en profondeur aux problèmes les plus graves rencontrés aujourd'hui dans l'application du droit international humanitaire si l'on ne parvient pas à bâtir un véritable consensus sur la marche du monde et sur le contenu des règles internationales qui doivent le régir, dans un but de paix et de justice. Sans accord sur ces règles, sans un strict respect de celles-ci, c'est toute la morale internationale qui

s'effondrera et qui emportera avec elle même les règles les plus fondamentales du droit international humanitaire.

Il ne faut pas créer de cloisons entre les différents corps de droit protégeant la personne humaine dans les situations de conflit armé mais consolider les efforts concrets et pratiques pour coordonner l'action de tous ceux qui oeuvrent à la mise en œuvre de ces corps de droit.

Le droit international humanitaire a indéniablement un effort de clarification à poursuivre dans différents domaines mais il serait erroné de perdre une énergie considérable à entreprendre une large révision de ce droit, qui ne se justifie pas.

Il faut évaluer avec rigueur les instruments de mise en oeuvre du droit international humanitaire et concentrer son énergie, et son argent, à consolider ce qui marche ou ce qui est réellement prometteur. Sans du tout prétendre être exhaustif, j'aimerais mentionner là, outre les institutions déjà évoquées, la toute nouvelle Cour pénale internationale, qui devrait jouer un rôle important dans l'ordre international et qu'il est impératif de soutenir avec toute l'énergie voulue. J'ajouterai aussi, et pas seulement parce que nous avons la chance que l'un de ses membres assure la présidence de cette séance, que la Cour internationale de Justice mérite également tout notre soutien. Son travail intense ces dernières années est une manifestation encourageante que se construit, malgré les tourmentes actuelles, un ordre international plus fort, plus cohérent et plus juste, sans lequel tous les efforts pour faire mieux appliquer le droit international humanitaire demeureront vains.

Je vous remercie de votre attention.

International Humanitarian Law as "lex specialis"

Yoram Dinstein

Professor of Human Rights and Pro-President (Tel Aviv University);

Member, International Institute of Humanitarian Law.

It is easy to assume - wrongly - that International Humanitarian Law is “a legal system concerning the protection of human rights in armed conflicts”.⁹⁰ This can be a misconception. Although the expressions “human” and “humanitarian” strike a similar chord, it is essential to resist any temptation to regard them as intertwined or interchangeable. The adjective “human” in the phrase “human rights” points at the subject in whom the rights are vested: human rights are conferred on human beings as such (without the interposition of States). In contrast, the adjective “humanitarian” in the term International Humanitarian Law merely indicates the considerations that may have steered those responsible for the formation and formulation of the legal norms. International Humanitarian Law is the law channeling conduct in international armed conflict, with a view to mitigating human suffering.

Undeniably, International Humanitarian Law contains norms protecting human rights. However, many of the rights established by International Humanitarian Law are granted exclusively to States and not to individual human beings. A comparison of some provisions of the Geneva Conventions of 1949 (the core of International Humanitarian Law) easily demonstrates that they cover both State rights and human rights.

Article 7 of Geneva Convention (I) sets forth:

*“Wounded and sick, as well as members of the medical personnel and chaplains, may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention”.*⁹¹

Parallel stipulations appear in Geneva Convention (II) (embracing the same categories plus shipwrecked persons);⁹² Geneva Convention (III) (relating to prisoners of war);⁹³ and Geneva Convention (IV) (pertaining to “[p]rotected persons”).⁹⁴ The phrase “rights secured to them” palpably denotes that these rights are bestowed directly on individuals belonging to the categories indicated, and that they are not only State rights from which individuals derive benefit.⁹⁵

On the other hand, Article 16 of Geneva Convention (I) includes the following obligation in its fourth Paragraph, dealing with enemy dead persons:

⁹⁰ S. MIYAZAKI, “The Martens Law and International Humanitarian Law”, in C. SWINARSKI (ed.) *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 1984, p. 433.

⁹¹ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, reproduced in *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, D. SCHINDLER & J. TOMAN (eds.), 3rd ed., 1988, pp. 373-377

⁹² Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, *ibidem*, pp. 401-405 (Article 7).

⁹³ Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, *ibidem*, pp.423-432 (Article 7).

⁹⁴ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, *ibidem*, pp. 495-504 (Article 8).

⁹⁵ See *Commentary, Geneva Convention I*, J.S. PICTET (ed.), Geneva, ICRC, 1952 pp 82-83.

“Parties to the conflict shall prepare and forward to each other through the same bureau [Information Bureau], certificates of death or duly authenticated lists of the dead”.⁹⁶

The clause then goes on to ordain that the Parties to the conflict are to collect and forward to one another itemized personal effects of the deceased.⁹⁷ A matching duty appears in Geneva Convention (II).⁹⁸ Indisputably, the right to receive death certificates and personal effects – corresponding to the obligation to prepare and forward them – is accorded not to individual human beings, but to belligerent States. Human beings, in this instance the next of kin, will benefit from the implementation of the provision, but the right is not conferred directly on them.

These illustrations admittedly represent cases of unusual clarity. At times, it is not so easy to determine whether the entitlements created by International Humanitarian Law amount to human rights or to State rights. Moreover, a duty incurred by a belligerent State may engender corresponding rights both for the enemy belligerent (State right) and for an individual affected (human right). This is exemplified by Article 33 of Geneva Convention (IV) with respect to civilians:

“No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited”.⁹⁹

The first sentence is glaringly couched in individual human rights terminology. But the second sentence, cast in general terms and affecting groups of people – perhaps even the civilian population as a whole – is more relevant to the legal relations between the two adversary Parties. The existence of dual rights (a State right and an individual human right), corresponding to a single obligation devolving on the enemy State, is conducive to a better protection regime. The individual may stand on his right without necessarily relying on the good will of his belligerent State, and symmetrically the belligerent State has a *jus standi* of its own. Each is empowered to take whatever steps are available and deemed appropriate by virtue of the separate (State or individual) right, and neither one is capable of waiving the other’s independent right.

It ought to be stressed that all rights and duties created by International Humanitarian Law (including human rights and their corresponding duties) come into play upon the outbreak of an international armed conflict, and they remain fully applicable throughout the conflict. Rights created by International Humanitarian Law – whether human rights or state rights - are in force, in their full vigour, in wartime (as well as in hostilities short of war), inasmuch as they are directly engendered and shaped by the special demands of the armed conflict. Derogation from rights created by International Humanitarian Law is possible in some extreme instances,¹⁰⁰ but it is limited to specific persons or situations and no others.

In this crucial respect, International Humanitarian Law's human rights are utterly different from ordinary (peacetime) human rights. Ordinary (peacetime) human rights are frequently subject to restrictions,

⁹⁶ Geneva Convention (I), *supra* note 2, p. 381.

⁹⁷ *Ibid.*, *id.*

⁹⁸ Geneva Convention (II), *supra* note 3, p. 410 (Article 19).

⁹⁹ Geneva Convention (IV), *supra* note 5, p. 511.

¹⁰⁰ See Article 5 of Geneva Convention (IV), *ibid.*, p. 503; and Article 54(5) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, *op. cit.*, *supra* note 2, p. 621, 653.

which can be placed on their exercise "*in the interests of national security or public safety*".¹⁰¹ Even more significantly, the application of ordinary (peacetime) human rights - whether or not restricted - can usually be derogated from in time of an international armed conflict.

The derogation from ordinary (peacetime) human rights is authorized, *e.g.* in Article 4(1) of the 1966 International Covenant on Civil and Political Rights:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".¹⁰²

Although Article 4(1) avoids a direct reference to war, there is general recognition that war "*represents the prototype of a public emergency that threatens the life of the nation*".¹⁰³ Indeed, the *travaux préparatoires* divulge that war was uppermost in the minds of the drafters of the derogation clause.¹⁰⁴ It is worth noting that Article 15(1) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, in laying down a comparable derogation clause, adverts expressly to a "*time of war or other public emergency threatening the life of the nation*".¹⁰⁵ When derogation from ordinary (peacetime) human rights occurs, one can say that the (war-oriented) human rights created by International Humanitarian Law fill much of the vacant space. This is of particular import if due process of law is imperilled. Peacetime judicial guarantees may be derogated from in wartime, yet International Humanitarian Law introduces other minimum guarantees in their place.¹⁰⁶

Not all peacetime human rights are derogable in wartime (or in any other public emergency). Article 4(2) of the Covenant forbids any derogation from itemized human rights.¹⁰⁷ These are the right to life; freedom from torture or cruel, inhuman or degrading treatment or punishment (including non-subjection to medical or scientific experimentation without free consent); freedom from slavery or servitude; freedom from imprisonment on the ground of inability to fulfil a contractual obligation; freedom from being held guilty of any act or omission which did not constitute a criminal offence at the time of its commission, or being subject to a heavier penalty than the one applicable at that time; the right to recognition as a person before the law; freedom of thought, conscience and religion.

Some of the non-derogable rights enumerated in Article 4(2) have little or no special impact in wartime, as attested by the right to recognition as a person. The right to life is more directly apposite, but it

¹⁰¹ For instance, freedom of assembly and freedom of association, as per Articles 21 and 22(2) of International Covenant on Civil and Political Rights, 1966, [1966], United Nations Juridical Yearbook 178, 184-185.

¹⁰² *Ibid.*, 180.

¹⁰³ M. NOWAK, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 1993, p. 78.

¹⁰⁴ See A.-L. SVENSON-MCCARTHY, *The International Law of Human Rights and States of Exception with Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs*, 1988, p. 214.

¹⁰⁵ [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 213 United Nations Treaty Series 222, 232.

¹⁰⁶ See R.E. VINUESA, "*Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law*", *Yearbook of International Humanitarian Law*, Vol 1, 1998, pp. 69-89.

¹⁰⁷ International Covenant on Civil and Political Rights, *supra* note 12, at 180.

does not protect persons from the ordinary consequences of hostilities (which can lead to catastrophic losses of human lives). An exception to the non-derogation clause "*in respect of deaths resulting from lawful acts of war*" is explicitly made in Article 15(2) of the European Convention.¹⁰⁸ As for the Covenant, the International Court of Justice held in the 1996 Advisory Opinion on Nuclear Weapons that, in the conduct of hostilities, the test of an (unlawful) arbitrary deprivation of life is determined by the *lex specialis* of the Law of Armed Conflict (LOAC).¹⁰⁹ In time of international armed conflict, the right to life is tied to "*acts such as the killing of prisoners [of war] and the execution of hostages*",¹¹⁰ which are specifically prohibited by LOAC.

Other non-derogable human rights usually coincide with rights established directly by LOAC. Thus, torture in international armed conflicts is forbidden by LOAC treaties: both in general¹¹¹ and in the specific contexts of the wounded, sick and shipwrecked;¹¹² prisoners of war;¹¹³ and civilians.¹¹⁴ The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia held in the *Furundzija* case, in 1998, that the International Humanitarian Law prohibition of torture constitutes a preemptory norm of customary international law (*jus cogens*).¹¹⁵ This interdiction engendered by International Humanitarian Law operates independently of non-derogable human rights.

Torture is by no means the only activity detrimental to human rights banned directly by International Humanitarian Law. By and large, assuming that a belligerent State has issued the proclamation that is a prerequisite to the derogation of ordinary (peacetime) human rights, most of the substantive protection of human rights in the course of an international armed conflict stems from International Humanitarian Law and not from the continued operation of non-derogable (peacetime) human rights.

International Humanitarian Law may even guarantee human rights to a greater extent than this is done by a non-derogable human right under the Covenant. A case in point is freedom from medical experimentation. Article 7 of the Covenant (a non-derogable provision) states that "*no one shall be subjected without his free consent to medical or scientific experimentation*".¹¹⁶ The Geneva Conventions go beyond the issue of consent and forbid subjecting a prisoner of war to "*medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest*",¹¹⁷ or a civilian to "*medical or scientific experiments not necessitated by the medical treatment of a protected person*".¹¹⁸ Additional Protocol I of 1977 - in dealing with internees, detainees and

¹⁰⁸ [European] Convention, *supra* note 16, at p. 232.

¹⁰⁹ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, [1996], ICJ Report 226, 240.

¹¹⁰ See A.H. ROBERTSON and J.G. MERRILLS, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights*, 4th ed., 1996, p.412.

¹¹¹ Protocol I, *supra* note 11, at 665 (Article 75(2)(a)(ii)).

¹¹² Geneva Convention (I), *supra* note 2, at 379 (Article 12, 2nd para.); Geneva Convention (II), *supra* note 3, at 408 (Article 12, 2nd para.).

¹¹³ Geneva Convention (III), *supra* note 4, at 436 (Article 17, 4th para.).

¹¹⁴ Geneva Convention (IV), *supra* note 5, at 511 (Article 32).

¹¹⁵ ICTY, Trial Chamber, *Prosecutor v. Furundzija*, Judgment (1998), 121 International Law Reports 213, pp. 254-257, pp. 260-261.

¹¹⁶ International Covenant on Civil and Political Rights, *supra* note 12, at 181.

¹¹⁷ Geneva Convention (III), *supra* note 4, at 435 (Article 13, 1st para.).

¹¹⁸ Geneva Convention (IV), *supra* note 5, at 511 (Article 32).

other persons who are in the power of the adverse Party – expatiates on the theme, ruling out for instance removal of tissue or organs for transplantation even with the consent of donor (except in cases of blood transfusion or skin grafting).¹¹⁹ Of course, there is a good reason for the extra caution shown by the framers of the Protocol, since “the persons concerned here are especially vulnerable in this field”.¹²⁰ But, without disparaging the non-derogable clause of the Covenant, the fact remains that International Humanitarian Law is more advanced on this specific issue.

The continued operation in wartime of non-derogable human rights - side by side with the norms of International Humanitarian Law - may prove of signal benefit to some individual victims of breaches. The reason is that, when it comes to seeking remedies for failure to comply with the law (such as financial compensation), human rights law may offer effective channels of action to individuals, whereas no equivalent avenues are opened by International Humanitarian Law.¹²¹ This is particularly manifest when human rights instruments set up supervisory organs (epitomized by the European Court of Human Rights) vested with jurisdiction to provide adequate remedies to victims of breaches. On the other hand, the European Court of Human Rights - in the 2001 *Bankovic* case - declared inadmissible applications by relatives of civilians killed or injured in a NATO bombing of the Belgrade Television and Radio Station (during the 1999 Kosovo air campaign), because of lack of “any jurisdictional link” between the alleged victims and the acts in complaint.¹²² The Court concluded that the responsibility of States under the European Convention on Human Rights is essentially territorial, not covering acts of war outside their territories.¹²³ Such acts, removed from the protection of human rights instruments, are the main thrust of regulation by International Humanitarian Law.

¹¹⁹ Protocol I, *supra* note 11, at 633-4 (Article 11).

¹²⁰ Y. SANDOZ, “Article 11”, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Y. SANDOZ et al. (eds.), Geneva, ICRC, 1987, pp. 149-156.

¹²¹ See R. PROVOST, *International Human Rights and Humanitarian Law*, 2002, p.45.

¹²² European Court of Human Rights, *Bankovic et al. v. Belgium et al.* (2001), 41 *International Legal Materials* 517, 530 (2002).

¹²³ *Ibid.*, 526.

Conflit armé non international: interaction des différents régimes juridiques

Djamchid MOMTAZ

Professeur à l'Université de Téhéran. Membre de la Commission du droit international des Nations Unies.

Membre de l'Institut International de Droit Humanitaire.

L'article 3 commun aux quatre Conventions de Genève du 12 août 1949, qui fixe pour la première fois les règles minimales applicables à un conflit armé ne présentant pas un caractère international, ne donne aucune définition de cette catégorie de conflits armés. Néanmoins, en vue de dissiper tout malentendu, le Commentaire de cet article, préparé par les soins du Comité international de la Croix-Rouge, précise que seuls sont visés les conflits armés qui opposent, à l'intérieur du territoire d'un Etat, les forces armées d'une partie contractante à des groupes armés dissidents et qui présentent bien les aspects d'une guerre intérieure. Ceci exclut, ainsi que le Commentaire ne manque pas de le relever, les troubles et tensions internes.¹²⁴

Le Protocole II additionnel à ces Conventions, adopté le 17 juin 1977, qui "*développe et complète l'article 3 commun*",¹²⁵ exclut par contre expressément de son champ d'application matériel de telles situations. Il en va de même des conflits armés dans lesquels les peuples luttent contre la domination coloniale, l'occupation étrangère et les régimes racistes que le Protocole I additionnel à ces mêmes Conventions qualifie désormais de conflits armés internationaux.¹²⁶

En revanche, relèvent du Protocole II additionnel les conflits armés qui se déroulent sur le territoire d'une partie contractante entre ses forces armées et des forces armées dissidentes s'ils répondent aux deux conditions cumulatives fixées par cet instrument: tout d'abord le contrôle d'une partie du territoire national par les forces armées dissidentes, première condition qui leur permettrait de mener des opérations militaires continues et concertées et d'appliquer les dispositions du Protocole, deuxième condition exigée.¹²⁷

Cette définition ne viserait ainsi que les conflits armés d'une certaine intensité et exclurait du champ d'application matériel du Protocole la plupart des conflits armés non internationaux contemporains, à savoir les conflits armés non internationaux, qui opposent deux ou plusieurs factions armées sans l'intervention des forces armées gouvernementales ainsi que ceux qui se prolongent dans le temps sans que les forces armées dissidentes ne parviennent à contrôler une partie du territoire national.¹²⁸

¹²⁴ J. PICTET, *Commentaire de la Convention de Genève relative à la protection des personnes civiles en temps de guerre*, CICR, Genève, 1956, p. 42.

¹²⁵ Art. 1 du Protocole II additionnel.

¹²⁶ Art. 1 du Protocole II additionnel.

¹²⁷ Art. 1 du Protocole II additionnel.

¹²⁸ D. MOMTAZ, "Le droit international humanitaire applicable aux conflits armés non internationaux", *Recueil des Cours de l'Académie de Droit International*, Tome 292, Martinus Nijhoff Publishers, 2002, pp. 51 et s.

La définition que le Tribunal Pénal International pour l'ex Yougoslavie a donnée dans son arrêt du 2 octobre 1995, dans l'affaire *Tadic*, présente l'avantage de pallier cette lacune. D'après le Tribunal, un conflit armé non international existe quand il y a "*un conflit armé prolongé*" entre les forces armées gouvernementales et des groupes armés organisés et entre de tels groupes dans le cadre du territoire du même Etat.¹²⁹ Cette nouvelle catégorie de conflits armés non internationaux a été consacrée par le Statut de Rome pour la Cour Pénale Internationale adopté le 18 juillet 1998. Les violations graves des lois et coutumes de guerre autres que les violations graves de l'article 3 commun telles qu'identifiées par l'article 8 du Statut, ne relèveraient de la compétence de la Cour que si elles ont été commises dans le cadre des conflits armés non internationaux répondant à ces conditions et non à celles auxquelles le Protocole II additionnel se réfère.

Dans la mesure où cette nouvelle définition dégagée par le Tribunal pénal pour l'ex Yougoslavie a pour conséquence d'étendre le champ d'application matériel des dispositions du Protocole II additionnel ainsi que des règles coutumières applicables aux conflits armés non internationaux, et ce à l'avantage des victimes, on ne saurait évidemment s'abstenir d'étendre les effets bénéfiques de l'interaction des différents régimes juridiques à cette nouvelle catégorie de conflits armés. Ainsi, au cours des conflits armés non internationaux, quelles que soient leur intensité et leurs caractéristiques, les droits fondamentaux de l'homme s'appliquent (I) et s'interprètent à la lumière du droit international humanitaire (II).

I – Les droits fondamentaux de l'homme s'appliquent au cours des conflits armés non internationaux

La règle selon laquelle les droits fondamentaux de l'homme s'appliquent au cours des conflits armés non internationaux n'est désormais plus contestée. Le droit positif l'énonce expressément et la jurisprudence internationale l'a confirmée à maintes reprises.

Une règle de droit positif

En se fondant sur les travaux préparatoires de la Déclaration universelle des droits de l'homme du 10 décembre 1948, il semblerait au premier abord que les droits qu'elle énonce ne s'appliquent qu'en période de paix, et ce d'autant plus que la Déclaration laisse totalement à l'écart la question du respect des droits de l'homme dans les conflits armés.¹³⁰ La déclaration du Président de la Conférence de Genève de 1949 qui a adopté les quatre Conventions de Genève n'est pourtant pas de nature à confirmer cette interprétation. En effet, ce dernier précisait à cette occasion que la Déclaration et les Conventions procèdent du même idéal et que certains droits fondamentaux que la première proclame sont à la base de

¹²⁹ Arrêt relatif à l'appel de la défense concernant l'exception préjudicielle d'incompétence, *Le Procureur c. Dusko Tadic, alias "Dule"*, affaire n° II-94-I-AR, 72, 2 octobre 1995, § 70.

¹³⁰ R. KOLB, "Aspects historiques de la relation entre le droit international humanitaire et les droits de l'homme", *Annuaire Canadien de Droit International*, Tome XXXVII, 1999, pp. 66 et s.

ces instruments.¹³¹ Il va sans dire que dans les deux cas le but poursuivi était un respect accru de la condition humaine par l'Etat, cette filiation étant encore plus étroite dans le cas du droit international humanitaire applicable aux conflits armés non internationaux dans la mesure où ce sont les rapports de l'Etat avec ses propres citoyens qui sont en cause.¹³² L'article 3 commun est la manifestation la plus éclatante de cette filiation. Ses dispositions reflètent en effet, ainsi que la Cour internationale de Justice l'a souligné dans son arrêt du 27 juin 1986 rendu dans l'affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci, des "*considérations élémentaires d'humanité*".¹³³ D'après cet article, les parties à ces conflits armés sont tenues de traiter les personnes qui ne participent pas directement aux hostilités, y compris les membres des forces armées qui ont déposé les armes ainsi que les personnes mises hors combat pour quelque raison que ce soit, avec humanité et sans aucune distinction de caractère défavorable. Il est vrai que les rédacteurs de l'article 3 ont préféré se fonder sur les dispositions du droit international humanitaire alors qu'ils auraient pu s'inspirer des dispositions pertinentes de la Déclaration universelle, preuve s'il en est de l'absence "*d'influence réciproque réelle*"¹³⁴ des négociateurs de ces deux textes. Quoiqu'il en soit, cet article doit être considéré comme le point de convergence entre le droit international des droits de l'homme et le droit international humanitaire et a été à l'origine du mouvement en faveur du respect des droits de l'homme au cours des conflits armés.

C'est au lendemain de la guerre des six jours et en raison du refus d'Israël d'appliquer les dispositions pertinentes de la quatrième Convention de Genève dans les territoires Palestiniens¹³⁵ qu'il venait d'occuper que le Conseil de Sécurité fut amené, par sa Résolution 237, à insister sur le fait que "*les droits de l'homme essentiels et inaliénables doivent être respectés même dans les vicissitudes de la guerre*".¹³⁶ Cette prise de position avait alors été accueillie avec grande satisfaction par l'Assemblée Générale.¹³⁷

La Conférence de Téhéran, convoquée du 22 avril au 13 mai 1968 par l'Assemblée Générale à l'occasion du vingtième anniversaire de la Déclaration universelle, allait permettre une prise de conscience accrue par la communauté internationale de l'existence d'un lien entre le droit international des droits de l'homme et le droit international humanitaire. Cette prise de conscience s'est concrétisée par l'adoption par cette Conférence d'une Résolution intitulée "*Respect des droits de l'homme en période de conflit armé*" sans distinction aucune, qui situe désormais le droit international humanitaire dans le prolongement des droits de l'homme.¹³⁸ L'adoption, le 16 décembre 1966, des deux Pactes sur les droits de l'homme, plus particulièrement celui relatif aux droits civils et politiques, sera à l'origine d'un nouvel

¹³¹ R. KOLB, "Relations entre le droit international humanitaire et les droits de l'homme", *Revue Internationale de la Croix Rouge*, septembre 1998, 80^{ème} année, n° 831, p. 444.

¹³² M. EL KOUHENE, *Les garanties fondamentales de la personne en droit humanitaire et droits de l'homme*, Martinus Nijhoff Publishers, 1986, p. 6.

¹³³ CIJ, *Recueils*, 1986, § 218.

¹³⁴ R. KOLB, *op.cit.*, *supra*, note 8, p. 445.

¹³⁵ Y. BLUM, "The Missing Reversioner Reflections on the Status of Judea and Samaria", *Israel Law Review*, Vol. 3, 1968, pp. 279 et s.

¹³⁶ Résolution 237 du 14 juin 1967.

¹³⁷ Résolution 2252, ES/V du 4 juillet 1967.

¹³⁸ Résolution XXIII adoptée le 12 mai 1968.

élan dans ce sens. C'est en se fondant sur les dispositions de ce dernier Pacte que l'Assemblée Générale adoptait le 9 décembre 1970 une nouvelle résolution axée cette fois sur les "*principes fondamentaux touchant la protection des populations civiles en cas de conflit armé*".¹³⁹ Le premier de ces principes affirme que "*les droits fondamentaux de l'homme, tels qu'ils sont acceptés par le droit international et énoncés dans les instruments internationaux, demeurent applicables en cas de conflit armé*".

Le Protocole II additionnel est le premier instrument de droit international humanitaire qui se réfère expressément au droit international des droits de l'homme. Le deuxième considérant de son préambule affirme en effet que "*les instruments internationaux relatifs aux droits de l'homme offrent à la personne humaine une protection fondamentale*". Il s'agit entre autres, d'après le Commentaire du Comité international de la Croix-Rouge, de la Déclaration universelle des droits de l'homme et des Pactes qui en sont dérivés, mais aussi d'instruments régionaux comme la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales du 4 novembre 1950 et la Convention américaine relative aux droits de l'homme du 22 novembre 1969.

Cette mention des instruments de droits de l'homme se justifie dans la mesure où ils se réfèrent, en termes plus ou moins identiques, à des droits auxquels il est interdit en toutes circonstances de déroger. Il s'agit généralement des droits dont le respect, au cours des conflits armés non internationaux, présente les meilleures garanties pour la protection de la personne humaine contre l'arbitraire des parties au conflit. L'article 4 du Pacte, pour ne prendre que cet exemple, qualifie de non dérogeables notamment le droit à la vie, l'interdiction des traitements inhumains ainsi que la règle de non rétroactivité des lois et des peines. La Cour internationale de Justice, dans son avis consultatif du 7 juillet 1996 relatif à la licéité de la menace et de l'emploi d'armes nucléaires, a relevé très clairement que les droits non dérogeables, tels qu'identifiés par cet article, continuent à s'appliquer en temps de guerre.¹⁴⁰

Le Comité des droits de l'homme, dans son "*observation générale relative à l'article 4*" rendue le 24 juillet 2001,¹⁴¹ ne semble pas vouloir se limiter à l'énumération des droits non dérogeables telle qu'elle figure dans cet article. En se fondant sur l'évolution du droit international, le Comité parvient en effet à cette conclusion qu'il existe désormais d'autres droits fondamentaux auxquels il n'est guère possible de déroger.¹⁴² D'après le Comité, les Etats parties au Pacte ne peuvent en aucune circonstance invoquer l'article 4 "*pour justifier des actes attentatoires au droit humanitaire ou aux normes impératives du droit international, par exemple une prise d'otages, des châtiments collectifs, des privations arbitraires de liberté ou l'inobservation de principes fondamentaux garantissant un procès équitable comme la présomption d'innocence*".¹⁴³ Cette «Observation» est conforme à l'attitude adoptée par certains groupes d'Etats en ce domaine. On en veut pour preuve la Charte africaine des droits de l'homme et des peuples du 26 juin 1981 qui ne prévoit pas, contrairement aux autres instruments régionaux, de clause

¹³⁹ Résolution 2675 du 9 décembre 1970.

¹⁴⁰ CIJ, Recueils, 1996, § 25.

¹⁴¹ HRI/GEN/1/Rev. 5/Add 1, 18 avril 2002, pp. 2 s.

¹⁴² Par. 10 de l'Observation générale

¹⁴³ Par. 11 de l'Observation générale

échappatoire.¹⁴⁴ De même, les Etats membres de l'Organisation pour la sécurité et la coopération, dans le cadre de la Déclaration de Moscou du 3 octobre 1991, ont renoncé à recourir aux clauses dérogatoires des instruments de droits de l'homme auxquels ils sont parties.¹⁴⁵

Bien qu'on ne puisse toujours pas déterminer avec précision la sphère de convergence du droit international des droits de l'homme et du droit international humanitaire, il ne fait désormais guère de doute qu'il existe bel et bien un consensus sur la nécessité de respecter les droits fondamentaux de l'homme durant les conflits armés,¹⁴⁶ consensus confirmé par la Déclaration et le Programme d'action adoptés le 25 juin 1993 par la Conférence mondiale sur les droits de l'homme, réunie à Vienne, qui demandent aux parties aux conflits armés de respecter les règles humaines minimales de protection des droits de l'homme résultant des Conventions internationales.¹⁴⁷ Pour ce qui est des conflits armés non internationaux, qui nous intéressent en premier lieu, l'Institut de droit international vient de rappeler que "*les principes et règles du droit international garantissant les droits fondamentaux de l'homme*" leur étaient applicables¹⁴⁸. La jurisprudence internationale a eu d'ores et déjà à plusieurs reprises l'occasion de se prononcer sur l'applicabilité des droits fondamentaux de l'homme en période de conflit armé.

Une règle confirmée par la jurisprudence internationale

Le principe de l'applicabilité des règles fondamentales du droit international des droits de l'homme lors des conflits armés a été admis pour la première fois par la Cour internationale de Justice, et ce avant même l'adoption des quatre Conventions de Genève. En effet, dans son arrêt rendu le 9 avril 1949 dans l'affaire du détroit de Corfou opposant le Royaume-Uni à l'Albanie, la Cour se référait déjà à "*certaines principes généraux et bien reconnus tels que des considérations élémentaires d'humanité, plus absolus encore en temps de paix qu'en temps de guerre*".¹⁴⁹ Il est vrai que, d'après ce *dictum*, la différence entre le droit international des droits de l'homme et le droit international humanitaire ne se limiterait pas à une question d'applicabilité puisque la Cour ne semble pas vouloir accorder le même degré d'importance au respect de ces principes dans les deux situations évoquées. Depuis, ainsi que l'atteste son avis consultatif sur la question de la licéité de la menace et de l'emploi de l'arme nucléaire, la jurisprudence de la Cour exclut toute possibilité d'entorse à ces principes en période de conflit armé. Il en va de même de la jurisprudence des Cours interaméricaine et européenne des droits de l'homme.

¹⁴⁴ F. OUGUERGOUZ, "L'absence de clause de dérogation dans certains traités relatifs aux droits de l'homme", *Revue General de Droit International Public*, 1994, n° 2, pp. 289-336.

¹⁴⁵ *Conférence sur la sécurité et la coopération en Europe*, déclaration du 3 octobre 1991, in *International Legal Materials*, Vol. XXX, 1991, pp. 1670 s.

¹⁴⁶ Rapport sur la situation des droits de l'homme dans le Koweït sous occupation irakienne présenté par le Secrétaire Général, "*Rapport Walter Kalin*", E/CN.4/1992/26.

¹⁴⁷ Par. 29 de la "Déclaration de Vienne et le programme d'action", *International Legal Materials*, Vol. XXXII, p. 1671.

¹⁴⁸ *Résolution relative à l'application du droit international humanitaire et des droits fondamentaux de l'homme dans les conflits armés auxquels prennent part des entités non étatiques*, adoptée par l'Institut de Droit International, 17-25 août 1999, Berlin.

¹⁴⁹ C.I.J., *Recueils*, 1949, p. 22.

Dans l'affaire *Juan Carlos Abella c. Argentine*, plus connue sous le nom «affaire Tablada», la Commission interaméricaine des droits de l'homme relevait, dans son rapport du 18 novembre 1997,¹⁵⁰ que la Convention interaméricaine partageait avec d'autres instruments universels et régionaux des droits de l'homme ainsi qu'avec les Conventions de Genève de 1949 un noyau commun de droits auxquels il est impossible de déroger. Ces droits s'appliquent aussi bien en temps de paix qu'en situation de conflit armé. D'après la Commission, bien que tout instrument juridique délimite son propre champ d'application, il n'en demeure pas moins que les règles générales des Traités de droits de l'homme s'appliquent aux conflits armés non internationaux au même titre que les règles plus spécifiques du droit international humanitaire.¹⁵¹

Dans son rapport du 29 septembre 1999 dans l'affaire *Coard et autres c. Etats-Unis*,¹⁵² la Commission, tout en reprenant cette argumentation, précisait que bien que, par définition, ces deux branches de droit international, à savoir le droit international des droits de l'homme et le droit international humanitaire, s'appliquent dans des situations différentes, l'application potentielle de l'un n'exclut ni ne remplace nécessairement l'application de l'autre.¹⁵³ Enfin, dans l'une de ses dernières décisions en date du 12 mars 2002 concernant la demande de mesures conservatoires dans l'affaire des détenus de Guantanamo Bay, la Commission confirme une nouvelle fois sa jurisprudence antérieure. D'après elle, sans préjuger de l'application éventuelle du droit international humanitaire à ces détenus, ils devront jouir des garanties juridiques, qui ne sauraient être inférieures aux normes minimales des droits auxquels il est impossible de déroger.¹⁵⁴

La Cour européenne des droits de l'homme a été amenée à son tour à se prononcer en faveur de l'applicabilité des droits fondamentaux de l'homme en période de conflit armé. Son approche a été néanmoins différente de celle retenue par la Commission interaméricaine des droits de l'homme, la Cour européenne étant parvenue à une conclusion identique par le biais de l'extension du champ d'application matériel de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales. Suite à l'occupation de la partie nord de Chypre par les forces armées turques, la question s'était en effet posée de savoir si la Turquie était tenue au respect des dispositions de la Convention en dehors de son territoire national. Dans son arrêt du 23 mars 1995 sur les exceptions préliminaires dans l'affaire *Loizidou c. Turquie*,¹⁵⁵ la Cour précise tout d'abord que l'obligation qui, conformément à l'article 1 de cette Convention, incombe aux Etats parties de reconnaître à "toute personne relevant de leur juridiction" les

¹⁵⁰ Interamerican Commission on Human Rights, Report n° 55/97, *Juan Carlos Abella Case*, 11.137, Argentina, in 1997 Annual Report, OEA/Ser/L/V/II. 98, Doc. 6 rev, 13 avril 1998. Version anglaise disponible sur <http://www.cidh.org>.

¹⁵¹ Cf. par. 160 du Rapport de la Commission Interaméricaine des Droits de l'Homme dans l'affaire *Tablada*, *supra*, note 27.

¹⁵² *Coard et autres c. Etats-Unis*, affaire 10951, rapport n° 109 / 99, 29 septembre 1999, Rapport annuel disponible en anglais sur <http://www.cidh.org>.

¹⁵³ Par. 39 du Rapport de la Commission Interaméricaine des Droits de l'Homme dans l'affaire "*Coard*", *supra*, note 29.

¹⁵⁴ Commission Interaméricaine des Droits de l'Homme, Décision sur la demande de mesures conservatoires (Détenus de Guantanamo Bay, Cuba), texte in *Un droit dans la guerre*, M. SASSOLI et A. BOUVIER, Comité International de la Croix-Rouge, Genève, Vol. II, 2003, pp. 1863 s.

¹⁵⁵ *Loizidou c. Turquie*, exceptions préliminaires Ser. A/ n° 310.

droits et libertés qu'elle définit ne se circonscrit pas au territoire national de ces derniers.¹⁵⁶ L'interprétation extensive de la notion de juridiction l'amenait dans une seconde étape à cette conclusion que si, suite à une action militaire, un Etat partie est amené à exercer son contrôle sur un territoire autre que son territoire national, il sera tenu au respect des dispositions de la Convention dans ledit territoire.

Plus récemment, la Cour, dans son arrêt du 10 mars 2001 dans l'affaire Chypre c. Turquie,¹⁵⁷ confirme cette jurisprudence en précisant une nouvelle fois que la juridiction de la Turquie dans la partie nord de Chypre vaut pour la totalité des droits matériels énoncés dans la Convention européenne et ses Protocoles additionnels.¹⁵⁸ Sans renier pour autant sa jurisprudence antérieure, la Cour, dans sa décision du 12 décembre 2001 sur la recevabilité de la requête présentée par Borka Bankovic contre la Belgique et plusieurs autres Etats membres de l'OTAN,¹⁵⁹ a refusé d'assimiler le contrôle de l'espace aérien de la République fédérale de Yougoslavie par les forces de l'OTAN, lors de la guerre du Kosovo, au contrôle militaire de la partie nord de Chypre par la Turquie.¹⁶⁰ Dans cette affaire, les requérants, victimes des bombardements des bâtiments de la Radiotélévision serbe effectués par ces forces, avaient invoqué certaines dispositions de la Convention européenne et prétendaient que ces actes, de portée extra territoriale, étaient susceptibles d'entrer dans le champ d'application de la notion de juridiction au sens de l'article 1 de ladite Convention.¹⁶¹

La Cour a refusé de reconnaître l'existence d'un lien juridictionnel entre les victimes et les Etats membres de l'OTAN, limitant ainsi l'applicabilité de la Convention, en période de conflit armé se déroulant hors du territoire d'un Etat partie impliqué dans le conflit, au territoire terrestre sur lequel il exerce un contrôle effectif,¹⁶² à l'exclusion de son espace aérien.

II – Au cours des conflits armés non internationaux, les droits fondamentaux de l'homme s'interprètent à la lumière du droit international humanitaire

De nos jours, au cours des conflits armés, plus particulièrement ceux ne présentant pas un caractère international, la population civile est souvent prise en otage et constitue dans la plupart des cas le véritable enjeu du conflit. Ces conflits armés se caractérisent en effet généralement par des privations

¹⁵⁶ Par. 62 de l'arrêt, cf. P. TAVERNIER, "Le droit international dans la jurisprudence de la Cour européenne des droits de l'homme: l'apport des arrêts Loizidou c. Turquie", in *Du droit interne au droit international. Le facteur religieux et l'exigence des droits de l'homme*, Mélanges R. GOY, Publications de l'Université de Rouen, 1998, p. 423

¹⁵⁷ *Chypre c. Turquie*, Cour Européenne des Droits de l'Homme, arrêt du 10 mai 2001, disponible sur <http://www.hudoc.echr.coe.int>.

¹⁵⁸ Par. 77 de l'arrêt de la Cour Européenne des Droits de l'Homme dans l'affaire *Chypre c. Turquie*, *supra*, note 34.

¹⁵⁹ *Bankovic et autres c. Belgique et autres*, Cour européenne des droits de l'homme, Grande Chambre. Décision sur la recevabilité de la requête n° 52207/99, 12 décembre 2001, disponible sur <http://www.hudoc.echr.coe.int>

¹⁶⁰ G. COHEN-JONATHAN et J.F. FLAUSS, *Cour européenne des droits de l'homme et droit international général*, AFDI 2001 p. 440.

¹⁶¹ Par. 74 de la décision dans l'affaire "*Bankovic*".

¹⁶² Cf. le commentaire de la décision de la Cour Européenne des Droits de l'Homme dans l'affaire "*Bankovic*", par A., RUTH et M. TRILSH, *American Journal of International Law*, January, 2003, Vol. 97, n° 1, pp. 170 s. Il est intéressant de noter que la jurisprudence de la Cour Européenne des Droits de l'Homme dans l'affaire "*Bankovic*" a été reprise par le Tribunal de Bonn qui, par sa décision du 10 décembre 2003, rejetait une demande émanant des victimes d'une attaque des forces aériennes de l'OTAN lors de la campagne du Kosovo, Cf. Bofaxe, n° 267 E, du 27 décembre 2002.

arbitraires de vie telles qu'exécutions sommaires et extra judiciaires ainsi qu'arrestations massives d'opposants ou supposés tels auxquels le droit à un procès équitable est refusé.

Le droit à la vie, non dérogeable, n'est pas considéré par les Traités de droits de l'homme comme un droit absolu. Seule la privation arbitraire de la vie est visée et interdite par ces instruments. Ainsi, en période de conflit armé, l'obligation de respecter ce droit est sans préjudice des privations de vie résultant d'un acte licite de guerre¹⁶³ tel que défini par le droit international humanitaire. S'il est vrai que le droit à un procès équitable peut être suspendu, les clauses échappatoires qui autorisent une telle mesure prennent toutes soin de préciser qu'elle ne saurait être incompatible avec les autres obligations du droit international, dont, bien évidemment, celles découlant du droit international humanitaire.

Ainsi, aussi bien les allégations de violations des dispositions des instruments de droits de l'homme auxquelles aucune dérogation n'est possible que celles relatives à l'incompatibilité avec le droit international des mesures d'exception prises doivent être nécessairement examinées à la lumière des règles pertinentes du droit international humanitaire. C'est bien la ligne de conduite adoptée par la Cour internationale de Justice, la Cour européenne des droits de l'homme ainsi que la Cour interaméricaine des droits de l'homme. Il ne s'agit évidemment pas, comme cette dernière instance n'a pas manqué de le relever dans sa décision du 4 février 2000 rendue dans l'affaire *Las Palmaras c. Colombie*,¹⁶⁴ d'appliquer directement les règles du droit international humanitaire mais d'y recourir en tant que source d'orientation faisant autorité.¹⁶⁵

Droit à la vie

C'est la Cour internationale de Justice qui, pour la première fois, a eu recours aux normes du droit international humanitaire en tant qu'outil d'analyse et d'interprétation des obligations résultant des instruments de droits de l'homme en période de conflit armé. Lors de l'examen de la question de la licéité de la menace ou de l'emploi d'armes nucléaires par la Cour, plusieurs Etats avaient soutenu que l'emploi de cette arme violerait la prescription de l'article 6 du Pacte international relatif aux droits civils et politiques, à savoir le droit de ne pas être privé arbitrairement de la vie. Après avoir rappelé qu'en principe ce droit vaut aussi pendant les hostilités, la Cour déclare qu'en pareil cas *"c'est uniquement au regard du droit applicable dans les conflits armés et non au regard des dispositions du Pacte lui-même que l'on pourra dire si tel cas de décès provoqué par l'emploi d'un certain type d'armes au cours d'un conflit armé doit être considéré comme une privation arbitraire de la vie contraire à l'article 6 du Pacte"*.¹⁶⁶ C'est sur cette base qu'il a été soutenu que les décès entraînés par l'utilisation d'armes de

¹⁶³ Cf. art. 15 de la Convention Européenne des Droits de l'Homme qui n'autorise aucune dérogation au droit à la vie *"sauf pour le cas de décès résultant d'actes licites de guerre"*; cf. le commentaire de l'article 15 par P. TAVERNIER in *La Convention européenne des droits de l'homme, commentaire article par article*, sous la direction de L.E. PETTITI, E. DECAUX, P.H. IMBERT, Economica, Paris, 1995, p. 493.

¹⁶⁴ *Caso Las Palmaras*, excepciones preliminares, Sentencia de 04 Febrero 2000, Serie c n° 66, disponible sur le web à <http://www.nu.or.cr/ci>.

¹⁶⁵ J.K. KLEFFNER, "Improving Compliance with International Humanitarian Law Through the Establishment of an Individual Complaints Procedure", *Leiden Journal of International Law*, Vol. 15, n° 1, 2002, p. 241.

¹⁶⁶ CIJ, *Recueils*, 1996, § 25.

destruction massive, par nature incapables de distinguer entre cibles civiles et militaires et causant des maux superflus en violation des principes intransgressibles du droit international humanitaire, doivent être qualifiés de privations arbitraires de la vie en violation du droit international des droits de l'homme.¹⁶⁷ En définitive, toute mort infligée au cours d'un conflit armé suite à un acte commis en violation de règles du droit international humanitaire, dont celles régissant les moyens et méthodes de combat, doit être considérée comme une privation arbitraire de la vie.

C'est en se penchant sur ces règles, et plus précisément sur celles définissant les personnes ne participant pas directement aux hostilités, que la Commission interaméricaine des droits de l'homme a pu statuer dans l'affaire *Tablada* sur les allégations de violations de l'article 4 de la Convention interaméricaine des droits de l'homme relatif au droit à la vie. D'après la Commission, une telle approche s'imposait dans la mesure où cet article ne prévoit aucune disposition permettant de distinguer les civils des combattants contre lesquels des actes licites de guerre pouvant entraîner la mort sont permis d'après le droit international humanitaire.¹⁶⁸

La Cour européenne des droits de l'homme, bien que plus réticente à invoquer le droit international humanitaire, n'en a pas moins été amenée à son tour, dans son arrêt du 28 juillet 1998 rendu dans l'affaire *Ergi c. Turquie*, à se référer aux moyens et méthodes employés dans la conduite d'une opération militaire contre des opposants. Pour la Cour, il appartient aux agents de l'Etat de prendre "*toutes les précautions en leur pouvoir pour éviter de provoquer accidentellement la mort de civils, ou, à tout le moins, réduire ce risque*".¹⁶⁹

Le droit à un procès équitable

En période de conflit armé non international, la protection offerte par le droit international humanitaire aux personnes privées de liberté est incontestablement plus efficace que celle prévue par le droit international des droits de l'homme.¹⁷⁰ S'il est vrai que le droit à un procès équitable, figurant en bonne place dans tous les instruments de droits de l'homme, constitue l'une des garanties les plus importantes en faveur de ces personnes, il n'en demeure pas moins que les clauses échappatoires qu'ils prévoient autorisent les Etats partis à en suspendre l'application en période de conflit armé. Il n'en va pas de même des dispositions du droit international humanitaire, qui accordent à ces personnes des garanties juridictionnelles auxquelles aucune dérogation n'est admise. Pour s'en tenir aux conflits armés non internationaux, qui nous préoccupent en premier lieu, la référence à l'article 3 commun, dont les dispositions sont désormais considérées comme étant l'expression d'une coutume bien établie, s'impose

¹⁶⁷ F. HAMPSON, "Using International Human Rights Machinery to Enforce the International Law of Armed Forces", *Revue de droit pénal militaire et de droit de la guerre*, Vol. XXX1, 1992, p. 127.

¹⁶⁸ Par. 161. Rapport affaire *Tablada*, *supra*, note 27.

¹⁶⁹ Par. 79 de l'arrêt cité par A. REIDY in "La pratique de la Commission et de la Cour européenne des droits de l'homme en matière de droit international humanitaire", *Revue Internationale de la Croix Rouge*, septembre 1998, 80^{ème} année, n° 831, p. 565.

¹⁷⁰ A. EIDE, "Troubles et tensions intérieurs", in *Les dimensions internationales du droit humanitaire*, Pédone, Institut H. Dunant, UNESCO, 1986, p. 285.

de toute évidence. En effet, d'après cet article, demeurent prohibées en tout temps et en tout lieu "*les condamnations prononcées et les exécutions effectuées sans un jugement préalable rendu par un tribunal régulièrement constitué, assorti des garanties judiciaires reconnues comme indispensables par les peuples civilisés*". Les dispositions de l'article 6 du Protocole II additionnel relatives à la poursuite pénale vont encore plus loin puisqu'elles précisent qu'un tel tribunal devrait offrir "*les garanties essentielles d'indépendance et d'impartialité*", dont certaines sont énumérées. Elles s'inspirent des dispositions pertinentes des instruments de droits de l'homme, dont l'article 14 du Pacte auquel les Etats peuvent paradoxalement déroger en période de conflit armé non international.

Ceci dit, la question se pose de savoir si les Etats qui ont recours aux clauses échappatoires des instruments de droits de l'homme pour suspendre l'application des dispositions traitant de l'obligation d'assurer un procès équitable sont tenus de respecter les dispositions prévues à cet effet par le droit international humanitaire. Plusieurs raisons militent en faveur d'une réponse positive : tout d'abord, ces dispositions, à l'instar de toutes les autres dispositions du droit international humanitaire, s'appliquent en toutes circonstances et ne peuvent faire l'objet d'aucune dérogation; ensuite, toutes les clauses échappatoires prévoient que les mesures d'exception que les Etats adoptent doivent être obligatoirement conformes aux autres obligations internationales qu'ils ont contractées. Il appartient évidemment aux organes de contrôle des instruments de droits de l'homme de s'en assurer, ce qui ne peut se faire qu'à la lumière des dispositions pertinentes du droit international humanitaire. C'est ainsi que la Commission interaméricaine des droits de l'homme a été amenée à deux reprises à examiner si les mesures adoptées par les Etats-Unis n'étaient pas en contradiction avec les dispositions de la Déclaration américaine des droits et devoirs de l'homme du 30 mai 1948¹⁷¹ relatives au droit de protection contre les détentions arbitraires et au droit à un procès équitable: une première fois, à l'occasion de l'affaire Coard où les requérants prétendaient que les forces armées d'occupation des Etats-Unis dans l'Etat de Grenade avaient procédé à des arrestations arbitraires, et, une seconde fois dans le cadre de la demande du 12 mars 2002 de la Commission sur les mesures conservatoires concernant les détenus de la base de Guantanamo Bay, cette demande étant consécutive au non respect par les Etats-Unis d'un certain nombre de dispositions de cette Déclaration, dont celle protégeant les personnes contre une détention arbitraire et le droit à un procès régulier. Dans les deux cas, les Etats-Unis ont prétendu que la Commission, faute de compétence, ne pouvait appliquer le droit international humanitaire,¹⁷² argumentation rejetée à juste titre par cet organe. Dans l'affaire Coard, la Commission considère que le critère devant permettre d'évaluer le respect d'un droit précis tel que le droit à la liberté peut, dans une situation de conflit armé, s'écarter du critère applicable en temps de paix. Elle en conclut que, dans ces conditions, la norme à appliquer doit être

¹⁷¹ La référence de la Commission Interaméricaine à cette Déclaration au lieu de la Convention Interaméricaine des Droits de l'Homme se justifie dans la mesure où les Etats-Unis ne sont pas partie à cette Convention. La Commission rappelle, dans sa décision sur la demande de mesures conservatoires au sujet des détenus de Guantanamo Bay, qu'elle a été chargée de surveiller le respect des droits de l'homme dans l'hémisphère par les Etats membres de l'Organisation des Etats américains. Tel est le fondement de sa compétence dans cette affaire.

¹⁷² Par. 39 du rapport de la Commission Interaméricaine des Droits de l'Homme, *supra* note 29; et la réponse des Etats-Unis à la demande de mesures conservatoires dans l'affaire des détenus de Guantanamo Bay, texte in *Un droit dans la guerre*, *op.cit.*, Comité International de la Croix-Rouge, p. 1866.

déterminée par référence au droit international humanitaire, source qui fait autorité en la matière.¹⁷³ Par ailleurs, au cas où ces deux branches de droit international que sont le droit international des droits de l'homme et le droit international humanitaire offrent à la personne humaine des degrés différents de protection, la Commission est d'avis qu'elle est tenue d'appliquer la norme qui assure une plus grande protection et qui permet de mieux préserver les droits de la personne humaine.¹⁷⁴ La Commission rejoignait ainsi la jurisprudence qu'elle avait dégagée dans l'affaire *Tablada* en se fondant sur l'article 29 al. b de la Convention interaméricaine des droits de l'homme qui stipule qu'aucune de ses dispositions ne peut être interprétée comme restreignant la jouissance et l'exercice de tout droit ou de toute liberté reconnus par la législation d'un Etat partie ou une Convention à laquelle cet Etat est partie,¹⁷⁵ en l'occurrence un instrument de droit international humanitaire. Cet argument devait amener la Commission à conclure que les privations de liberté imposées par les forces armées des Etats-Unis en Grenade étaient arbitraires parce que contraires aux dispositions pertinentes du droit international humanitaire relatives à la résidence forcée et l'internement des civils.¹⁷⁶

Au terme de cette étude, on ne peut que constater que la convergence du droit international des droits de l'homme et du droit international humanitaire, surtout en période de conflit armé non international, a été à l'origine du recours des organes de contrôle des instruments de droits de l'homme au droit international humanitaire en vue d'interpréter les obligations qui en découlent. Il en résulte incontestablement une protection accrue des victimes de ces conflits. On ne peut que s'en réjouir et se rappeler la phrase hautement significative et imagée de Karek Vasak comparant ces deux branches du droit international à «deux pauvres béquilles sur lesquelles les victimes désarmées doivent s'appuyer simultanément».¹⁷⁷ Cette approche est indubitablement de nature à pallier l'absence de mécanisme de contrôle et de mise en œuvre du droit international humanitaire applicable aux conflits armés non internationaux.¹⁷⁸

Toutefois, il ne s'agit que d'un pis-aller en attendant la mise en place à cette fin de mécanismes plus appropriés. En effet, le recours aux mécanismes de contrôle des instruments de droits de l'homme en vue d'assurer le respect du droit international humanitaire lors de conflits armés non internationaux présente le grand inconvénient de limiter les investigations aux seules violations imputables aux Etats, à

¹⁷³ Par. 43 du rapport de la Commission Interaméricaine des Droits de l'Homme, *supra*, note 29. Voir aussi le commentaire de R. PROVOST in *International Human Rights and Humanitarian Law*, Cambridge, University Press, 2002, p. 333.

¹⁷⁴ Par. 42 du rapport de la Commission Interaméricaine des Droits de l'Homme, *supra*, note 29.

¹⁷⁵ Par. 164 du rapport de la Commission Interaméricaine des Droits de l'Homme dans l'affaire *Tablada*.

¹⁷⁶ Par. 60 du rapport de la Commission Interaméricaine des Droits de l'Homme dans l'affaire *Coard*.

¹⁷⁷ K. VASAK, "Pour une troisième génération des droits de l'homme", in *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge*, C. SWINARSKI (Ed.), Comité International de la Croix-Rouge, Martinus Hijhoff Publishers, 1984, p. 837.

¹⁷⁸ C. GREENWOOD, "International Humanitarian Law (Laws of War) ", *The Centennial of the First International Peace Conference*, F. KALSHOVEN (Ed.), Kluwer Law International, 2000, p. 240; R. ABI-SAAB, *Human Rights and Humanitarian Law in Internal Conflicts in Human Rights and Humanitarian Law*, D. WARNER (Ed.) Kluwer Law International 1997, p. 120.

l'exclusion de celles émanant d'entités non étatiques, responsables pourtant des violations les plus graves du droit international humanitaire lors de ces conflits.

Some Considerations Regarding the Law of Armed Conflict and Contemporary Issues

Steven A. SOLOMON

Deputy Legal Adviser, U.S. Permanent Mission in Geneva

I'd like to begin this presentation by thanking both the organizers and the participants for what has been an interesting and often provocative Round Table. I use the word provocative, by the way, not in a pejorative sense, but in a positive one. We have been listening carefully to the discussions and will take with us a better understanding of many of the views offered. We may not always agree, but I think there is a great benefit in the actual process of addressing the issues. We are not, after all, dealing with matters of settled, black-letter law. We are trading in much murkier areas – areas where law and policy tend to merge and where opinions about both tend to be strongly held.

So let me try now to give some reactions to some of the issues from a U.S. perspective. The events of 9/11, the problem of and threats posed by terrorism, have challenged the law of armed conflict, or International Humanitarian Law, without question. I believe, however, that its basic framework has emerged in a strong position, indeed without need for revision or major amendment, perhaps because several difficult aspects have actually been clarified and are therefore more apt to be understood than in the past.

While one could draw many conclusions from the application of the law of armed conflict since 9/11, the following 5 points are among the more important for purposes of understanding our sense of where the law stands in relation to the themes touched upon during the Round Table.

Point 1. The law of armed conflict provides the most appropriate legal framework for regulating the use of force in the war on terrorism. The earliest international reactions to 9/11, beginning with the UNSC Resolution 1368 on September, 12, 2001, and including the North Atlantic Treaty Organization's invocation of the Treaty's Article V provision on collective self-defense, demonstrated widespread recognition that the situation should be viewed as initiating an armed conflict. Regarding these attacks as implicating the law of armed conflict reflected an understanding that they were different in scale, effect, motivation and character from other terrorist acts.

The body of the law of armed conflict would thus apply and, from a U.S. perspective, there was never a question of not applying the law, or stepping away from international rules. In part, this ready recognition of the applicability of the law of war was a reaffirmation of long-standing U.S. policy to apply this law to its military operations. Most of all, it was a recognition that our response would be rule-based, indeed the appropriate response to the barbarism of terrorism.

The application of the LOAC, however, has created some points of confusion. Perhaps we have not well-enough communicated, for example, the point that if the body of law applied, we would also look to that body of law to determine to whom it would be applicable and to what extent. This approach has been controversial but, in fact, the law of armed conflict itself disqualifies some fighters from claiming certain

privileges. This is precisely what the law calls for, and it is a validation of long-standing elemental principles of the law of armed conflict, such as the principle of distinction, that are designed to promote humanitarian objectives.

Which brings me to the second point: **Terrorists are belligerents who lack the entitlements of those legitimately engaged in combat.** Nevertheless, they remain belligerents, subject legitimately to targeting or detention as such. As a group, terrorists willingly conduct themselves outside the coverage of Article 4 of the Geneva Convention on Prisoners of War (GPW). In fact, a core aspect of terrorism is that its perpetrators fail on a systematic basis to meet Article 4 criteria, including to “*conduct their operations in accordance with the laws and customs of war*” as required by that article.

It is important to recall why the Convention lays down such specific criteria for determining which combatants are entitled to the status of POW and the protections of the GPW. As far back as the negotiations that led to the 1907 Hague Regulations this question has always been of the utmost concern to States. Jean Pictet, in his famous commentaries for the ICRC, called Article 4 of the GPW “*in a sense the key to the Convention*”.

It is of fundamental importance that Article 4 imposes a distinction between legitimate and illegitimate combatant - and while Article 4 expressly entitles the legitimate soldier to the GPW’s protection, its real beneficiaries are the civilians who make up the mass of our societies. It requires soldiers to adhere to certain basic principles, such as distinction and compliance with the law, in order, first and foremost, to protect the civilian population. That is to say, the positive incentives of the existing normative system require that soldiers follow the rules and, most importantly, distinguish combatants from civilians – that fundamental issue which, as we know, underpins modern IHL.

Yet some still question the concept of “unlawful combatant” itself. This appears to be the case despite the concept’s well established position in international law and its recognition by courts, military manuals and international legal scholar. Take Professor Adam Roberts of Oxford, whose many works include the widely used *Documents on the Law of War*. He wrote last February in an op-ed piece that the concept of unlawful combatants was implicit in the Geneva Conventions. He discusses the standards for determining who is an unlawful combatant in this Article in *Survival* (Spring, 2002) on “*Counter-terrorism, Armed Forces and the Laws of War*”.

And what about courts? The U.S. Supreme Court expressly dealt with unlawful combatants in a famous World War II case involving Nazi saboteurs (ex Part Quirin).

In fact, the concept of unlawful or unprivileged combatants is well-established in the law of war. Moreover, the law of war grants authority to detain enemy combatants, lawful or unlawful, who pose an ongoing security threat and to hold them until the end of hostilities. The law of war does not, we think it is clear, require that detained combatants be charged with a crime. Detention of enemy combatants under the law of war serves the function in a time of armed conflict of preventing belligerents from rejoining hostilities.

Thus it is surprising to us to hear some say that detainees who fail to meet POW requirements must be released or charged with an offense, at the same time as they recognize that Article 4 POWs can be detained without charges until the end of the war. That is saying, in effect, that honourable soldiers who are captured who meet all of the requirements for POW status, such as carrying arms openly, can be kept when captured, but those who violate those requirements cannot be similarly detained. If you accept that they are “combatants,” this makes no sense. Worse it upends the system of incentives that serve the humanitarian objectives of IHL. It’s a position that raises the spectre of private war by independent actors who operate outside of the system of state responsibility and accountability.

Point 3. **Certain minimum standards apply to the detention of even unprivileged belligerents – such persons are not outside the law.** Terrorists forfeit any claim to POW status under the laws of armed conflict but they do not forfeit their right to humane treatment – a right that belongs to all humankind, in times of war and peace. It is a general principle of civilized societies that inhumane treatment is cruel and unacceptable under any circumstance. Accordingly, the customary law of armed conflict innovated a structure to deal with the situation of persons – like terrorists – who fall into “enemy” hands without meeting the basic criteria of Article 4 of the GPW.

Point 4. **The law of armed conflict constrains and, if necessary, sanctions privileged and unprivileged belligerents.** This point is in keeping with the grave breach provisions of the Geneva Conventions and other instruments of, and tribunal decisions concerning, the law of armed conflict, which do not require that a perpetrator be a *lawful* combatant in order to commit *unlawful* acts. Imagine the consequences if it were otherwise.

Point 5. **The law applicable to the means and methods of warfare generally applies whenever armed forces employ military force, however the conflict is characterized.** The U.S. military, in its actions since 9/11, has assiduously adhered to the traditional rules associated with the use of military force. And this has been the case whether the conflict may be considered an international one, an internal one, or, in common usage, a war against terrorism. In fact, the U.S., just months after its military campaign commenced in Afghanistan, pressed successfully for an expansion of the rules contained in the Convention on Conventional Weapons so that they apply in all armed conflicts.

Let me conclude with the observation that terrorism, from a legal perspective, may be seen as the negation of law. More particularly, it may be seen as the negation of the fundamental humanitarian principles of the law of armed conflict. Whereas humanitarian law proscribes directing attacks against civilians as such, terrorism promotes it; and whereas a fundamental purpose of *jus in bello* is the facilitation of order, the aim of terrorism is the opposite – chaos and violence. Application of the law of armed conflict, and in particular, its bedrock principles of distinction and fundamental protections, serves fundamental humanitarian ends and in so doing ultimately reinforces the rules of governing international behaviour at all times.

Thank you.

***Extraterritorial 'Self-Help' Operations:
Meaning and Applicable Law***

Avril McDONALD

Head of the Section of International Humanitarian Law and International Criminal Law,
TMC Asser Institute for International Law, The Hague,
Managing Editor, Yearbook of International Humanitarian Law.

1. LEGAL QUALIFICATION OF EXTRATERRITORIAL 'SELF-HELP' OPERATIONS

1.1 Introduction

Self-help measures refer in public international law to countermeasures taken by States in response to a breach of an international legal obligation of the targeted state.¹⁷⁹ International law recognises "*the basic right of a State to take countermeasures to remedy an internationally wrongful act*".¹⁸⁰ Countermeasures taken by states acting either alone or collectively should be distinguished from countermeasures taken by international organisations, such as sanctions. During what might be termed the 'golden age' of self-help, during the eighteenth and nineteenth centuries,

*"if a State breached one of its obligations, the victim State(s) of such a breach could take both non-forcible and forcible measures to remedy or to punish that breach. Forcible measures could range from measures short of war, such as armed reprisals, or could take the form of war. War itself could be a relatively minor exchange of fire, even mere confrontation without hostilities, or it could be a full-scale bloody conflict the causes of which could be relatively minor."*¹⁸¹

According to Tomuschat: "*Self-help was a widely accepted concept of international law before the emergence of the new world order brought by the UN Charter.*"¹⁸²

The Charter introduced a hierarchical system of international relations, to replace the horizontal one of pure self-help. Aggression, even in response to a prior illegal act, was prohibited, and decisions regarding use of force were entrusted to a system of collective security, as embodied by the UN Security Council. Although this is hardly a representative organ, given that it consists of 15 member states, five of which have a permanent veto, it is the only international legal entity with the power to authorise resort to force. Since the establishment of the system of collective security, forcible countermeasures and preemptive action are left to the UN Security Council acting under Chapters VI and VII of the UN Charter.

International law today therefore recognises only a limited form of self-help. Generally speaking only non-forcible countermeasures are permitted, namely, retorsion and reprisals.¹⁸³ According to White and

¹⁷⁹ According to SCHACHTER, the term "*self-help*" refers to "*action taken by an aggrieved State against a State that has violated a norm of international law*". O. SCHACHTER, *International Law in Theory and Practice* (Dordrecht, Martinus Nijhoff 1991) p. 2.

¹⁸⁰ See N.D. WHITE and A. ABASS, "Countermeasures and Sanctions", Chapter 16 of *International Law*, Malcolm D. EVANS (ed.), Oxford, 2003, p. 505.

¹⁸¹ *Ibid.*, at p. 506.

¹⁸² Christian TOMUSCHAT, "Are Counter-measures Subject to Prior Resource to Dispute Settlement Procedures?" 5 *European Journal of International Law*, N° 5, 1994, p. 2.

Abass, since the first use of the term in 1978 by the arbitral tribunal in the *Air Services Agreement* case, "international lawyers have used the term countermeasures to indicate non-forcible measures".¹⁸⁴ 'In its final Articles on State Responsibility of 2001, the ILC defines countermeasures as "non-forcible measures taken by an injured State in response to a breach of international law in order to secure the end of the breach and, if necessary, reparation."¹⁸⁵

1.2 Distinguishing between retorsion and reprisals

A distinction can be made between self-help measures taken in response to an unfriendly but not illegal act of a state (retorsion) and those taken in response to an illegal act of a state (reprisals).

Retorsion refers to countermeasures that would not normally be illegal but may on occasion be illicit. They could include withholding benefits (investments, financial or military aid, etc.). An example here is the US threatening to withhold financial and military assistance to countries that signed the ICC Statute (regarded by the USA as an unfriendly if not illegal act).

Reprisals (non-violent) are countermeasures that may themselves be illegal or that would be illegal if it was not for the prior illegal act.¹⁸⁶

All reprisals are subject to legal preconditions and limits.

- They must be proportionate and taken in good faith.
- Warning of the retaliatory action should be conveyed to the targeted State in advance.
- They must not conflict with any overriding legal norm, especially norms of *jus cogens*.
- Any use of force taken in reprisal must observe the other applicable legal norms, in particular, the principles and rules of international humanitarian law and the protection of the rights of the civilian population.
- Last resort. All other avenues/remedies must first have been exhausted.

The *Naulilaa* arbitration of 1928 was one of the first cases to consider countermeasures, albeit in the context of forcible reprisals. It is "the source of the requirement that responses be made in proportion to offending acts [...]".¹⁸⁷ It stated that: "Even if [...] the law of nations does not require that the reprisal should be approximately in keeping with the offense, one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them".¹⁸⁸

In the *Air Services Agreement* award, the tribunal refined the *Naulilaa* rule of proportionality in the context of non-forcible countermeasures, to leave considerable discretion to States. Proportionality should be

¹⁸³ See Peter MALANCZUK, *Akehurst's Modern Introduction to International Law*, 7th rev. ed. (London, Routledge 1997) pp. 3-4.

¹⁸⁴ *Ibid.*, at p. 508.

¹⁸⁵ *Ibid.*

¹⁸⁶ "Most reprisals and other counter-measures are taken against the offending States. Although such measures affect individuals and may inflict serious harm [...], the reprisals are not thereby rendered unlawful, provided of course that they are proportionate to the wrong and imposed in good faith." SCHACHTER, *op. cit.* n. 2 at p. 194.

¹⁸⁷ D. J. BEDERMAN, "Counterintuiting Countermeasures", *American Journal of International Law*, Vol. 96, 2002, pp. 817 at 820.

measured in light of what is not disproportionate. The tribunal stated that measuring proportionality could "*at best be accomplished by approximation*" and was to "*be satisfied with a very approximate appreciation*".¹⁸⁹

The ILC, in Article 51 of its Draft Articles on State Responsibility, states that "*Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrong act and the rights in question.*" Article 49 provides that a countermeasure may be taken *only "in order to induce [a] State to comply with its obligations"*, meaning that it should not be excessive or disproportionate with regard to this purpose.

We can distinguish between reprisals not involving the use of (armed) force and those involving the use of (armed) force:

- *Non-forcible Actions*: The types of actions falling under the rubric of non-forcible reprisals include seizure of assets and expulsion of diplomats.

- *Forcible Actions*: The types of actions involving force include reprisals involving the use of armed force by a State against another State as a punitive (rather than self-defence) measure in response to a prior illegal act; use of armed force against persons, entities, or property within a third State; extrajudicial use of force against non-state targets within a third State; etc. The measures could include the bombing of a particular target assassination of a suspected criminal or terrorist and forcible abduction.

This contribution focuses on the most controversial type of self-help operations, that is, extraterritorial self-help operations involving the use of armed force. One question is whether these operations are *prima facie* illegal or whether they might be legal in certain circumstances. A further question is whether the law concerning forcible countermeasures has changed in the post-September 11 environment, and whether the traditional law concerning self-help operations is adequate for the new security environment. In this regard, one must consider the possibility of an instant custom regarding the use of armed force in self-defence post-September 11. A problem is that self-help operations were traditionally directed against States, whereas the real targets of many contemporary self-operations are non-state actors, including terrorists. Yet operations directed against terrorists inevitably involve a breach of territorial integrity and sovereignty and can constitute aggression.

1.3 Extraterritorial self-help operations as countermeasures

If international law recognises only a limited form of self-help, that is, non-forcible countermeasures, is it therefore correct to describe forcible extraterritorial self-help operations as countermeasures or indeed as measures of self-help, at least as a matter of international law? Self-help operations involving the use of force generally are actions taken as countermeasures although they may be taken in preemption or anticipation. They are often illegal. They cannot therefore be considered as countermeasures as that term is generally understood in international law.

¹⁸⁸ Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa (*Portugal v. Germany*), RIAA, Vol 2, 1928, pp. 1011 at 1028.

¹⁸⁹ Air Services Agreement of 27 March 1946 (United States/France).

There is no customary international law definition of self-help or of extraterritorial self-help operations involving the use of force. The term is used here in a descriptive rather than a strictly legal sense, to cover a wide range of activities which nonetheless share some common elements.

This contribution adopts a broad working definition. Extraterritorial self-help operations for the purposes of this paper includes all actions taken by States involving the use of force or coercion against another state or the national(s) of another States in response to a prior violation or in anticipation of a future violation by the States or non-national(s). They generally involve the use of armed force, either with or without the extraterritorial State's consent, and a violation of a State's territorial integrity, and are frequently considered to be illegal under international law, except in certain clearly defined and other greyer cases, or where a States is clearly considered to be acting in self-defence under Article 51 of the UN Charter. The use of armed force for the purpose of military conquest cannot of course be considered as self-help.

Do extraterritorial self-operations necessarily involve the use of force and should they by definition be considered as forcible measures? While they do not necessarily involve a resort to force, they are generally armed operations, are often covert, and usually involve a violation of the territorial integrity of another States. They should therefore be considered as forcible operations.

1.4 The legality of reprisals involving the use of force

All reprisals involving the use of force are considered to be prohibited under the UN Charter. Aggressive war is banned under Article 2(4). However, the outlawing of aggression predates the Charter. The Kellogg-Briand Pact of 1928 (Paris General Treaty for the Renunciation of War)¹⁹⁰ is considered to have codified customary law.¹⁹¹ Of course, not all reprisals may constitute aggression. *"After controversy in the era of the League of Nations the Charter of the United Nations affirmed the prohibition of the so-called 'hostile measures short of war': reprisals, pacific blockade and forcible intervention."*¹⁹²

Britain's claim to be asserting its legal rights against Albania by using a minesweeper in the Corfu Channel was rejected by the ICJ in the *Corfu Channel* case:

*"The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law."*¹⁹³

The Court rejected the argument that Britain was acting as a matter of self-help:

*"The United Kingdom Agent [...] has further classified 'Operation Retail' among methods of self-protection or self-help. The Court cannot accept this defence either. Between independent States, respect for territorial sovereignty is an essential foundation of international relations."*¹⁹⁴

¹⁹⁰ Art. 1 provides that 'the high contracting parties condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.'

¹⁹¹ I.A. SHEARER, *Starke's International Law*, 11th edn. (London, Butterworths 1994) p. 484.

¹⁹² Ian BROWNIE, *The Rule of Law in International Affairs: International Law the Fiftieth Anniversary of the United Nations* (The Hague, Martinus Nijhoff 1998) p. 195.

¹⁹³ *Corfu Channel (United Kingdom v. Albania)*, in Merits, ICJ Rep., 1949, pp. 4 at 35.

¹⁹⁴ *Ibid.*

The General Assembly stated in 1970 that 'states have a duty to refrain from acts of reprisal involving the use of force'.¹⁹⁵ The UN Security Council has condemned reprisals as incompatible with the purposes and principles of the UN in SC Resolution 188 of 9 April 1994. This is also the widely held view of jurists.¹⁹⁶ Belligerent reprisals are illegal under Article 33 of the Fourth Geneva Conventions and Article 20 of 1977 Additional Protocol I to the 1949 Geneva Conventions.

1.5 The distinction between self-help and self-defence

There is a tendency to confuse self-help and self-defence. They are legally distinct yet at the same time they overlap. All self-defence actions are a form of self-help, but not all forms of self-help are a form of self-defence. Much of what is claimed as self-defence is not that at all but self-help more broadly, and is often illegal. Reprisals are punitive; self-defence is not.

Self-defence is action taken pursuant to Article 51 of the UN Charter in response to an armed attack by a State. It must be necessary and proportionate. As Gray notes:

"This requirement of necessity and proportionality is not explicit in the UN Charter but is part of customary international law. It is generally taken as limiting self-defence to action which is necessary to recover territory or repel an attack on a State's forces and which is proportionate to this end. These customary law requirements of necessity and proportionality were recently reaffirmed in the Nicaragua case and in the Nuclear Weapons Advisory Opinion."¹⁹⁷

The term self-help as used in this paper has a descriptive rather than a legal meaning, but it usually describes actions taken by states outside the system of collective security, that is, actions which violate Article 2(4) of the UN Charter, even where they do not involve acts of aggression, although there are some exceptions, such as where a state is acting as a matter of necessity. Bryde, however, states that:

"The term "self-help" should [...] be reserved to reactions against violations of a State's rights that do not occur in the form of an armed attack. In contrast to cases of self-defence, these reactions need not be confined to the preservation or restoration of the status quo ante but may aim to create lawful conditions. In principle, they may not include the resort to force."¹⁹⁸

It is suggested, instead, that self-help is the broader umbrella term, of which self-defence is a sub-category. Self-defence could be considered as a form of self-help, since the State is acting outside of the system of collective security, that is, it is relying on itself and not the Security Council to defend it, but the key difference is that this action is sanctioned by the Security Council, and one can say that the State is

¹⁹⁵ Declarations on Principles of International Law Concerning Principles of Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations. Annex to GA Res. 2625 (XXV) of 24 October 1970.

¹⁹⁶ According to Shaw "Reprisals short of the use of force may be lawful, but not armed reprisals". *International Law*, fourth ed., p. 786. Bryde notes that "war and the use of force in general were progressively outlawed as legitimate means of self-help." B. O. BRYDE, "Self-help", *Encyclopedia of Public International Law*, Vol. 4 North Holland Publishing Company 1982, p. 215. According to Brownlie, "In the period of the United Nations the use of force by individual states as a means of settling disputes is impermissible. Peaceful settlement is the only available means.", I. BROWNLIE, *Principle of Public International Law*, 5th ed. Oxford, 1998, p. 703.

¹⁹⁷ C. GRAY, "The Use of Force and the International Legal Order", Chapter 19, *International Law, International Law*, Malcolm D. EVANS (ed.), Oxford, 2003 pp. 589 at 600.

acting *in lieu* of the Council. This view is shared by Dinstein, who has written: "*The essence of self-defence is self-help [...]. Occasionally, international legal scholars regard the concept of self-help and self-defence as related yet separate. However, the proper approach is to view self-defence as a species subordinate to the genus of self-help. In other words, self-defence is a permissible form of armed self-help.*"¹⁹⁹ One can argue that when states operate outside the established system of self-defence they often stray into the realm of illegal self-help.

There are numerous instances of self-help operations where States claimed a right of self-defence, including the following cited by Schachter:²⁰⁰

"(1) *the use of force to rescue political hostages believed to face imminent danger of death or injury;*²⁰¹

(2) *the use of force against officials or installations in a foreign State believed to support terrorist acts directed against nationals of the State claiming a right of self-defence;*²⁰²

(3) *the use of force against troops, planes, vessels or installations believed to threaten imminent attack by a State with declared hostile intent;*²⁰³

(4) *the use of retaliatory force against a government or military force so as to deter renewed attacks on the State taking such action;*²⁰⁴

(5) *the use of force against a government that has provided arms or technical support to insurgents in a third State;*²⁰⁵

(6) *the use of force against a government that has allowed its territory to be used by military forces of a third State considered to be a threat to the State claiming self-defence;*²⁰⁶

(7) *the use of force in the name of collective defense (or counter-intervention) against a government imposed by foreign forces and faced with large-scale military resistance by many of its people.*"²⁰⁷

Regardless of the facts in any particular case, the first is not strictly speaking a case of self-defence, even though States frequently raise self-defence with respect to the case of rescue of nationals, particularly those of High Office. Even though an attack on a national is an attack on the State, a State may only act in self-defence in response to an armed attack and an imminent threat to the danger on a non-national cannot be considered as an armed attack within the meaning of Article 51 of the Charter. This type of action is more properly considered as the exercise of a form of self-help. As regards the second, the use of force in this instance could be a matter of self-defence, especially given the development of international law post-September 11.

¹⁹⁸ BRYDE, *op.cit.* n. 19 at p. 215.

¹⁹⁹ Y. DINSTEIN, *War, Aggression and Self-Defence*, 3rd ed., Cambridge, 2001, pp. 159-160.

²⁰⁰ SCHACHTER, *op. cit.* n. 2, p. 144.

²⁰¹ Rescue actions were undertaken by Israel against Egypt in 1967.

²⁰² The US bombing of Tripoli in 1986.

²⁰³ The Israeli action against Egypt in 1967.

²⁰⁴ The Israeli invasion of Lebanon in 1982.

²⁰⁵ The US support of the Contras in Nicaragua.

²⁰⁶ The US blockade of Cuba in 1962.

²⁰⁷ The military aid given to the resistance in Afghanistan by Pakistan and the US.

In the case of three, the use of force against troops, planes, vessels or installations believed to threaten imminent attack by a State with declared hostile intent can be considered as a matter of self-defence. Four is also properly a matter of self-defence. Five cannot be considered a matter of self-defence. It is more properly a matter of self-help more generally. In fact, it is a reprisal for the actions of the government. Six could be an act of reprisal, but there might be cases where it could be action taken in self-defence. Seven is a matter of self-defence.

As Schachter notes:

*"In the few cases where resolutions were adopted that passed judgment on the legality of the action, they denied the validity of the self-defense claim. In many cases, resolutions were not adopted, but the majority of States that addressed the issue of lawfulness criticized the actions as contrary to the Charter. Few ventured to defend the legality of the self-defense claims."*²⁰⁸

Using the concept of self-defence, with its limited application to use of force by a State in response to an armed attack that has occurred, to actions that are in fact clearly not cases of self-defence but are in fact other forms of self-help, many of which are prohibited under international law, is damaging to collective security. There is a risk of blurring the distinction between lawful self-defence and illegal acts of self-help.²⁰⁹

Some might say that the situation has changed since September 11 and that what would have before been considered as illegal self-help is now lawful self-defence. In the post-September 11 environment - and perhaps even before that date²¹⁰ - it is accepted that States can legitimately bomb in self-defence States considered to be harbouring terrorists, and that States might even be permitted to take extrajudicial measures normally considered to be unlawful, including assassinations or abductions, or at least that there is growing support for the view that the extraordinary security threat posed by terrorism gives some justification for the taking of extraordinary measures.

Where an attack on a State is made by a non-state actor, such as *Al Qaeda*, the question arises whether this can be considered an attack under Article 2(4) or Article 51 of the UN Charter. Schachter notes that while on its face Article 51, since it does not qualify "*armed attack*", could apply to attacks by any source, including non-state actors, "*this conclusion seems too simplistic in a world in which territorial sovereignty of States is a dominant principle*".²¹¹ He observes that the ICJ in the *Nicaragua* case "*considered that the requirement of armed attack for self-defense meant an attack by a state against which self-defense rights are asserted*",²¹² and the ILC "*concluded that self-defense applies only against a State that had itself wrongly used force*".²¹³

If one considered the 9/11 attacks as armed attacks carried out by a terrorist organisation, *Al Qaeda*, in violation of Article 2(4) and as justifying a response under Article 51, and if one does not consider Afghanistan as legally responsible for the terrorist acts, then the bombing of *Al Qaeda* targets in Afghanistan

²⁰⁸ SCHACHTER, *op. cit.* n. 2, pp. 144-145.

²⁰⁹ *Ibid.* pp. 145-146.

²¹⁰ See for example M. REISMAN, "International Legal Responses to Terrorism", *Houston Journal of International Law*, N° 22, 1999, p. 3.

²¹¹ SCHACHTER, *op. cit.* n. 2, p. 164.

²¹² SCHACHTER, *op. cit.* n. 2 at p. 164.

could be seen as an act of self-defence directed against a non-state actor, Al Qaeda, the instigators of the armed attack, rather than the State, even though Afghanistan's sovereignty and territorial integrity was infringed. On the other hand, Taleban targets were also struck because the Taleban was harbouring the terrorists and had refused requests to hand over bin Laden and dismantle the terrorist training camps.

The US message to the Security Council in which it announced that it was exercising its inherent right of individual and self-defence makes it clear that, although the attacks of 7 October were attributable to Al Qaeda, it implicitly attributed responsibility to the Taleban regime for facilitating the September 11 attacks by allowing its territory to be used by Al Qaeda:

*"The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals used by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad."*²¹⁴

Clearly, States are prohibited under international law from permitting their State to be used by terrorists. The 1970 Declaration on Principles of International Law states: *"Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts."*

Any State that breaches this rule may be responded to by all the means envisaged by international law, including possibly the right of self-defence under Article 51. However, simply harbouring terrorists is not prohibited under the 1970 Declaration.

The US Letter to the President of the Security Council does not suggest that the Taleban government took any active role in September 11 or even that it actively supported *Al Qaeda* more generally by means of funding, training, arms, etc. It simply says that it *"allowed its territory to be used by the organization as a base of operation"*. This would suggest a very low threshold of facilitation by the host State. Indeed, this interpretation would allow States wide discretion to attack other States that are considered to be harbouring Serrorists.

Any lingering doubt as to who was considered by the United States to be legally responsible for the 9/11 attacks and the targets of its attacks was dispelled by a speech given by Bush on 7 October 2001 announcing Operation Enduring Freedom:

"More than two weeks ago, I gave Taliban leaders a series of clear and specific demands [...] None of those demands were met. And now the Taliban will pay a price. [...] Today we focus on

²¹³ *Ibid.*, p. 165.

²¹⁴ Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/2001/946 (7 October 2001). Online at <http://www.un.int/usa/s-2001-946.htm>.

Afghanistan, but the battle is broader. Every nation has a choice to make. In this conflict, there is no neutral ground. If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers, themselves. And they will take that lonely path at their own peril. [...]"²¹⁵

As Schachter points out:

*"An armed attack in self-defence against a State on harbouring terrorists could only be considered as justified in self-defence where the State provides weapons, technical advice, transportation aid and encouragement to terrorists on such a substantial scale, that it is not unreasonable to conclude that the armed attack is imputable to that government."*²¹⁶

However, the almost universal support of States and the UN and other international bodies for the US use of force against Afghanistan in response to the September 11 attacks indicates that, at least in this case, harbouring of terrorists and refusal to cooperate in their handover to a State, if not active support of them and direct or indirect involvement in a specific attack, would justify resort to force in self-defence. According to Gray: *"It seems that the massive State support for the legality of the US claim to self-defence could constitute instant customary international law and an authoritative reinterpretation of the UN Charter, however radical the alteration from many States' prior conception of the right to self-defence."*²¹⁷ However, it may be going too far to read into one resolution, on a particular situation, the legal basis of an instant custom.

Resolution 1368 adopted by the Security Council (SC) on 12 September 2001 characterised the *Al Qaeda* attacks as a threat to international peace and security, and while not pronouncing Afghanistan legally responsible for them, affirmed the inherent right to individual or collective self-defence and the need to combat by any means the threats to international peace and security caused by the terrorist attacks. Resolution 1373 of 28 September 2001 also affirmed the USA's inherent right of individual and collective self-defence, as well as the need to *"combat by all means"* the *"threats to international peace and security caused by the terrorist acts"*. The General Assembly, conversely, while condemning the *"heinous acts of terrorism"* did not follow the Security Council in characterising them as armed attacks or recognise a right of self-defence of the US. Instead, it called for *"international cooperation to bring to justice the perpetrators, organizers and sponsors"* of the terrorist actions.²¹⁸

Should this be interpreted as meaning that the SC recognised the right of any State to respond with all necessary means, including the use of force, against a State harbouring terrorists? Does the right of self-defence encompass the right to use force directly against terrorists, regardless of the infringement of the sovereignty of the State where the terrorists are based? Since the latter seems unlikely, as the Security Council would scarcely support an interpretation of the right of self-defence that would result in a breach of the Charter, the former appears to be the most reasonable interpretation. However, it is not clear from the resolution what degree of support, if any, the State harbouring the terrorists must provide in order to legally

²¹⁵ "Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations", *Weekly Compilation of Presidential Documents*, N° 37, 7 October 2001, p. 1432.

²¹⁶ *Ibid.*, p. 165.

²¹⁷ GRAY, *op. cit.* n. 20, pp. 589 at 604.

²¹⁸ GA Resolution 56/1 (18 September 2001).

justify resort to force in self-defence against it. The mere presence of terrorists on the territory of a State which is not in any way assisting or supporting them, and is even sincerely committed to finding and arresting them, seems to hardly justify the use of force on the grounds of self-defence. As Ratner points out: *"The harboring notion endorsed by the United States and acquiesced in by others would presumably allow other states to attack terrorist bases on foreign soil as well."*

Should one read SC Resolutions 1368 and 1373 not only as changing the law on self-defence but also the law on State responsibility? Since the law on State responsibility is customary rather than treaty-based, and since only States can create customary law, it seems correct to assume that a resolution of the Security Council could not affect the customary international law on State responsibility. On the other hand, as Ratner points out, in such a situation as the attacks of September 11 or similar attacks which might be perpetrated against targets elsewhere, *"the view of state responsibility proffered by the ICJ, the ICTY, and the ILC - and by many international lawyers - becomes, in effect, instantly anachronistic as a limitation on self-defense."*²¹⁹

1.5.1 Anticipatory self-defence

Anticipatory self-defence is a preemptive strike, to prevent an attack which is imminent. A limited degree of anticipatory self-defence may be permitted under the Charter. On the other hand, this limited degree of first-strike capability does not mean that States can launch an armed attack based on some vague degree of disquiet about the intentions and capabilities of another state or even evidence that another State is developing a weapons program and is up to no good; there must be evidence of an imminent and actual attack. Nor does the concept of anticipatory self-defence cover things like extrajudicial assassinations of suspected terrorists, which are self-help measures that are illegal. Terrorist suspects against whom there is evidence of involvement in a crime should be apprehended, not assassinated. Even in situations of armed conflicts, assassination of both combatants and civilians is illegal. This subject is dealt with in more detail below. One must also consider whether the imminent prospect of a terrorist attack constitutes the imminent prospect of an armed attack for the purposes of the Charter, since it is not an imminent attack by a State.

In June 2002, President George W. Bush outlined his doctrine of anticipatory self-defence, in which he pledged to preempt terrorist actions by having a military *"ready to strike a moment's notice in any dark corner of the earth"*.²²⁰ Such a policy, if carried out, would involve widespread infringement of the principle of territorial integrity, unless one applied the loose harbouring standard previously endorsed by the SC. The previous year, in a Speech to Congress, President Bush outlined what is called the Bush Doctrine, including his administration's response to nations that support terrorists:

"And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day

²¹⁹ S. R. RATNER, "Jus ad Bellum and Jus in Bello after September 11", 96 *American Journal of International Law*, N° 96, 2002, pp. 905 at 919.

²²⁰ Remarks by the President at the 2002 Graduation Exercise of the United States Military Academy, West Point, New York, 1 June 2002, White House Release.

forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime."²²¹

Further refinement of the policy came in September 2002 when the Bush administration released a policy paper that proclaimed a doctrine of preemption.

"The American policy [...] proceeds from the premise that Americans "cannot let our enemies strike first". Therefore, "to forestall or prevent ... hostile acts by our adversaries [...] the United States will, if necessary, act preemptively" - that is, strike first."²²²

Some jurists argue that international law appears to recognise some leeway as far as anticipatory self-defence is concerned, although there are clear limits on its use.²²³ Dinstein argues that customary international law permits anticipatory self-defence, although he does not make clear what are the limitations on its use.²²⁴ According to Casey and Rivkin:

"[I]nternational law has always, and continues to, recognize a right of anticipatory self-defense, and the U.S. would be fully justified in relying on that right. [...] The actual practice of states since 1946 suggests that the traditional self-defense doctrine, including the right of anticipatory self-defense, survived intact."²²⁵

It is true that self-defence developed through state practice and that the customary international law relating to self-defence may differ from the Charter rules. Given that the United States bases the doctrine of preemptive on customary international law, it is ironic that in its brief to the International Court of Justice in the *Nicaragua* case, the United States contended that *"the only general and customary international law on which Nicaragua can base its claims is that of the Charter; in particular, the Court could not, it is said, consider the lawfulness of an alleged use of armed force without referring to the "principal source of the relevant international law", namely, Article 2, paragraph 4, of the United Nations Charter. In brief, in a more general sense, "the provisions of the United Nations Charter relevant here subsume and supervene the related principle of customary and general international law.*"²²⁶

The ICJ pointed out that in its Judgement of 26 November 1984, it

"had already commented briefly on this line of argument. Contrary to the views advanced by the United States, it affirmed that "[...] Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial independence of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of

²²¹ Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. (10 September 2001) pp. 1347 at 1349.

²²² M. J. GLENNON, "Why the Security Council Failed", in *Foreign Affairs*, May/June 2003, pp. 16-20.

²²³ See SCHACHTER, *op. cit.* n. 2 at p. 130.

²²⁴ See DINSTEIN, *op. cit.* n. 22, pp. 166-167.

²²⁵ L. A. CASEY and D. B. RIVKIN Jr., "Anticipatory Self-Defense Against Terrorism is Legal", in *Legal Opinion Paper*, Vol. 11, No. 19, Washington Legal Foundation, 14 December 2001.

²²⁶ See the case concerning Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v. United States*) Merits, Judgement of 27 June 1986, para. 173.

provisions of conventional law in which they have been incorporated." (I.C.J. Reports 1984, p. 424, para. 73).²²⁷

Further,

"the United Nations Charter [...] by no means covers the whole area of the regulation of the use of force in international relations". On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the *"inherent right" [...] of individual or collective self-defence, which "nothing in the present Charter shall impair" and which therefore applies in the event of an armed attack.*"²²⁸

In other words, while self-defence exists as a matter of customary law, predating the Charter, and applicable alongside it,²²⁹ it applies in the event of an armed attack, rather the opposite of the American argument.

Actions which fall outside the narrow margins of permissible anticipatory self-defence - however that is defined - are not lawful self-defence but illegal measures of self-help. As Gray points out, however, there is a possible check on States unilaterally asserting any right of anticipatory self-defence: *"the right of self-defence against terrorism may exist only in cases where the right has been asserted by the Security Council, as here in Resolutions 1368 and 1373. Several States regarded this Security Council backing as crucial to the US claim to self-defence"*.²³⁰ Gray notes other difficulties with applying the doctrine of anticipatory self-defence to a campaign like the *"war against terror"*, which we have been warned could have a very long duration, namely the question of proportionality and necessity.²³¹

The use of force avowedly in anticipatory self-defence has generally been condemned. For example, the SC did not accept that Israel's bombing of a nuclear power facility in Iraq in 1981 was an act of anticipatory self-defence and condemned the action.²³²

1.5.2 Self-help operations not in violation of Article 2(4)

A first question is whether there are any possible uses of armed force extra-territorially as a means of self-help which are not in violation of UN Charter Article 2(4), outside the exception of self-defence in Article 51.

There are circumstances in which States can use force against another State where a breach of the Charter is not incurred. A state is entitled to make an immediate armed response to a minor use of force. The ICJ in the *Corfu Channel* case stated that a warship passing through an international waterway was entitled to *"retaliate quickly if fired upon"* by the batteries of the coastal State.²³³ According to Cassese:

"The armed response is only authorized if it fulfills the conditions of necessity and proportionality generally required for the category of specific circumstances precluding wrongfulness of otherwise

²²⁷ *Ibid.*, para. 174.

²²⁸ *Ibid.* para. 176.

²²⁹ *Ibid.*

²³⁰ GRAY, *op. cit.* n. 20 at p. 604.

²³¹ *Ibid.*, p. 605.

²³² SC Res. 487 of 1981.

illegal acts, as well as that of immediacy, inherent in the characteristic of this type of military response."²³⁴

It has been argued that Article 2(4) of the Charter does not prohibit all threats or uses of force but only those which are directed against the territorial integrity or political independence of a State or are otherwise contrary to the purposes and principles of the UN. The argument runs that each word should be given its full meaning and not considered to be redundant, and if all uses of forces were *per se* prohibited these qualifying words would serve no purpose. Thus, to take Dinstein's example,²³⁵ you could have a situation whereby one State crossed into the territory of another to arrest or eliminate terrorists, where the territorial State had refused or otherwise failed to act. In this case, the action is not directed against the State; there is no attempt to annex the State's territory and the troops are merely there in a so-called law enforcement operation. And especially if you have a situation of a failed State, there can be no breach of territorial integrity, no threat to sovereignty because there is no sovereign.

It is disingenuous to argue that a mere cross-border or small criminal law enforcement operation does not involve a breach of territorial integrity and political independence of the State violated, and thus no breach of the Charter. Any illicit entry into the territory and the carrying out therein of an unlawful operation certainly constitutes a violation of the sovereignty and territorial integrity of the affected State, as well as being contrary to the purposes and principles of the United Nations.

Some possible areas where it is argued that force can be used without involving a violation of Article 2(4) are:

- Armed intervention at the invitation of a State. One could imagine a situation where a State cannot defeat or capture terrorists or armed rebels operating in its territory and so invites in another State to help it do so.
- Use of force to protect or secure legal rights where no other legal means are available (e.g., recapturing hostages and to protect ones' nationals).
- Use of force to capture, abduct or assassinate terrorists or criminal suspects.
- Use of force to reclaim territory illegally occupied.
- Use of force for humanitarian ends – the humanitarian intervention type of scenario.
- Use of force to assist people struggling for national liberation or democracy (regime change or self-determination).

There is sufficient space only to examine the first three scenarios.

1.5.3 Military intervention with the consent of the territorial State

Cassese cites as examples of cases where military intervention was effected with the consent of the territorial State: the USA in Lebanon in 1958; Belgium in the Congo in 1964; the Federal Republic of Germany in Somalia in 1977; France and Belgium in the then-Zaire in 1978; and the USA in Grenada in

²³³ *Supra* n. 16.

²³⁴ A. CASSESE, "International Law", Oxford, 2001, p. 320.

²³⁵ Given in an intervention during the meeting.

1983. In the latter case, Cassese notes: "*The UN GA did not uphold the legal grounds adduced by the USA and by resolution 38/7 of 1984 deplored the US intervention.*"²³⁶

Cassese summaries the present legal regulation as follows: consent must be freely given. It must be real and not merely apparent. It must be given by the lawful government. It must not be blanket but *ad hoc*. It may not legitimise the use of force against the territorial integrity or political independence of the state contrary to Article 2(4) of the UN Charter; and it must not run counter to the principles of *jus cogens*.²³⁷

1.5.4 Use of force to protect or rescue nationals

There are many cases where States have used force extraterritorily to protect their nationals. Cassese cites as examples where force was used without the consent of the territorial State: Belgium in the Congo in 1960; the USA in the Dominican Republic in 1965; the USA in Cambodia in 1975; Israel in Uganda in 1976; and the USA in Iran in 1980.²³⁸

Cassese says that it is remarkable that while largely western States have supported a right of armed intervention to protect one's nationals, other countries have "*consistently opposed the legality of this class of resort to force. Except for the German intervention in Somalia (where the territorial State gave its consent), foreign intervention has often been attacked as contrary to international law.*"²³⁹

Schachter takes the view that intervention to protect a State's nationals could be considered as self-defence "*where the nationals are attacked because of political antagonism to their government (as in the Teheran Hostages case)*".²⁴⁰ Cassese also believes that, despite the objections of many states, the general rule concerning the use of force to protect one's nationals abroad can be subsumed under the general concept of self-defence. It "*may only be resorted to under very strict conditions*" and these conditions are:

"(1) The threat or danger to the life of nationals—either due to terrorist attacks or to the collapse of the central authorities, or to the condoning by those authorities of terrorist or similar activities - is serious. (2) No peaceful means of saving their lives are open either because they have already been exhausted or because it would be utterly unrealistic to resort to them. (3) Armed force is used for the exclusive purpose of saving or rescuing nationals. (4) The force employed is proportionate to the danger or threat. (5) As soon as nationals have been saved, force is discontinued. (6) The State that has used armed force abroad immediately reports it to the SC; in particular, it explains in detail the grounds on which it has considered it indispensable to use force and the various steps taken to this effect."²⁴¹

²³⁶ CASSESE, *op. cit.* n. 57 at p. 313.

²³⁷ *Ibid.*, p. 318.

²³⁸ CASSESE, *op. cit.* n. 57 at p. 313.

²³⁹ *Ibid.*, p. 315.

²⁴⁰ SCHACHTER, *op. cit.* n. 2, pp. 166-167.

²⁴¹ *Ibid.*, pp. 315-316.

1.5.5 Use of force extraterritorially to capture and attack terrorists

The US has argued since 1986 that it is legitimate for it to use force to capture terrorists in international waters or airspace or to attack them on the soil of other nations, for capturing hostages, and against States that train, support or harbour terrorists or guerrillas (the Shultz doctrine, 15 January 1986).²⁴² The US doctrine has not, however, been supported unreservedly, even within the US administrations.²⁴³

Some other States, notably Israel, have also supported the use of force against terrorists as a means of self-help, but it is notable that when force has been used, it has often been condemned. For example, the SC condemned Israel's use of force against Tunisia by bombing the PLO Embassy in Tunis in 1985 on grounds of proportionality and necessity and characterised it as an act of armed aggression and as an act in violation of the territorial integrity and sovereignty of Tunisia.²⁴⁴

Similarly, the US bombing of Libyan targets in 1986 in response to a terrorist attack on a nightclub in Berlin frequented by US soldiers was almost universally criticised and was condemned by the Security Council on the grounds of necessity and proportionality.²⁴⁵ Similarly, the 1998 strikes on possible civilian targets (pharmaceutical plants) in Sudan and Afghanistan authorised by US President Clinton were not condemned outright but strongly criticised on humanitarian law grounds (that is, the choice of targets selected).

Bryde asserts that: "[T]he use of force in such circumstances has always generated such controversy that it cannot be considered the nucleus for the development of new customary authorizations for the use of force and the recognition of exceptions to Article 2(4) of the UN Charter."²⁴⁶

One response to the argument that force is permitted against terrorists is that the UN Charter system established a system of collective security and that any unilateral use of force by any State against another State is inconsistent with the purposes and principles of the UN.²⁴⁷

The definition of aggression adopted by the Special Committee of the General Assembly and the General Assembly in 1974 in Article 3 enumerated as specific acts of aggression: "*invasion or attack by the armed forces of a state on the territory of another state, military occupation resulting from invasion or attack, annexation by the use of force, bombardment of or the use of weapons against the territory of another State, blockade of the ports or coasts of a State, and the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to invasion, attack, bombardment, etc, or substantial "involvement" therein by the sending*

²⁴² "A nation attacked by terrorists is permitted to use force to prevent or pre-empt future attacks, to seize terrorists, or to rescue its citizens, when no other means is available." 25 ILM, January 1986, p. 204.

²⁴³ See J. J. PAUST, "Responding lawfully to international terrorism: the Use of Force Abroad", *Whittier Law Review*, N° 8, 1986, pp. 711 at 712.

²⁴⁴ See UN Docs. S/17509, 1 October 1985; S/PV 2611, 2 October 1985; S/PV 2615, 4 October 1985; and S/17659, 25 November 1985.

²⁴⁵ See "Contemporary Practice of the United States Relating to International Law", *American Journal of International Law*, N° 80, 1986, pp. 632-636.

²⁴⁶ BRYDE, *op. cit.* n. 19, p. 217.

²⁴⁷ See SHEARER, *op. cit.* n. 14, p. 484.

state". Article 4 provided that the acts listed in Article 3 were not exhaustive, and that the Security Council could determine other acts to constitute aggression.²⁴⁸

The extraterritorial use of self-help to capture or attack terrorists may therefore not necessarily involve an act of aggression if it is not of sufficient gravity as to amount to an invasion, attack, bombardment, etc. although it necessarily involves a breach of territorial integrity, except in cases where consent is given, and therefore a breach of Article 2(4).

1.6 Distinguishing extraterritorial self-help operations from the right of hot pursuit

Some commentators have suggested that some extraterritorial self-help operations can be considered as an exercise of the right of hot pursuit, where the extraterritorial self-help operation is conducted further to the commission of a crime by a perpetrator who then flees the territorial State. It is important for these purposes to clearly distinguish self-help and hot pursuit. Regarding hot pursuit on land, it has been defined as *"the uninterrupted continuation into a no man's land or into the territory of another State - following an explicit agreement with the State into the question permitting the exercise of the right of hot pursuit in its own territory - of the pursuit of an offender or a group of offenders started by the authorities immediately after the commission of an offence."*²⁴⁹

It is thus clear that most purported exercises of the right of self-help cannot therefore be assimilated with the right of hot pursuit. Many extraterritorial self-help operations lack the condition of immediacy. Even where they are law enforcement operations, they generally are not an immediate response to the commission of a crime. Neither are they conducted pursuant to an agreement between the States concerned.

It is also relevant that, even in cases of hot pursuit, *"the arrested offenders had to be delivered to the authorities of the State on whose territory they were apprehended. The recovery of the fugitive offenders by the State where the commission of the offence occurred might follow through the process of extradition."*²⁵⁰ Thus, a breach by a State of the territorial sovereignty of another State in order to apprehend a person suspected of committing a crime on the first State's territory and the abduction of the suspect back to the first state either for the purposes of preventive detention or to stand trial could not be regarded as a case of hot pursuit. The subject of abductions is discussed further below.

2. WHAT DISTINGUISHES AN EXTRATERRITORIAL SELF-HELP OPERATION FROM AN ARMED CONFLICT

An armed conflict, if it is international in character, involves at a minimum of two States. According to common Article 2 of the 1949 Geneva Conventions, *"the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting*

²⁴⁸ GA Resolution 3314 of 1974.

²⁴⁹ N. A. POULANTZAS, *The Right of Hot Pursuit in International Law*, 2nd ed., The Martinus Nijhoff Publisher, 2002, p. 11.

²⁵⁰ *Ibid.* p. 13.

Parties, even if the state of war is not recognized by one of them". The difficulty is in knowing what "armed conflict" means. The *Commentary* of the International Committee of the Red Cross on Common Article 2 states:

*"Any difference arising between two States and leading to the intervention of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place."*²⁵¹

The *Commentary* further asserts that even if both Parties deny the existence of an armed conflict, the Conventions should apply.

Generally, reprisals involving the use of armed force where there is no preexisting armed conflict are banned under international law as they are considered to be acts of aggression, prohibited under Article 2(4) of the Charter. Once an armed attack has taken place, even if it consists only of a bombing of a specific target as a means of reprisal, international humanitarian law comes into play and the bombing would be subject to its principles and rules. Where action involving the use of force is not an armed attack within the meaning of Article 2(4) of the UN Charter, but nevertheless involves a breach of territorial integrity, it does not necessarily precipitate a state of armed conflict, and the application of international humanitarian law. In order for an armed conflict to exist, there are certain minimum requirements of scale and intensity. As Detter notes:

"There must [...] obviously exist a de minimus rule to distinguish war and other forms of armed conflicts from raids. Sporadic operations fall outside the concept of "armed attack" unless "powerful bands of irregulars" are involved in a "coordinated and general campaign". There is also a required "degree of intensity", that is, "the dispute must be of a certain magnitude". "[U]nless incursions sponsored by a State or self-sponsored groups are of a prolonged and intensive nature, they will fall under de minimus rule and will not constitute war".²⁵²

Thus, a limited intervention for law enforcement purposes, such as a raid by law enforcement agents, would not amount to an armed conflict - even if it involves a breach of territorial integrity. Neither would an assassination of a suspected terrorist or criminal or even a head of state or high official. International humanitarian law would however apply to certain self-help operations involving a requisite degree of armed force, for example, such as to amount to an armed attack under Article 2(4) of the Charter. Any armed force taken in self-defence would be subject to the rules of humanitarian law.

3. EXTRATERRITORIAL CRIMINAL LAW ENFORCEMENT OPERATIONS

Some extraterritorial self-help operations not amounting to armed attacks and not covered by international humanitarian law may be justified on grounds of necessity, but international law nevertheless

²⁵¹ *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, (Geneva, International Committee of the Red Cross 1958) p. 20.

²⁵² I. DETTER, *The Law of War*, Cambridge, 2000, p. 20.

prescribes certain actions which could be considered as forms of extraterritorial self-help. This contribution examines two in particular: abductions and assassinations.

3.1 Abductions

3.1.1 Legality of abductions under international law

Abductions involve a breach of the territorial integrity of one State by another State, with the purpose of forcibly apprehending a criminal or suspect and the forcible removal of that person into the jurisdiction of the abducting State for the purposes of criminal trial or otherwise, without the consent of the territorial State.

According to Lauterpacht:

*"It is a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of having committed a crime. Apart from other satisfaction, the first duty of the offending State is to hand over the person in question to the State in whose territory he was apprehended."*²⁵³

Abductions are prohibited not only under customary international law²⁵⁴ but also under human rights law more specifically, starting with the 1948 Universal Declaration of Human Rights, Article 9 of which declares: *"No one shall be subjected to arbitrary arrest, detention or exile"*. Article 9(1) of the International Covenant on Civil and Political Rights provides: *"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."* Article XXV of the 1948 American Declaration of the Rights and Duties of Man provides that: *"No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law."* Article 5 of the 1950 European Convention on Human Rights states: *"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law."* Each of the prescribed procedures requires that a person be lawfully arrested and detained. In particular, subparagraph (c) provides that a person suspected of having committed a crime must be lawfully arrested or detained for the purposes of bringing him before a competent legal authority. The 1969 American Convention on Human Rights provides in Article 7 that: *"(1) Every person has the right to personal liberty and security. (2) No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. (3) No one shall be subject to arbitrary arrest or imprisonment."*

The recognition of the right to freedom from arbitrary detention in every major human rights treaty supports the view that it is a general principle of international law, of universal application, and has the status of customary international law. Wedgewood has stated that: *"Under the deepest norms of international law,*

²⁵³ H. LAUTERPACHT, 1 *Oppenheim's International Law*, 8th ed., 1955, p. 295.

²⁵⁴ See R. WEDGEWOOD, "The Argument Against International Abduction of Criminal Defendants: *Amicus Curiae* Brief Filed by the Lawyers Committee for Human Rights in *United States v. Humberto Alvarez-Machain*", 6 *The American University Journal of International Law and Policy*, Vol. 6, Summer 1991, pp. 537 at 566.

*the jurisdiction to apprehend offenders is limited to the political government that is sovereign in a particular country.*²⁵⁵

Abductions also involve a breach of any existing extradition treaty between the responsible State and the State from which the person is seized.

The most famous case of abduction of a suspect to face trial in another state was Israel's seizure of Eichmann from Argentina to face trial in Israel. In response to a formal complaint filed by the UN representative from Argentina pursuant to Article 35 of the UN Charter, the Security Council, by eight votes to none (with two abstentions and one member -Argentina- not participating), adopted a resolution condemning Eichmann's kidnapping and requesting "*the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and rules of international law [...]*"²⁵⁶

In 1985, the Security Council recognised that "*abductions are offenses of grave concern to the international community, having severe adverse consequences for the rights of the victims and for the promotion of friendly relations and co-operation among States*" and condemned "*unequivocally all acts of [...] abduction*", and recognised the "*obligation of all States in whose territory hostages or abducted persons are held urgently to take all appropriate measures to secure their safe release and to prevent the commission of acts of hostage-taking and abduction in the future*".²⁵⁷

The UN Human Rights Committee has recognised that forcible abductions can violate the human rights of the abductee.²⁵⁸ In Europe, abductions are also considered to violate human rights protecting the individual from arbitrary deprivation of liberty.²⁵⁹

Some authors recognise exceptions to the prohibition. According to Paust *et al* these include:

"reasonably necessary international criminal-napping (when, on balance, it is not arbitrary, cruel, inhumane, degrading, unjust, or otherwise unlawful), (2) capture of a dictator, (3) permissible acts of self-defense under the U.N. Charter, and (4) permissible actions under Chapter VII and VIII of the U.N. Charter. Clearly, the last two exceptions are based directly in the U.N. Charter. The first two are probably still a minority viewpoint, especially given the Eichmann and abduction resolutions of the Security Council in 1960 and 1985."²⁶⁰

A secondary issue, following the question of the legality of abductions, is whether a person who has been abducted can be fairly tried in the territorial jurisdiction. The traditional position in many national jurisdictions was *mala captus bene detentus*, according to which a detainee cannot escape trial even if he is brought into the jurisdiction illegally, although in recent years there has been an increasing tendency towards

²⁵⁵ *Ibid.*

²⁵⁶ See UN SC Res. 138, 15 UN SCOR, UN Doc. S/4349 (1960).

²⁵⁷ UN SC Res. 579, UN Doc. S/Res/579 (1985).

²⁵⁸ Views of the Human Rights Committee on the Complaint of Lopez, 36 U.N. GAOR, Supp. No. 40, at 176-84, UN Doc. A/36/40 (1981).

²⁵⁹ See e.g., *Bozano v. France*, Ser. A, No. 111 (18 Dec. 1986), 9 EHRR 297 (1987), (2 Dec. 1991), 12 EHRR 428 (1991).

²⁶⁰ J. J. PAUST, M. C. BASSIOUNI, S. A. WILLIAMS, M. SCHARF, J. GURULÉ and B. ZAGARIS, *International Criminal Law, Cases and Materials*, Durham, North Carolina, Carolina Academic Press, 1996 p. 462.

courts finding *male captus male detentus*. However, as the ICTY observed in the *Nikolić* case, the national case law is rather diverse.²⁶¹

3.1.1 Abductions under US law

The position in the United States is that of *mala captus bene detentus*.²⁶² Until 1974, it was encapsulated in the so-called ‘Kir-Frisbie’ rule, according to which due process was limited to the guarantee of a constitutionally fair trial, regardless of the method by which jurisdiction was obtained over the defendant.²⁶³ In 1974, in the *Toscanino* case, however, the New York Circuit Court (2d Cir.) departed from the “*Kir-Frisbie*” rule. According to the Court, per Mansfield, J., since *Frisbie*, the Supreme Court views:

*"due process as now requiring a court to divert itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."*²⁶⁴

Commenting on the case in its decision on jurisdiction in the *Nikolić* case, a Trial Chamber of the ICTY said: *"One needs to take into account here that the decision to divest jurisdiction was based on the way the abduction was carried out and not on the fact that an abduction had taken place. [...] The Toscanino rule therefore appears to apply only when (i) the abduction itself amounts to “grossly cruel and unusual barbarities” or “shock the conscience”, (ii) the abduction was the work of State agents, and (iii) there was a protest by the injured State."*²⁶⁵

According to Paust *et al*:

*"In later cases such as United States v. Herrera 504 F.2d 859 (5th Cir. 1974); United States ex re. Lugan v. Gengler, 510 F. 2d 62 (2d Cir. 1975); United States v. Lira, 515 F.2d 1979: and United States v. Marschener, 470 F. Supp. 201 (D. Conn. 1979), the Toscanino decision was distinguished and explained. It was distinguished in Gengler on the ground that although government agents do not have a carte blanche to bring defendants from abroad to the United States by the use of torture, brutality and similar outrageous conduct, not every violation of law by the government or irregularity in the circumstances of a defendant's arrival in the jurisdiction is sufficient to vitiate the proceedings in a criminal court."*²⁶⁶

In 1989 the Office of Legal Counsel of the US Department of Justice reversed its earlier opinion and found that the US has the authority under its own domestic laws to carry out extraterritorial arrests without the consent of the other State, which may depart from principles embodied in international law.²⁶⁷

Abraham D. Sofaer, Legal Adviser at the US Department of State, in a statement given on 8 November 1989 to the US Department of Justice, to the US House of Representatives' Subcommittee on

²⁶¹ *Prosecutor v. Dragan Nikolić*, Decision on Defence Motion Challenging the Exercise of the Jurisdiction by the Tribunal, 9 October 2002, part VI, para. 26.

²⁶² PAUST *et al*, *op. cit.* n. 83, pp. 454-455.

²⁶³ *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). Reprinted *ibid.*, pp. 455 at 457.

²⁶⁴ *Ibid.*, p. 458.

²⁶⁵ *Nikolić*, *supra* n. 84, part VI, para. 13.

²⁶⁶ PAUST *et al*, *op. cit.* n. 83, p. 460.

²⁶⁷ *Ibid.*, pp. 440-488 at 441.

Civil and Constitutional Rights of the Committee on the Judiciary, justified the right to make arrest drug traffickers in a foreign State without its consent in some cases on the ground of "*self-defence*", and said that international law permits States to make extraterritorial arrests in situations which permit a valid claim of self-defence.²⁶⁸

By 1992, what was left of *Toscanino* was finally buried with the Supreme Court decision in *United States v. Alvarez-Machain*, what the ICTY has called "*the leading U.S. case on forcible abduction by government agents*".²⁶⁹ In the majority decision, Rehnquist, C.J. held that a criminal defendant, abducted to the US from a nation with which it has an extradition treaty, does not thereby acquire a defence to the jurisdiction of US courts, and may be tried in federal district court for violations of the criminal law of the United States.²⁷⁰ The case turned, however, not on the question whether the kidnapping constituted outrageous government conduct or a violation of international law but on the terms of the extradition treaty between the US and Mexico.

Alvarez-Machain was a Mexican citizen, indicted in the US for participating in the kidnapping and murder of US Drug Enforcement Agency (DEA) official special agent Enrique Camarena-Salazar and a Mexican pilot working with Camarena, Alfredo Zavala-Avelar. The DEA believed that Alvarez-Machain, a doctor, participated in the murder by prolonging agent Camarena's life so that others could torture him to extract information. On 2 April 1990, the respondent was forcibly kidnapped from his medical officer in Guadalajara, Mexico by five DEA agents, and flown by private plane to El Paso, where he was arrested by DEA officials.

Alvarez-Machain petitioned to dismiss the indictment against him on the grounds that his abduction constituted outrageous government conduct, and that the District Court lacked jurisdiction to try him because he was abducted in violation of the extradition treaty between the US and Mexico. The District Court rejected the outrageous governmental conduct claim, but held that it lacked jurisdiction to try the respondent because his abduction violated the extradition treaty between Mexico and the US.²⁷¹

The Court of Appeals affirmed the dismissal of the indictment and the repatriation of the respondent, relying on its decision in *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991).

The Supreme Court, conversely, reversed, finding that

"The Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nations, or the consequences under the Treaty if such an abduction occurs. ... The history of negotiation and practice under the Treaty also fails to show that abductions outside of the Treaty constitute a violation of the Treaty. The current version of the Treaty, signed in 1978, does not attempt to establish a rule that would in any way curtail the effects of Ker."

²⁶⁸ Statement of Abraham D. SOFAER, Legal Adviser, U.S. Department of State, on the International Law and Foreign Policy Implications of Nonconsensual Extraterritorial Law Enforcement Activities, before the Subcommittee on Civil and Constitutional Rights of the Committee of the Judiciary, United States House of Representatives, November 8, 1989. Reprinted in Paust et al, op. cit. n. 83, pp. 440-488 at 450.

²⁶⁹ *Nikolić*, supra n. 84, part VI, para. 14.

²⁷⁰ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

It is interesting to note that Rehnquist, C.J. stated that

*"Respondent and this amici may be correct that respondent's abduction was "shocking," Tr. Of Oral Arg. 40, and that it may be in violation of general international law principles. Mexico has protested the abduction of respondent through diplomatic notes, App. 33-38, and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch."*²⁷²

Mexico strongly protested the abduction of Alvarez-Machain and demanded his return. It stated that it regarded the Supreme Court decision as invalid and illegal, and considered as a criminal act any attempt by a foreign government to apprehend in Mexican territory a person accused of a crime.²⁷³ In its *amicus curiae* brief filed in support of the respondent, Canada stated that transborder abductions of fugitives contrary to law *"contravene fundamental principles of justice that Canada has sought to uphold"*.²⁷⁴

The *Alvarez-Machain* Supreme Court precedent was upheld by the 9th Circuit in *United States v. Matta-Ballesteros*.²⁷⁵

In 1992, Alan J. Krecko, the Deputy Legal Adviser of the US Department of State, testified to a House Judiciary Subcommittee about the international reaction to the Supreme Court's opinion in *Alvarez-Machain*. He acknowledged that many governments have expressed outrage that the United States believes that it has *"the right to decide unilaterally to enter their territory and abduct one of their nationals"* and *"would regard such action as a breach of international law, as well as of their domestic law and extradition treaties with the US."* The US wished

*"to reassure other governments that it didn't regard the Supreme Court decision as giving a green light for the US to conduct operations on foreign territory [...] At the same time, we are not prepared categorically to rule out unilateral action. It is not inconceivable that in certain extreme cases, such as the harboring by a hostile foreign country of a terrorist who has attacked U.S. nationals and is likely to do so again, the President might decide that such an abduction is necessary and appropriate as a matter of the exercise of our right of self-defense."*²⁷⁶

3.1.2 ICTY case law on abduction

The International Tribunal for the Former Yugoslavia (ICTY) has been presented with the possibility of ruling on the legality of abduction three times, in the *Dokmanović*,²⁷⁷ *Todorović*²⁷⁸ and *Nikolić* cases,²⁷⁹ but only in the latter case has it been able to give a ruling on the matter.

²⁷¹ Extradition Treaty, May 4, 1978, [1979] United States-United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656.

²⁷² *Alvarez-Machain*, *supra* n. 93, per Rehnquist, C.J. See M. Glennon, 'State sponsored abduction: A comment on United States v. Alvarez-Machain', 86 *AJIL* 1992, p. 746; M. HALBERSTAM, 'In defence of the supreme court decision in Alvarez-Machain', 86 *AJIL* (1992) p. 736, M. HALBERSTAM, 87 *AJIL* 1993, p. 256.

²⁷³ *Alvarez-Machain*, *supra* n. 93.

²⁷⁴ Brief of the Government of Canada as Amicus Curiae in Support of the Respondent in the case of *United States v. Alvarez-Machain*, reprinted in 31 *ILM* (1992) p. 919.

²⁷⁵ 71 F.3d 754 (9th Cir. 1995).

²⁷⁶ 3 U.S. Dept. of State Dispatch 614 (1992). Reprinted in Paust et al, op. cit. n. 83, pp. 480-483.

²⁷⁷ *Prosecutor v. Slavko Dokmanović*, Case No. IT-95-13-T, Indictment of 29 February 1996.

²⁷⁸ *Prosecutor v. Todorović*, Second Amended Indictment, 25 March 1999.

In *Dokmanović*, the accused claimed that he had been lured from the FRY into then UN-administered Croatia, where he was arrested, and that this was tantamount to kidnapping, and that his right to freedom from arbitrary arrest had been infringed. The operation was staged by the ICTY Office of the Prosecutor (OTP) and the UN Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTEAS).

The Trial Chamber found that the trickery used by the OTP did not amount to a "*forcible abduction or kidnapping*". Although the accused had been "*deceived, tricked, and lured into going into Eastern Slavonia*", the conduct was "*consistent with the principles of international law and the sovereignty of the FRY*".²⁸⁰ Since it found the luring to be legal, it did not have to look into the question of whether the Tribunal can exercise jurisdiction over a defendant illegally obtained from abroad".²⁸¹

In the *Todorović* case, the accused reached a plea agreement with the Office of the Prosecutor, in which, in return for it dropping all but one (crime against humanity) count against him, he agreed to plead guilty to that count, drop all motions relating to the nature of his apprehension, and cooperate with the Prosecutor.²⁸² The exact manner in which he was apprehended and came into the custody of the Tribunal remains a mystery; indeed, such was the desire of the OTP to keep it a secret that it made the plea agreement. It is known, however, that on the night of 27 September 1998, four armed masked men burst into his home in western Serbia, gagged, blindfolded and beat him with a baseball bat, then smuggled him out of Serbia and into Bosnia. Within a few minutes of his arrival there, a helicopter arrived to take him to SFOR's Tuzla base.²⁸³

The *Nikolić* case was the first in which the Tribunal examined the principle of *male captus bene detentus*. The accused claimed that he was abducted in Serbia by men falsely claiming to be police officers, bundled into the boot of a car and driven over the border into Bosnia, where he was taken by boat across the Drina River where he was handed over to US SFOR soldiers.²⁸⁴ His captors, who did not belong to SFOR, were subsequently convicted by a court in Serbia for his kidnapping.²⁸⁵ The basic facts of the manner in which Nikolić came into the jurisdiction of the ICTY were not disputed by the OTP.²⁸⁶

The accused argued that the principle of *male captus bene detentus* should no longer be applied as it has lost its relevance in the practice of many national jurisdictions, but instead the principle *male captus male detentus* should be determinative. He based his argument on three legal grounds: (1) such an abduction constitutes a violation of state sovereignty of the allegedly injured State; (2) such abduction could constitute a serious curtailment of basic inalienable rights and lead to a subsequent irregular exercise of jurisdiction

²⁷⁹ *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, Third Amended Indictment, 19 June 2003.

²⁸⁰ *Prosecutor v. Slavko Dokmanović*, Decision on the Motion for Release by the Accused Slavko Dokmanović, Case No. IT-93-13a-PT, T. Ch. II, 22 October 1997, para. 57.

²⁸¹ *Ibid.*, para. 78.

²⁸² For a discussion of the case see J. SLOAN, "Prosecutor v. Todorović: Illegal Capture as an Obstacle to the Exercise of International Criminal Jurisdiction", *Leiden Journal of International Law*, Vol.16, March 2003, p. 85.

²⁸³ *Ibid.*, p. 86.

²⁸⁴ *Prosecutor v. Dragan Nikolic*, Defence Motion for Relief Based Inter Alia Upon Illegality of Arrest following upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-related Abuse of Due Process within the Contemplation of Discretionary Jurisdictional Relief under Rule 72, filed 17 May 2001.

²⁸⁵ "Seven Jailed by Yugoslav Court for Abducting War Crimes Suspect", *AFP*, 24 November 2000.

over an individual by an adjudicating court; (3) such an abduction *per se* and the subsequent exercise of jurisdiction constitutes an abuse of process and a breach of the rule of law. The defence interpreted the concept of the rule of law in a broad way, acknowledging explicitly that *"there is no suggestion on the part of the Defence that the irregular rendition inevitably divests the accused of a fair trial"*.²⁸⁷

The Trial Chamber acknowledged that it found *"itself in uncharted waters"*.²⁸⁸ Noting that both parties had relied extensively in their submissions on national case law, it observed *"that the case law referred to is far from uniform. In some national jurisdictions, the maxim male captus, bene detentus is more closely followed than in others."*²⁸⁹ Furthermore, *"all case law is based on various forms of forced cross-border abductions which occur between sovereign States, i.e. on a horizontal level. [...] [But] [T]he relationship between the Tribunal and national jurisdictions is not horizontal, but vertical. [Therefore,] the national case law must be "translated " in order to apply to the particular context in which this Tribunal operates."*²⁹⁰

The Chamber rejected the defence's first legal argument, that the abduction constituted a breach of state sovereignty. While agreeing with it that *"in clear cases of State involvement in a forced abduction serious questions may arise about respect for the sovereignty of the injured State. [...] the Chamber cannot concur with the Defence that such a violation of international law has occurred here."*²⁹¹

It is interesting to note the legal argument advanced by the Chamber in favour of this finding. In a manner not unlike that of the US Supreme Court in *Alvarez-Machain*, it jumps through some rather artificial legalistic hoops to justify its desired result. It returned to its oft-repeated argument concerning its vertical position, in which context, *"sovereignty by definition cannot play the same role"* as between States. The Chamber sought to distinguish the case here from some national case law by stating that the persons who abducted *Nikolić* were not working for the OTP or SFOR and that their actions could not be attributed to the OTP or SFOR.

"The Accused was deprived of his liberty in the territory of the FRY by unknown individuals and brought by those individuals across the border into the territory of Bosnia and Herzegovina. At no time prior to the Accused's crossing the border between the FRY and Bosnia and Herzegovina were SFOR and/or the Prosecution involved in the transfer. In addition, from the assumed facts the conclusion must be drawn that there are no indicia that SFOR or the Prosecution offered any incentives to these unknown individuals. Further analysis of the national case law shows that in every case in which a court decided not to exercise jurisdiction the facts of the case demonstrated that executive authorities of the forum State had been involved in the disputed operation to transfer an accused from one State to another. Furthermore, in several cases where it was clear that those

²⁸⁶ *Nikolic, supra* n. 84, paras. 21 and 22.

²⁸⁷ *Ibid.*, para. 3, part VI.

²⁸⁸ *Ibid.*, para. 7.

²⁸⁹ *Ibid.*, para. 4.

²⁹⁰ *Ibid.*, para. 8.

²⁹¹ *Ibid.*, para. 31.

authorities had not been involved , the courts saw no obstacle to the exercise of jurisdiction over the case."²⁹²

While its argument is technically correct, since abduction is normally inter-state, and the national case law naturally deals only with such abductions, it does not follow that since the SFOR and the OTP are not States that there was no breach of State sovereignty.

If the direct involvement of the OTP or SFOR in the kidnapping was not proven, it nonetheless seems to be testing disingenuity to the limit for the Tribunal to find in its conclusions that, "*as the Accused had "come into contact with SFOR", SFOR was obliged to arrest, detain and transfer him to The Hague*". While the Chamber was obviously forced to recognise a *de facto* situation, its too easy dismissal of the forcible manner in which *Nikolić* came into its jurisdiction is worrying. The fact that SFOR troops were waiting on the right bank of the Drina to arrest *Nikolić* indicates that it was indeed aware of and complicit in his abduction, or at least this happy coincidence of their being there to meet him should have been investigated. The chain of events, carried out, and encouraged, or at least tolerated and sanctioned, by and large, by international organisations, including SFOR and the ICTY, and including *some "unknown individuals"*, would indeed lead to the responsibility of a State if carried out by a State or its agents, and to hide behind the veil of being international organisations is at least exemplary of international institutional irresponsibility. The question of State sovereignty may be irrelevant for an international organisation such as the ICTY or SFOR, which technically cannot breach it, although one must recall that that idea of what constitutes breaches of State sovereignty has opened up and it is not unforeseeable that international institutions or corporations could be seen as in violation of state sovereignty. The ICTY or any international organisation certainly is not justified in using the idea of verticality to distance itself from unlawful acts. As Wedgewood pointed out in her *amicus curiae* brief to the Court in *Alvarez-Machain*, on behalf of the Lawyers' Committee for Human Rights: "*Kidnapping is a continuing offense. The arbitrariness of abducting a foreign citizen from his homeland does not cease once he is over the border.*"²⁹³

Regarding the second ground, that the abduction violated the human rights of the defendant, the Chamber, while purporting to acknowledge the human rights of the accused, too easily dismissed them. In particular, its discussion quite simply ignored the right to freedom from arbitrary detention. Instead it focussed on human rights violations suffered in the process of abduction, the standard applied in *Toscanino* and subsequent US cases.

The Chamber's exclusive focus on the issue of whether his rights were violated during the kidnapping, and particular, the question of whether he had been abused, is mistaken. Abduction is a separate crime; the initial crime, a point which was not even considered by the Trial Chamber. The assimilation of the separate crime of abduction, with that of human rights violations carried out during the abduction is confusing and illegally incoherent. The most fundamental legal basis of the illegality of an abduction is not any additional human rights violations (in the way of illegal treatment) committed during the process (although these may be further grounds in favour of its illegality) but the fact of the kidnapping itself. The

²⁹² *Ibid.*, para. 33.

legal prohibition is rooted in the prohibition against arbitrary detentions, and in the right to liberty and security of persons.

As to the third legal ground raised by the defence, that such an abduction *per se* and the subsequent exercise of jurisdiction constitutes an abuse of process and a breach of the rule of law, the Chamber concurred with the view that *"the issue of respect for due process of law encompasses more than merely the duty to ensure a fair trial for the Accused [but] [...] also includes questions such as how the Parties have been conducting themselves in the context of a particular case and how an Accused has been brought into the jurisdiction of the Tribunal."*²⁹⁴ On the other hand, here again it failed to take notice of the illegality of the abduction itself, again limiting its focus to mistreatment carried out during the abduction.

"The Chamber holds that, in a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused."

This would be the case where such persons were acting for SFOR or the OTP. *"But even without such involvement this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated."*²⁹⁵

The question of whether the treatment was egregious enough for the Tribunal to divest itself of jurisdiction would have to be decided on a case-by-case basis. *"In this case, the assumed facts, although they do raise some concerns, do not at all show that the treatment of the Accused by the unknown individuals amounts to such an egregious nature."*²⁹⁶ The Chamber thus concluded finally that, *"on the basis of the assumed facts, the Tribunal must exercise jurisdiction over the Accused. The allegations that his human rights have been violated or that proceeding with the case would violate the fundamental principle of due process of law are rejected."*²⁹⁷

The decision can be criticised in many respects. It is remarkable that the Chamber made absolutely no reference to the international standards concerning abduction, and limited its review to a small number of national jurisdictions' case law. Although this argument was not specifically raised by the defence, it was remiss of the Chamber in its review of the legality of the abduction to avoid mention of the position under international law. This alone would have been sufficient to deem Nikolić's abduction as unlawful, regardless of the success of any of his other legal arguments. Nor did it examine the lawfulness of the abduction *per se* under international law and the question of the continuing nature of the crime, but restricted itself to the questions of whether egregious violations of human rights and due process were committed in the process, and whether the abduction could be attributed to the OTP and SFOR. Even if it was technically correct in stating that the abduction was not a violation of State sovereignty, since the captors were not acting on behalf

²⁹³ WEDGEWOOD, *op. cit.* n. 77, pp. 537 at 567.

²⁹⁴ *Nikolic, supra* n. 84, para. 43.

²⁹⁵ *Ibid.*, para. 46.

²⁹⁶ *Ibid.*, para. 46.

²⁹⁷ *Ibid.* para. 47.

of a State, the result: the sanctioning by an international organisation of an action that would be illegal if committed by a State, is regrettable.

Particularly since the trend in national jurisdictions has been towards *male captus male detentus*, it is particularly disappointing that an international criminal tribunal should reach such a regressive decision.

3.2 Assassinations

3.2.1 The position under international law

Assassinations, whether during peace or wartime are prohibited under international law. Article 6(1) of the International Covenant on Civil and Political Rights states that: *"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."* Article 2(1) of the European Convention on Human Rights provides that: *"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the circumstances of a sentence of a court following his conviction of a crime for which this penalty is provided by law."* (The death penalty was later abolished in Protocol, 6 as amended by Protocol 11). Article 4(1) of the American Convention similarly provides: *"Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."* These provisions are non-derogable and apply during armed conflict as well as during peacetime.

Assassinations during war are prohibited under Article 23(b) of the Hague Regulations 1907 which provides: *"It is especially forbidden [...] to kill or wound treacherously individuals belonging to the hostile nation or army."*

*"This article is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon the enemy's head, as well as offering a reward for an enemy "dead or alive". It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory or elsewhere."*²⁹⁸

It is forbidden under Hague Law (and under the US Army Field Manual) to order that no quarter be given (Article 23(d) Hague Regulations). Article 40 of Additional Protocol I also provides: *"It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis."* Killing of a captured person by any means is also obviously prohibited under international humanitarian law.²⁹⁹

3.2.2 The position under US law and policy

In 1976, President Gerald Ford issued Executive Order 11905, section 5 of which provides: *"(g) Prohibition of Assassination. No employee of the United States Government shall engage in, or conspire to engage in, political assassination."* Similar executive orders were issued by Presidents Carter and Reagan.

²⁹⁸ PAUST et al, *op. cit.* n. 83, p. 489. See also J. PAUST, "My Lai and Vietnam: Norms, Myths and Leader Responsibility", *Military Law Review*, N° 57, 1972, pp. 99.

²⁹⁹ Article 4 of the Hague Regulations stipulate that prisoners of war *"must be treated humanely"*. Article 23(c) provides that *"[...] it is especially forbidden to (c) To kill or wound an enemy who, having laid down his arms or having no longer means of defence, has surrendered at discretion."*

This standard was also included in the US Army Field Manual, 27-10, *Law of Land Warfare* (1956), according to whose paragraph 31, political assassination is a violation of the laws of war.

US policy regarding assassinations seems to have changed post-September 11, however. On 3 November 2001, an unmanned American Predator drone operating out of a US base in Djibouti fired a Hellfire missile at an automobile in Yemen which was believed to be carrying an Al Qaeda leader named Qaed Salim Sinan al-Harethi. Al-Harethi and five other passengers were killed.³⁰⁰

Although the US was apparently acting with the consent of Yemen, such an action could not however be considered as lawful under international law. The action cannot be considered to have been carried out during an international armed conflict or occupation, nor an internal armed conflict, so the targets cannot be considered combatants or civilians directly participating in conflict, however broadly that concept is understood. Since it was a situation of peacetime, the action constituted arbitrary killings. According to the US, though, it was a lawful killing of unlawful combatants. According to Charles Allen, Deputy General Counsel for International Affairs at the Pentagon: "*When we have a lawful military target that the commander determines needs to be taken out, there is by no means a requirement under the laws of war that we must send a warning to these people, and say, 'You may surrender rather than be targeted.'*"³⁰¹

Many more such operations can be expected. The US has indicated that it regards the law relating the conduct of hostilities in war as applicable to terrorists, even in *de jure* peacetime and terrorists as legitimate targets. According to Charles Allen: "*despite the fact that the terrorists present an unconventional foe, the fundamental principles of the law of armed conflict have proven themselves to be applicable to this conflict.*"³⁰² Defense Department lawyers have concluded that the killing of selected individuals would not be illegal under the Army's Law of War if the targets were "*combatant forces of another nation, a guerrilla force, or a terrorist or other organization whose actions pose a threat to the security of the United States.*"³⁰³

On 22 July 2002, Secretary of Defense Donald Rumsfeld issued a secret directive ordering Air Force General Charles Holland, the four-star commander of Special Operations, "*to develop a plan to find and deal with members of terrorist organizations.*" He added, "*The objective is to capture terrorists for interrogation or, if necessary, to kill them, not simply to arrest them in a law-enforcement exercise.*"³⁰⁴ The US has made no secret of the fact that if the opportunity presents itself, it is ready to assassinate or 'neutralise' Osama Bin Laden, rather than arrest him.³⁰⁵ According to a CNN report of 4 November 2002,

"[...] President Bush [...] signed an intelligence 'finding' instructing the CIA to engage in 'lethal covert operations' to destroy Osama bin Laden and his al Qaeda organization. White House and

³⁰⁰ See S. M. HERSH, "Manhunt: The Bush administration's new strategy in the war against terrorism", *The New Yorker*, 23 and 30 December 2002; A. DWORKIN, "Law and the Campaign Against Terrorism: The View From the Pentagon", *Crimes of War Project*, www.crimesofwar.org/onnews-pentagon.html.

³⁰¹ See DWORKIN, *ibid.*

³⁰² HERSH, *loc. cit.* n. 123.

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

³⁰⁵ President Clinton on 23 September 2001 admitted that he ordered the capture and possible assassination of Osama bin Laden following the 1998 bombings of the US embassies in Nairobi and Dar es Salaam: "*We did everything we could. I authorized the arrest and, if necessary, the killing of Osama bin Laden, and we actually made contact with a*

*CIA lawyers believe that the intelligence "finding" is constitutional because the ban on political assassination does not apply to wartime. They also contend that the prohibition does not preclude the United States taking action against terrorists.*³⁰⁶

According to Murphy, *"the wording of the executive order ("assassination"), coupled with the context in which it was originally formulated and passed during the Ford Administration, arguably suggests that the executive order was intended to prohibit the killing of government officials, not nongovernmental persons, such as Bin Laden.*"³⁰⁷

While assassination of Bin Laden would be prohibited under international law, during both war and peacetime, if he were killed during an armed conflict, it could be lawful in certain circumstances.

Supposing Osama Bin Laden was located in a hostile territory or territory not under the control of a friendly State. If he was alone or with just a few minders, and was killed by an unmanned Predator Drone, this would be a case of assassination, and therefore prohibited under international law. Even if the US undertook this operation in a friendly State and was there and operating with its consent, the action would still be prohibited. The legally correct course of action is for the national authorities to arrest him. It would not be unlawful, however, if he was to be killed during the course of an attempt to arrest him, such as in a gunbattle. On the other hand, extrajudicial killing is prohibited. Supposing, on the other hand, Bin Laden was located in a part of Pakistan not under its administrative or military control, along with hundreds of Al Qaeda and Taliban fighters, and military confrontations ensued. If Bin Laden were to be killed in the course of an internal armed conflict between Pakistan (and the US on its side and acting with its consent) and Al Qaeda and the Taliban, there might be no breach of international law. Bin Laden, provided that he was directly participating in combat, along with the other fighters would be a legitimate military target. Of course, in this scenario, international humanitarian law would apply, or at least that part of it applicable in internal armed conflicts, and the US and Pakistan would be bound to apply it. It would remain illegal to assassinate Bin Laden, even in an internal armed conflict, unless he was participating in hostilities as understood by the Protocol. Under Article 4(II) of Additional Protocol II: *"All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there are no survivors."*

3.2.3 The Israeli position on targeted assassinations

Israel has been most robust in defence of so-called *"selective targeting"*, calling it:

"a legitimate act of self-defense against legitimate military objectives. [...] In all cases, persons targeted were involved in the perpetration of homicidal and/or suicidal attacks against Israelis, and in some cases were targeted while being on the way to commit such an attack. The IDF states that

group inside Afghanistan to do it. They were unsuccessful." "Clinton says he ordered the assassination of Osama", AFP, 24 September 2001.

³⁰⁶ See B. DOUGHERTY, "Targeted killings", *BOFAXE* No. 265E, 20 December 2003. <http://www.ifhv.de>.

³⁰⁷ Sean D. MURPHY, "Contemporary Practice of the United States Relating to International Law", *American Journal International Law*, N° 96, 2002, pp. 237 at 249.

the killings have taken place in areas where Israel does not have effective control, and consequently cannot arrest and bring these terrorists to trial. Since the Palestinian Authority has refused to arrest these terrorists who were operating in areas subject to its jurisdiction and control or to otherwise halt their hostile actions, Israel is entitled to neutralize them itself."³⁰⁸

On the question of direct participation of civilians in hostilities, Israel has said that individuals who by taking part in armed attacks designated themselves as combatants lose their immunity from attack, and are considered military targets both when planning attacks and after their attacks have been carried out. However, it rejected the term "*assassination*" or "*extrajudicial killings*" for its "*preventive, precisely-targeted operations*, saying that the use of these terms is '*intended to cast Israel in a pejorative light and does not reflect the legal reality*". It made what is basically a plea of necessity: "*In a small minority of cases, where arrests are impossible, and when a clear, specific and imminent terrorist threat must be countered, Israel is forced to carry out other types of preventive operations.*"³⁰⁹

A Report of the UN Human Rights Commission of 16 March 2001, prepared by a Commission of Inquiry consisting of Professor John Dugard, Professor Richard Falk and Dr Kamal Hossain, examined, *inter alia*, the legality of targeted killings undertaken by the Israeli Defence Forces.³¹⁰ It found that Israel's use of targeted killings is inconsistent with international law. It rejected Israel's contention that the applicable law was the law of warfare, namely, customary law as reflected in the 1907 Hague Regulations, Part IV of 1977 Additional Protocol I and Part IV of 1977 Additional Protocol II, and found that the applicable law was the law of occupation, and the question of whether a particular loss of life constituted an arbitrary killing could only be decided by reference to the Fourth Geneva Convention. Since that Convention prohibits extrajudicial killings of protected persons, even if there is suspicion that they are involved in hostile acts against the Occupying Power, it found targeted killings to constitute grave breaches of the Fourth Geneva Convention. However, civilians lose their protection when they directly participate in hostilities but only for the duration of their participation in a hostile act. Civilians also lose their protection during internal armed conflicts when they participate directly in hostilities, under Article 13(3) of Additional Protocol II.

Some commentators have argued in favour of a broad reading of Article 51(3) of the First Additional Protocol, which provides: "*Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.*" Shany has argued in favour of broadening the temporal range of application of Article 51(3)

"so as to encompass civilians directly involved in hostilities, as long as they meet the definition of a legitimate military objective under Article 52(2) of the First Additional Protocol (i.e., they continue to provide an effective contribution to military security and to offer a definite military advantage in their destruction or neutralization). Such a construction, would equate, in effect, the status of

³⁰⁸ See Ministry of Foreign Affairs, *Second Statement of the Government of Israel submitted to the Sharm El Sheik Fact Finding Committee*, 20 March 2001.

³⁰⁹ See Ministry of Foreign Affairs, "Targeting Terrorists", *Yearbook of International Humanitarian Law*, N° 4, 2001, pp. 663 at 664.

³¹⁰ According to Amnesty International, 32 Palestinians were targeted under this policy in 2001. See Y. SHANY, "Correspondent's Report on Israel", *Yearbook of International Humanitarian Law*, N° 4, 2001, pp. 547 at 548.

civilians who take direct part in hostilities to that of regular members of enemy military forces (who are, in the event of an armed conflict, legitimate targets for the duration of their active service – that is, even while they are asleep in their barracks)."³¹¹

But as Shany acknowledges, targeting of civilians taking a direct part in hostilities is only allowed to the extent that no other possible means of neutralising them are possible, such as arresting them.³¹² Shany states, however, that the arrest and trial of persons involved in hostilities is often impractical, given Israel's lack of *de facto* control over PA-controlled areas (with the exception of the control exercised by Israel during its incursions into Palestinian areas).

The argument that targeted assassinations may be permitted during hostilities against civilians who participate in hostilities - assimilating that to the *de facto* status of combatants - to the extent that no other means of neutralising such a person are available, if difficult to defend in principle, cannot be said to apply to a situation of occupation, where the occupying power has legal control over the territory, and therefore the legal ability to detain the person. It would also be inequitable to assimilate civilians participating in hostilities for limited periods with that of the armed forces, as the latter enjoy the benefits of combatancy, namely, POW status, whereas the former do not.

4. CONCLUSIONS

4.1. The presumptive illegality of extraterritorial self-help operations

This review of the legal qualification of extraterritorial self-help operations and the law applicable to them reveals that these operations, are, with a few exceptions, illegal. Given the Charter prohibition on the use of force except in lawful self-defence, any use of force by one State against the territory of another State is presumptively illegal. Even an operation which does not involve the use of such force as to amount to aggression involves a breach of the sovereignty and territorial integrity of the affected State and a violation of Article 2(4), with the limited exceptions of those operations undertaken with the consent of the territorial State. In a few limited cases, the use of force or a limited military intervention may be justified in extreme cases of necessity. Outside these exceptions, extraterritorial self-help operations are illegal under international law. Although some States have justified such operations on the basis of their national law, or on a misreading of the factual situation and the law applicable, national law cannot be invoked to justify a breach of international law. Extraterritorial self-help operations should therefore be considered as presumptively illegal.

4.2 The blurring of the distinction between lawful self-defence and illegal self-help

Self-defence is one of the few cases where a State can act either unilaterally or collectively with other States in response to an armed attack on it. While such action can be considered as a form of self-help, one can distinguish lawful self-defence from extraterritorial self-help operations by virtue of the fact that the

³¹¹ *Ibid.*, at pp. 550-551.

³¹² *Ibid.*, at p. 551.

former is undertaken within the framework of the UN Charter and with the assent of the Security Council. Self-help operations, conversely, involve uses of armed force extraterritorially outside the vertical framework of the collective security system and beyond that contemplated by the Charter.

Recent developments, particularly in the post-September 11 period, indicate, however, support for a broader interpretation of the right of self-defence than that thought to exist previously. The fact alone of a State harbouring terrorists could justify the use of force in self-defence against it. Moreover, some states have indicated that they favour a broader still interpretation, which would allow the use of force preemptively, in the name of self-defence. While harbouring may provide some legal basis - even if not a strong one, despite any purported instant custom - for self-defence, the doctrine of preemption is another animal entirely. The further States move away from the orthodox understanding of self-defence, the more States opt out of the Charter system. The worry is that if one or more States begin to adopt a policy of acting in anticipation whenever and wherever there is a perceived threat or future threat, a slippery slide will follow, and we may potentially find ourselves with the collective security system in tatters and in a new age of self-help. It is thus necessary to have a broad-based debate, including at the highest levels, about the meaning of self-defence, the parameters of its use, and limitations on its use.

4.3 The blurring of the distinction between war and peace

Since 9/11, what were previously thought to be the clear lines separating peace from armed conflict have become somewhat fuzzy around the edges. The situation was confused from the outset, with the characterisation of the terrorist attacks as armed attacks and the initiation of a war and an international armed conflict.³¹³ It hasn't helped that militaristic language has been appropriated by political leaders. On the other hand, it must be acknowledged that the security threat posed by terrorism is certainly grave enough to put any nation threatened on a "war-like" footing, and to consider the situation a national emergency on a par with an armed conflict. Nevertheless, legally at least, a high state of emergency is not equivalent to an armed conflict.

The war on terror is a campaign that has many facets. Some phases could involve armed conflict. But many aspects do not. Yet the Bush administration has indicated that they will apply the law concerning to the conduct of hostilities to terrorists, even where they are not found on territory where there is an armed conflict. This makes it easier to legally justify acts that would be clearly unlawful during peacetime, such as killings of civilians suspected of participating in unlawful activities. But whatever cloak is cast over operations undertaken in the fight against terrorism does not alter the actual legal situation. If existing methods of criminal law enforcement are unable to cope with the security challenges posed by terrorism,

³¹³ Addressing Congress on 20 September 2001, President BUSH said: "*On September 11th, enemies of freedom committed an act of war against our country.*" Address Before a Joint Session of the Congress of the United States in Response to the Terrorist Attacks of September 11, 37 Comp. Pres. Doc. 1347, 1347 (20 September 2001). US War Crime Ambassador Pierre PROSPER said: "*These aggressors initiated a war that under international law they had no legal right to wage... And their conduct, in intentionally targeting and killing civilians in a time of international armed conflict, constitutes war crimes.*" P. R. PROSPER, Ambassador-at-Large for War Crimes Issues, "Status and Treatment of Taliban and al-Qaida Detainees", *Remarks at Chatham House*, London, United Kingdom, 20 February 2002. <http://www.state.gov/s/wci/rls/rm/2002/8491.htm>.

then the way to proceed is not by selectively borrowing from a body of law that is by and large not applicable to the "war on terror", but by critically assessing national and international law and law enforcement; improving and better sharing of intelligence and information at the national level, and adequate resources being devoted to the problem, *inter alia*. If international humanitarian law needs to make some adjustments to the new security reality, then this must be done in an international fora, and not by one or more states acting unilaterally outside the existing rules.

4.4 The illegitimacy of new forms of self-help in the current age

Particularly since September 11 2001 but also before that date, some States have claimed that resort to extraordinary measures is justified in order to defeat terrorism. Such measures might include the use of force against a State in anticipated self-defence, the assassinations, rather than the arrest and trial, of terrorist suspects, and the abduction of suspected criminals or terrorists. Furthermore, the relevance of the Charter system and the Council in this new world disorder are being questioned. Some States are already acting outside the Charter system and are taking the law into their own hands under the pretext of fighting terror. Such challenges to the integrity and to the authority of the UN are serious and cannot go unanswered. The danger is that with increasingly resort to extraterritorial measures of self-help, the hierarchical system of collective security will become steadily weaker. It may remain and have an important symbolic value, but it will stand alongside the emergence of a return of self-help measures. To stem this emergent tendency, the Security Council and the United Nations as a whole must act proactively to meet this challenge to its authority. A debate about the structure, composition and role of the Security Council has long been going on, but it needs to assume a new urgency. In particular, the Organisation needs to link the debate about the role of the United Nations in the Twenty-First Century with that of the challenge to international peace and security posed by terrorism and by non-state actors generally, but also by States acting unilaterally outside the Charter by way of illegal measures of self-help.

Présentation des rapports des II^{ème}, III^{ème} et IV^{ème} Séances

François BUGNION

Directeur du Droit et de la Coopération au sein du Mouvement au Comité International de la Croix Rouge

Avec votre permission, nous nous arrêtons ici. Je ne vais pas rouvrir la liste des orateurs et je m'en excuse auprès de toutes celles et de tous ceux d'entre vous qui souhaiteraient encore prendre la parole, mais il ne nous reste que quatre minutes pour conclure cette session et je m'en voudrais d'empiéter sur le temps de parole réservé à notre Président. Je m'exprimerai en français, en raison du principe d'impartialité, le français étant encore, je crois, l'une des langues de votre Institut.

En votre nom à tous, je souhaite renouveler encore l'expression de notre gratitude aux sept rapporteurs que nous avons entendus ce matin et à tous ceux qui ont contribué à nos débats.

Trois remarques en tant que président de cette session.

La première: Nous sommes tous d'accord sur la pertinence du thème que l'Institut International de Droit Humanitaire a retenu pour notre session, sur cette interaction des différents régimes juridiques dans la situation de violence que nous connaissons aujourd'hui, et nous sommes également d'accord sur un élément fondamental qui a été rappelé ce matin, c'est-à-dire la pertinence du droit international humanitaire par rapport à la situation à laquelle nous sommes confrontés.

Deuxième remarque: Je crois que cette discussion venait à son heure; elle touche l'un des défis les plus brûlants de notre temps en ce qui concerne la protection des victimes de la violence armée.

Troisième conclusion: Il convient de relever la très forte complémentarité qui s'est manifestée tout au long des débats entre les ordres juridiques que nous avons évoqués, entre les différents corps de droit que nous avons évoqués: les droits de l'homme, le droit des réfugiés, le droit pénal, aussi bien national qu'international, et, bien entendu, le droit international humanitaire. Nous avons également relevé la complémentarité des mécanismes qui existent pour assurer la mise en œuvre et le respect de ces différents ordres juridiques. Il n'y a pas lieu de s'en étonner. En effet, ces différents ordres juridiques – qu'il s'agisse du droit humanitaire, des droits de l'homme, du droit des réfugiés ou du droit pénal – visent tous en définitive un objectif de protection de la personne humaine. Pour être impartial dans l'impartialité, je me permettrais, si vous le voulez bien, une citation en anglais car elle souffrirait de la traduction: "*The protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international*" écrivait l'éminent juriste et ancien juge à la Cour internationale de Justice Sir Hersch Lauterpacht. Ces ordres juridiques ont tous le même objectif: assurer la protection et le respect de la personne humaine en toute circonstance et même dans les situations extrêmes de violence qui sont celles de la guerre. En revanche nous avons aussi reconnu que ces ordres juridiques ont leurs spécificités, que leurs mécanismes de mise en œuvre ont leurs spécificités, et l'un des principaux défis auxquels nous sommes confrontés – et je dirais "nous" dans cette salle, en tant qu'internationalistes, plus encore que tous les autres – c'est d'arriver à organiser la relation entre ces différents ordres juridiques et entre les différents mécanismes, sans pour autant abolir les spécificités qui leur sont propres.

"Where do we go from here?" Quelle conclusion tirer? Quelle suite donner à nos débats? Tout d'abord, je souhaiterais rappeler, ainsi que cela a été signalé par le Président Kellenberger tout au début de nos travaux, que les délibérations de ces trois jours s'inscrivent dans une continuité et notamment dans la continuité de la série cinq conférences régionales d'experts que le CICR a organisées au Caire, à Pretoria, à Kuala Lumpur et à Mexico. La cinquième aura lieu à Bruges dans quelques jours. Nous souhaitons aussi tirer profit des délibérations d'aujourd'hui pour finaliser un rapport que le Comité international de la Croix-Rouge entend soumettre à la 28^{ème} Conférence internationale de la Croix-Rouge et du Croissant-Rouge sur les défis du droit international humanitaire aujourd'hui. Je précise que ce sera un rapport synthétique, sans attribution personnelle, puisque le temps ne permet pas de retourner vers les différents orateurs pour s'assurer que nous avons bien transcrit leurs interventions.

La 28^e Conférence internationale de la Croix-Rouge et du Croissant-Rouge, qui se réunira à Genève en décembre prochain, sera une étape importante, puisqu'elle réunit aussi bien les Etats parties aux Conventions de Genève que les Sociétés Nationales de la Croix-Rouge et du Croissant-Rouge, ainsi que différents observateurs. Mais ce n'est qu'une étape d'un processus qui est appelé à se poursuivre en 2004, peut être même au-delà, avec un objectif de clarification de certaines questions juridiques. Pour que le droit soit respecté, il faut en effet arriver à un consensus sur la signification des règles et à un objectif de réaffirmation. D'ailleurs, notre Table Ronde, comme les séminaires qui l'ont précédée, a clairement démontré la pertinence du droit. Le fait que la question de la pertinence du droit international humanitaire au regard des conflits de notre temps n'ait même pas été soulevée à aucun moment de nos débats en est en soi la meilleure preuve. L'objectif ultime est bien entendu d'assurer le respect du droit et la protection des victimes de la guerre.

Le débat va donc se poursuivre et nous-mêmes, en tant que Comité international de la Croix-Rouge, avec les responsabilités que vous connaissez en ce qui concerne le respect et le développement du droit humanitaire, nous serons toujours reconnaissants pour les propositions, les suggestions, les idées, dont vous pourriez souhaiter nous faire part à l'avenir par correspondance, par e-mail ou par d'autres moyens.

Deux mots encore en ce qui concerne la Table Ronde de San Remo de 2004. Ce sera la 28^{ème}, si je ne me trompe pas. La Commission du Droit International Humanitaire de votre Institut a eu des échanges de correspondance à ce sujet; elle s'est également réunie à deux reprises en marge de notre Table Ronde. Votre Commission a retenu deux propositions:

La première proposition est de consacrer la Table Ronde 2004 à la protection des biens culturels en période de conflit armé. Pourquoi ce choix ? Pour deux motifs: le premier c'est que les conflits récents ont été des conflits non seulement d'État à État, pour reprendre la fameuse formule de Jean-Jacques Rousseau, mais malheureusement aussi de peuple à peuple, des conflits trop souvent dirigés contre l'identité des peuples. D'où les agressions dirigées contre des biens culturels dont nous avons été les témoins ces dernières années, contre des monuments, contre des églises, contre des mosquées, contre d'autres lieux de culte, contre des monastères, contre des musées et des bibliothèques. Tout cela est très regrettable, parce que c'est tout un patrimoine commun de l'humanité, des pans entiers de la conscience collective des peuples et de l'humanité,

qui ont été irrémédiablement détruits. En outre, l'année 2004 marquera le 50^{ème} anniversaire de la Convention de La Haye pour la protection des biens culturels en cas de conflit armé et nous pensons que ce serait une bonne occasion pour réanimer l'intérêt pour cette Convention, qui répond à un besoin plus urgent aujourd'hui que cela n'a jamais été le cas. Une condition essentielle pour la mise en œuvre de cette proposition et du programme qui a été établi est évidemment un intérêt et un soutien de la part de l'institution la plus directement concernée, c'est-à-dire de l'UNESCO. Des contacts vont être pris à cet effet. Si cet intérêt est confirmé, c'est le thème qui sera retenu pour 2004.

Si ce n'est pas le cas, nous avons une autre proposition qui a également été examinée dans le cadre de votre Commission: c'est la question de l'équilibre entre le besoin de faire respecter la justice, de sanctionner les crimes commis à l'occasion des conflits armés, d'une part, et la nécessaire réconciliation, de l'autre. Bien entendu, la question sera abordée dans la perspective qui est la nôtre, c'est-à-dire celle du droit international humanitaire. Nous pensons que cette question serait également d'une très grande actualité en raison de l'entrée en vigueur du Statut de la Cour Pénale Internationale, de la nomination des juges ce printemps, et, espérons-le d'ici l'année prochaine, de l'entrée en fonction de la Cour et, déjà, des premiers cas.

Il me reste à renouveler nos très vifs remerciements aux orateurs, qui ont préparé les différents exposés, tous d'une qualité remarquable. Nous sommes infiniment reconnaissants pour ces contributions, pour les contributions des différents "*panelists*" et pour celles de tous les intervenants. Un grand nombre d'idées ont été évoquées lors de ces délibérations et il y a là beaucoup de matière sur laquelle il nous sera possible de travailler dans l'avenir.

Je souhaite aussi remercier les présidentes et présidents des séances plénières et des commissions, ainsi que les rapporteurs qui nous ont présenté d'excellents rapports tout au long de cette Table Ronde. Je souhaite bien sûr remercier Mme Baldini et l'ensemble du personnel de l'Institut International de Droit Humanitaire, ainsi que l'Institut lui-même, sans le soutien duquel cette Table Ronde n'aurait pu avoir lieu et qui nous a également fait bénéficier, comme chaque année, d'une merveilleuse hospitalité. Je ne doute pas que je puis me faire l'interprète de toute la salle en leur adressant nos très vifs remerciements.

Avec votre permission je souhaite aussi remercier mes collègues de la Division juridique du CICR pour leur contribution à la préparation de ce séminaire, particulièrement M. Jean-François Quéguiner, qui est resté dans l'ombre, mais qui a fait un immense travail de préparation, ainsi que Mme Jelena Pejic, à qui nous devons la conception de cette Table Ronde. Je souhaite également remercier très vivement les traducteurs, sans lesquels nous n'aurions pu délibérer, et grâce auxquels nos discussions ont été aussi animées.

Avec votre permission, je souhaite réserver les derniers mots de remerciement au Professeur Jovan Patrnogic, créateur de cet Institut, qui en a suivi le développement comme une mère éduque son enfant, pendant maintenant plus de trente ans, et qui a également fait preuve pour l'organisation de cette réunion du dynamisme inlassable qu'on lui connaît. Professeur, mille et mille remerciements.

Rapporteur's Report of Working Group VI

-Detention-

Helen DUFFY

Legal Director, Interights, United Kingdom

This short contribution records the discussion of the Working Group on the interplay of different legal regimes applicable to detention during armed conflict.³¹⁴ As this note reflects, the discussion touched on a broad range of issues, in certain cases only cursorily, in a manner that served to flag matters ripe for more detailed consideration in another context.

Many of the comments in this group tended to reflect a preoccupation with the "war on terror". Situations relating to the detention in the course of this so called "war" were felt to highlight the importance of a correct understanding of applicable law as well as the possible need to consider how the law might be clarified, strengthened or developed to better protect persons in detention. However, the importance of recalling the relevance of these issues beyond the context of the war on terror was also noted.

The group followed a sequential approach to detention: beginning with legal issues arising at the moment of apprehension or capture, to those relating to transfer of prisoners, and on to those concerning continuing detention.

Stage 1: arrest powers?

It was suggested that doubts may arise regarding the legal authority underpinning arrest or capture by foreign troops abroad. The issue arose regarding the lawfulness of arrests carried out by troops of the Stabilisation Force in Bosnia Herzegovina (SFOR) in Bosnia, but is clearly relevant also in the context of current conflicts.

International Humanitarian Law (IHL) and International Human Rights Law (IHRL) govern the lawful bases for the arrest and detention of persons in the context of armed conflict. Where IHL makes adequate provision for detention - for example of members of the armed forces who may be detained as POWs during armed conflict - a question that arose was whether implementing legislation, enshrining the power in domestic law, was also a necessary element of lawfulness. It was suggested in this Working Group, however, that as a matter of international law it is not necessary to have domestic legislation permitting detention of POWs in order to effect a capture.

The separate question raised was whether particular troops (which particular troops – in an armed conflict generally?) have a *mandate* to arrest/capture, or whether in doing so they could be said to be acting outside their authority. It was argued that absent a clear mandate and legal authority to carry out arrest and detention, doing so could be considered to amount to arbitrary arrest and detention. The potential for

³¹⁴ The discussions followed Hans Peter Gasser's thorough presentation detailing rules governing detention under IHL and human rights law. As that presentation is the subject of a separate paper it is not addressed here.

corresponding challenges by individuals before human rights courts, or by states before the International Court of Justice, or indeed of individual penal consequences for the personnel, were flagged. It was suggested that the mandate of personnel carrying out such arrests should therefore be given greater clarification than was presently the case.

Stage 2: transfer?

While this phase was not discussed in detail, it was noted that, even where the detention was itself lawful, the transfer of persons from one area/State to another may be unlawful under IHL. For example, if persons detained are entitled to protection as civilians, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) (GCIV) provides that their transfer is unlawful in certain circumstances.³¹⁵

Stage 3: continuing detention?

The bulk of the debate in Working Group IV related to this phase, and to the rights of detainees in detention under international human rights law and IHL.

Regarding the interrelationship between IHL and IHRL, both bodies of law were considered to apply side by side. The content to be given to the human rights provisions must however be understood by reference to the IHL rules: for example what amounts to arbitrary detention depends on the legal bases for detention in armed conflict. The predominant view was that a *lex specialis* arose, with the same rationale applying to arbitrary detention as to arbitrary killing. Conversely, human rights law informs the understanding of certain IHL provisions. The importance of understanding situations of detention as governed by applicable IHL and human rights law was emphasised.

The situation in Guantanamo Bay - which exemplified in dramatic fashion the need to clarify applicable law and the interplay of legal regimes - was, perhaps unsurprisingly, centre stage in discussions. Speculation continued as to the reasons for the choice of the Guantanamo site, as an apparent attempt to circumvent legal constraints and avoid the jurisdiction of American courts. Whatever the state of US law, on which the group felt unable to opine, it was considered that international law contains no legal void.

It was noted that while legal issues also arise regarding the rights of US nationals in the US, such individuals have at least been given access to the US courts to determine their status and the law applicable to them. By contrast, the Guantanamo detainees have been denied all judicial supervision of their detention. Their detention was described, variously, as ‘arbitrary detention’ and ‘in violation of fundamental principles of law’.

³¹⁵ For example, whereas Article 42 enables the Detaining Power to intern or place protected persons in an assigned residence “*only if the security of the Detaining Power makes it absolutely necessary*”; Article 49 prohibits “*individual or mass forcible transfers, as well as deportations of protected persons from occupied territory*”. As regards transfer between powers, Art 45 provides that “*Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention.*” Art 76 in turn provides that “*Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein.*” See also specific point on transfer of POWs pursuant to GCIII below.

As regards IHL, so far as the detainees *are* entitled to POW status, they are protected by the Geneva Convention Relative to the Treatment of Prisoners of War (GCIII), including the review mechanisms enshrined therein. If they are civilians under GCIV, the protections of that Convention apply, including the review mechanisms therein. In addition, it was noted that for *all* categories of detainees the protections found in Article 75 of Additional Protocol I apply.³¹⁶ There was broad agreement that IHRL applies, including Article 9 and 14 of the International Covenant on Civil and Political Rights, the core of which (including judicial oversight of detention) is non derogable. While status determinations are important, as precise rights applicable depend thereupon, when one considers the interplay of legal regimes, all categories of prisoner are deserving of protection.

A specific question was raised as to the permissible length of detention under each legal regime. It was noted that while there is no formula for permissible length of detention, the constant in each of the potentially applicable provisions of IHRL and IHL is that detention cannot be indefinite, and must be subject to review. One danger with the espousal of the so-called ‘war on terror’ as an armed conflict is the difficulty with identifying when the ‘conflict’ will end.³¹⁷ As IHL provisions on POWs permit their detention until the end of the conflict, concern was expressed about the possibility that such provisions may be invoked abusively as a means to justify indefinite detention.

3 specific issues were then addressed.

a) POW Protections:

i) should they be applied flexibly, or expanded, to protect other persons?

Reference was made to the broad reaching protections due to persons who meet the criteria of POWs under GC III.³¹⁸ The question raised was whether the [remove - principle of] humanitarian principles of IHL justify applying any of those protections more broadly, to others not falling within the scope of GC III.

On the one hand, it was suggested that there is a danger in doing so, as the fact that one of the criteria by which irregulars, members of militia and other volunteer corps qualify for POW status is conducting *"their operations in accordance with the laws and customs of war"* is an incentive to those fighters to meet IHL standards.³¹⁹ But it was felt by some that applying certain aspects of POW protections more flexibly may be appropriate. One example is the rule that, while a power detaining POWs may transfer them to another power (provided the latter is also a party to GCIII), the detaining power retains *"original responsibility"* for the detention.³²⁰ If considered a rule of general application, it was suggested that this could enhance the protection of all detainees and clarify responsibility in respect of their protection.

³¹⁶ While not all Parties to the Geneva Conventions are also Parties to Additional Protocol I, it is recognised that Art. 75 constitutes customary international law.

³¹⁷ The controversial question of whether, or how much, of the war on terror can properly be referred to as an armed conflict was discussed in other sessions so avoided in this Working Group.

³¹⁸ See API, Art 4A. Additional Protocol 1, Arts 43-45 also deal with POW status.

³¹⁹ See API, Art 4A(2)(d). However, it was noted that this aspect of the criteria for POW status (which applies only to irregulars and not armed forces) must be distinguished from the commission of violations of IHL, as POW status is not only due to those who ‘fight clean:’ a common misapprehension that must be avoided.

³²⁰ GCIII, Art 12. See also Article 45 GC IV, above.

ii) Should there be an international dimension to safeguard the Article 5 GCIII protection?

GC III provides for a competent tribunal to determine POW status in the event of doubt as to the entitlement of a detainee to such status.³²¹ The idea was floated of including an international dimension within the tribunal to safeguard the role of the competent tribunal and the protection that it affords. However, it was acknowledged that more thought would need to be given to how to operationalise such an idea and ensure its impact. For example, while the international element may import a valuable degree of impartiality into the notion of 'competent' tribunal, one question that remains is how this or other mechanism might ensure that the detaining power constitutes such a tribunal when appropriate to do so.³²²

b) Reciprocity and asymmetrical conflicts?

The question was raised as to the relevance of reciprocity, particularly in "asymmetrical" warfare, in circumstances where the other Party does not respect the laws of war? It was agreed that, legally speaking, it is irrelevant. IHRL contains no notion of reciprocity and under IHL violation by one Party does not affect the obligations of the other(s). However, the practical significance was also noted: meeting one's obligations, and indeed exceeding them (eg by affording POW status to persons not strictly entitled) may encourage the opposing Party to do likewise.

c) Non-international Conflicts and lawfulness of detention by Rebel Groups

It was queried whether armed groups, Party to a non-international armed conflict, have the right to detain persons under IHL or IHRL? Neither body of law was considered to provide a clear legal basis for such a right. However, it was suggested that the logic of IHL inclines towards an affirmative answer. As a related matter, it was noted that IHRL essentially confers obligations on States and rights on individuals, although support was expressed in principle for the notion that responsibility should accompany authority. Likewise another participant suggested that the trend towards recognising the responsibility of non-state actors may indicate a movement towards recognising the responsibility of armed groups under IHRL for the conditions in which persons are detained.

In conclusion, as a general matter it was recalled throughout the discussion that there is no legal black hole in international law and that different legal regimes coexist, and must be understood as a totality. The undoubted concerns that have arisen in the context of the "war on terror" relate not so much to shortcomings in applicable law, as to the way in which existing law has not been applied, or has been applied only selectively.

³²¹ GCIII, Art 5.

³²² As noted above, such a tribunal is not automatically constituted, but this must be done in case of reasonable doubt as to the status of detainees.