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Acknowledgements

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Preface

In a security landscape characterised by the changing nature of armed conflicts and the proliferation of non-state actors, the problem of the applicability and enforcement of international humanitarian law poses a number of new controversial issues and fundamental challenges.

Difficulties arise in precisely identifying and in clarifying the very notion of non-state actors; in defining whether and when they are parties to an armed conflict; in ensuring their adherence to relevant principles and rules of international humanitarian law; in preventing, prosecuting and sanctioning violations.

The Sanremo Round Table once again provided a prestigious and unique forum for addressing a problem of increasing importance in an even more complex world, from different perspectives and in a constructive spirit.

The debate focused on the issue of organised armed groups and in particular on the affordability and impact of initiatives of dialogue which could lead them to abide by existing norms.

The more general topic of the dissemination of international humanitarian law within the broader community of non-state actors was also addressed, both from the legal and policy angle, taking into consideration recent lessons learnt in the field.

Academics, legal experts, military commanders, and government officials took part in the Round Table, which had no ambition to provide answers to all the questions at stake, but rather to authoritatively reaffirm the need to keep the theme of non-state actors high on the agenda of international humanitarian law enforcement and evolution.

In publishing the entire proceedings of the Round Table, the International Institute of Humanitarian Law wishes to warmly thank the participants, the contributors, the editorial team and all those who have added to the success of this event, jointly organised with the ICRC.

Maurizio Moreno
President of the International Institute of Humanitarian Law

I. Opening session

Opening address

Maurizio Moreno
Presidente, Istituto Internazionale di Diritto Umanitario, Sanremo

Sono lieto di porgere un caloroso benvenuto a tutti i partecipanti a questa Tavola Rotonda organizzata congiuntamente, secondo una ormai consolidata tradizione, dall'Istituto Internazionale di Diritto Umanitario e dal Comitato Internazionale della Croce Rossa.

Il mio saluto riconoscente va innanzitutto alle Autorità presenti e alle illustri Personalità che prenderanno la parola nel corso di questa cerimonia di apertura, dando il la ai nostri lavori. Al Presidente del CICR, Dottor Jacob Kellenberger, la cui presenza ancora una volta ci lusinga e ci onora. Al Sottosegretario di Stato agli Esteri On. Vincenzo Scotti, qui per la prima volta, che vorrei ringraziare per il generoso sostegno offerto alle attività dell'Istituto dalla Farnesina. Al Presidente del Comitato Internazionale della NATO Ammiraglio Giampaolo di Paola e al Generale Pier Michel Joana, Consigliere speciale dell'Alto Rappresentante per la PESC dell'UE: il loro intervento mi sembra ben riflettere la crescente attenzione che le rispettive Organizzazioni, attivamente impegnate nelle operazioni internazionali di mantenimento della pace e di gestione della crisi, portano al problema del rispetto del diritto internazionale umanitario. Un grazie sincero anche al Commissario Straordinario della Croce Rossa Italiana, dottor Francesco Rocca, per aver accolto il nostro invito.

Sono lieto di veder tra noi il nuovo Sindaco di Sanremo, Maurizio Zoccarato, cui vorrei rivolgere ogni augurio di successo nell'assolvimento del suo importante incarico. Senza l'apporto del Comune di Sanremo, l'Istituto non avrebbe certo potuto affrontare quel piano di riqualificazione e rilancio delle attività e di risistemazione della Villa Ormond che il Consiglio Direttivo sta portando avanti con tanto impegno.

L'Istituto di Sanremo, grazie al suo prestigio sul piano internazionale, costituisce non solo per la città matuziana, ma per l'insieme del Ponente Ligure e la Regione tutta, una risorsa ricca di potenzialità e positive ricadute. Significativa mi appare anche in questa ottica la presenza in questa

sala – gentilmente concessaci dal Presidente del Casinò Municipale, l'amico Donato di Ponziano – di autorevoli Parlamentari, del Prefetto di Imperia, Dottor Maurizio Maccari, del Presidente del Consiglio Provinciale, Avv. Massimo Donzella, dei rappresentanti della Regione e dell'Unione Industriali, nei quali l'Istituto ha sempre trovato un fattivo sostegno.

La mia viva gratitudine va naturalmente ai relatori, ai moderatori, agli esperti, a tutti coloro che vorranno contribuire ai lavori. Un particolare ringraziamento sento di dovere ai due Coordinatori della Tavola Rotonda, il Professor Fausto Pocar, Vice Presidente dell'Istituto, Giudice al Tribunale Penale dell'Aja per l'ex Jugoslavia e il Dottor Robin Geiss, Consigliere giuridico del Comitato Internazionale della Croce Rossa. Un grazie infinito ai componenti del Consiglio direttivo e ai numerosi membri, di vecchia e più recente data, dell'Istituto, convenuti oggi a Sanremo per questo incontro.

Anche in questa circostanza, sono pervenuti messaggi di alto significato, che verranno pubblicati tra gli atti della Tavola Rotonda. A cominciare da quello del Presidente della Repubblica, di cui chiederò al Segretario Generale Stefania Baldini, di dar lettura.

Il tema prescelto per questa XXXII edizione della Tavola Rotonda è di particolare attualità e rilevanza nei complessi scenari che caratterizzano l'attuale contesto di sicurezza internazionale.

Le guerre tradizionali sono state per secoli guerre tra Stati. Guerre dichiarate, codificate, combattute da eserciti regolari, nelle quali non era in definitiva difficile operare una distinzione tra combattenti e civili. Oggi non è più così. I conflitti sono sempre più conflitti interni, asimmetrici. Le situazioni di conflittualità che la Comunità Internazionale si è trovata ad affrontare in epoca più recente – dai Balcani all'Iraq, dall'Afghanistan ai numerosi focolai di crisi tuttora non sopiti in Africa, in America Latina, in Asia – hanno portato alla ribalta problematiche per molti versi nuove, prima fra tutte quella della proliferazione e del ruolo crescente che in un conflitto armato assumono gli attori non statali.

È anche questo un portato, un riflesso della società globale che vede in tutti i settori una moltiplicazione, una frammentazione dei poli di influenza e dei centri di potere.

Quella di "attori non statali" è una nozione ampia e non omogenea, che può ricomprendere categorie di soggetti diversi, non sempre destinatari di norme specifiche dell'ordinamento internazionale, ma che è indispensabile sensibilizzare e corresponsabilizzare nel rispetto di norme e principi universali posti a tutela della vita e della dignità umana.

Attori non statali in un conflitto armato possono essere gli insorti e i movimenti di liberazione nazionale, cellule terroristiche, gruppi di opposizione e formazioni armate organizzate di diversa estrazione. Una miriade di soggetti che con le regole del diritto internazionale umanitario hanno

spesso scarsa familiarità, che non si fanno scrupolo di attaccare la popolazione civile e di ricorrere ad inammissibili violenze per raggiungere i propri obiettivi. Per altro verso tra gli attori non statali possono certo essere ricomprese altresì le Organizzazioni Internazionali, non sempre dotate di una propria personalità giuridica, le organizzazioni non governative, ormai capillarmente presenti in tutte le situazioni di conflitto e di pacificazione post-conflittuale con un'agenda che non è necessariamente soltanto umanitaria, le compagnie militari e di sicurezza private, che viepiù svolgono compiti in precedenza appannaggio delle sole Forze Armate, e in definitiva le stesse componenti della società civile, i rappresentanti dei media, dai quali un positivo impulso può derivare in definitiva all'applicazione e allo sviluppo del diritto umanitario, alla denuncia e alla repressione delle violazioni. Come non ricordare, ricorrendo quest'anno il 150° anniversario della battaglia di Solferino, che l'idea della Croce Rossa è nata proprio dall'intuizione di un privato, Henry Dunant? Come non ricordare il significativo contributo dato dalla società civile all'elaborazione delle Convenzioni di Ginevra e allo sviluppo del diritto internazionale umanitario?

Ladies and Gentlemen,

Today, we have a very challenging agenda ahead of us.

I shall be brief. I am not a lawyer and I shall refrain from going into the substance of the different issues we are called to discuss in the next two days.

Allow me, however, to make a few remarks.

Once again the Sanremo Round Table offers a unique, informal forum for in-depth reflection and open debate, as it gathers together people who are called to address the problem of the enforcement of international humanitarian law in different capacities and from different perspectives. Legal experts, scholars, diplomats, military officers, representatives of NGOs, and the civil society in the broader sense, will be able to enrich the debate with their thoughts, their experiences and their insight.

I am far from being among those who advocate the establishing of a brand new body of international humanitarian law for a better world. Nobody would agree that the existing legal instruments and, in particular, the Geneva Conventions, were obsolete or inadequate in coping with the important changes that characterize modern warfare.

The 1949 Geneva Conventions maintain – as the ICRC has recently recalled – all their relevance and validity, and continue to represent the cornerstone of international humanitarian law. Where properly applied, they can provide vital protection against violence and abuse, not only in international conflicts but also in conflicts which are waged within State boundaries.

The major problem is, in general, compliance with existing rules, which are often challenged by ignorance and lack of political will. We should not, however, consider international humanitarian law as being a static body of principles and rules, excluding *a priori* the possibility of further developments.

Taking into account lessons learnt from more recent conflicts, I think we are all convinced that there are norms in the existing legal regime which require an agreed interpretation and better clarification or qualification. There are norms that, with a little effort, could easily be revised and adapted to new situations while the existence of "normative gaps" cannot be ruled out in advance.

It is for this reason that we are here today. To develop a common understanding on the way ahead and specifically to identify ways and means of more effectively binding non-state actors to international humanitarian law, not only improving their accountability and responsibility but also providing them incentives for compliance where appropriate.

The Institute played a discreet but significant role during the negotiations of the Geneva 1977 Additional Protocols. Discussions held in Sanremo behind the scenes usefully complemented the efforts made in Geneva within the context of the Diplomatic Conference.

Our doors remain open to all those who believe in the virtues of informal dialogue and in the "spirit of Sanremo", who feel that the Institute could usefully assist in the search for concrete answers to open questions and in reducing grey areas, by hosting fresh expert discussions which could definitively contribute to the enhancement and further evolution of international humanitarian law.

Mesdames et Messieurs,

L'Institut de Sanremo fêtera en 2010 son quarantième anniversaire. Le Conseil est en train de réfléchir à un programme d'initiatives et d'événements – et notamment à la possibilité d'un congrès extraordinaire – qui puissent dignement marquer cette étape et constituer le point de départ d'un nouvel essor de nos activités.

Je crois que tout le monde reconnaît et apprécie le rôle que l'Institut a joué au fil des années dans la dissémination, la promotion et le développement du droit international humanitaire et des disciplines s'y rattachant.

En quarante ans le monde a changé. La situation internationale ne cesse d'évoluer.

Sans oublier son origine, l'Institut a peut-être intérêt à remettre en perspective sa mission et à mieux définir ses objectifs et ses priorités. Le nouveau Conseil est en train de le faire, en restant à l'écoute de tous ceux qui s'intéressent à nos activités.

Dès la création de l'Institut, douze mille personnes, provenant du monde entier, ont passé par la Villa Nobel et la Villa Ormond.

Dans quelques jours, les statuts d'une nouvelle association qui regroupera les milliers d'anciens et d'amis que l'Institut compte aux quatre coins du monde, seront déposés. J'espère que cette association puisse fournir le cadre pour des contacts plus suivis et intenses parmi nous tous.

Tout dernièrement, les programmes, les méthodes didactiques des cours de droit international humanitaire ont été entièrement revus, avec le concours d'un Comité Consultatif composé d'experts hautement qualifiés. Nous disposons aujourd'hui d'un outil performant, garantissant une formation de qualité, qui permettra à des nouvelles générations d'officiers, de fonctionnaires et de diplomates de bénéficier d'un enseignement de base et de stages de perfectionnement à la hauteur des attentes.

Récemment, des efforts accrus ont été effectués également dans le domaine de l'enseignement du droit international des réfugiés et des migrations ainsi que des droits de l'homme, grâce au soutien très apprécié de l'OIM et du HCR. Les résultats sont positifs et nous encouragent à poursuivre dans cette démarche.

L'Institut a toujours tenu à être un forum au sein duquel les problèmes les plus délicats puissent être discutés dans un climat informel de liberté, d'ouverture et d'indépendance.

La Table Ronde du mois de septembre est devenue désormais un rendez-vous incontournable, dont le succès est assuré par la qualité des orateurs et la diversité des participants.

L'Institut a été heureux de pouvoir organiser tout dernièrement d'autres rencontres et séminaires sur des thèmes de grande actualité, qui ont connu une très large participation. J'ai à l'esprit notamment le séminaire sur les conflits armés, le droit international et les interventions humanitaires organisé en février à Milan avec la coopération de l'ISPI (Istituto per gli Studi di Politica Internazionale), ainsi que le séminaire sur la piraterie organisé à Rome en juin auprès du CASD (Centro Alti Studi per la Difesa) avec la collaboration de l'IAI (Istituto Affari Internazionali).

L'Institut vient d'établir de nouvelles formes de partenariat et de collaboration – avec des instituts de recherches, des universités, voir des organisations internationales – qui peuvent contribuer de manière significative à accroître la visibilité et l'impact de nos activités en Italie et à l'étranger.

Parmi les initiatives à venir, je tiens à signaler l'atelier sur la responsabilité de protéger, que l'Institut organisera à Sanremo fin septembre en coopération avec le UN System Staff College de Turin; le séminaire sur le droit international humanitaire prévu à Pristina (Kosovo), fin octobre, avec l'appui du Ministère Italien des Affaires Etrangères; la conférence sur les enfants soldats, qui aura lieu au mois de novembre à Turin, en collabora-

tion avec l'ISPI de Milan, le Centre d'Etudes «Post-Conflict Operations» de l'Institut d'Etudes Militaires de l'Armée italienne et l'ONU. Et, enfin, la réunion d'experts sur la protection des biens culturels dans les conflits armés qui aura lieu le 14 décembre à Sanremo avec le concours de l'UNESCO et du Gouvernement italien, à l'occasion du 10ème anniversaire de la signature du Protocole de La Haye.

Comme à l'occasion des éditions précédentes, mais peut être aujourd'hui avec plus d'assurance à la lumière de notre longue expérience, j'exprime le vœu que cette Table Ronde puisse donner lieu à un débat constructif et fructueux et déboucher sur des propositions concrètes. Et j'espère naturellement vous voir nombreux aux prochaines rencontres inscrites au calendrier.

Opening address

Vincenzo Scotti
Sottosegretario di Stato, Ministero degli Affari Esteri, Roma

Sono molto lieto di essere oggi a Sanremo e di poter presenziare ai lavori dell'annuale Tavola Rotonda dell'Istituto Internazionale di Diritto Umanitario di Sanremo, in una fase così significativa di trasformazione e di rilancio delle sue attività.

A nome del Governo e del Ministro degli Affari Esteri Frattini, vorrei rivolgere a tutti i presenti, ai rappresentanti dei Governi esteri e delle Organizzazioni Internazionali, alle Autorità civili, militari e religiose, ai qualificati esperti provenienti da diversi Paesi del mondo, un caloroso saluto e un vivo augurio di buon lavoro. Un saluto particolare vorrei dedicare al Presidente dell'Istituto, l'Ambasciatore Moreno, che dal suo arrivo a Sanremo ha dato un nuovo e vigoroso impulso alle attività già di rilievo dell'Istituto.

In un'epoca in cui il moltiplicarsi delle situazioni di conflittualità e di confronto armato ripropone in tutta la sua complessità ed attualità il problema dell'applicazione e del rispetto delle norme del diritto internazionale umanitario e dei diritti dell'uomo, il Governo italiano valuta infatti appieno l'importanza ed il significato dell'impegno profuso dall'Istituto di Sanremo nel campo della formazione, della ricerca e della promozione delle leggi fondamentali dell'umanità. Un'istituzione che si appresta a compiere i quarant'anni di vita, che ha dimostrato di sapersi rinnovare ed adattare ai tempi, che ha acquisito a livello internazionale la meritata fama di "centro di eccellenza".

L'Italia è lieta di accogliere l'IIDU sul proprio territorio. Il Governo si sente fermamente impegnato a sostenerne le attività. La Liguria, il Ponente ligure, Sanremo debbono avere piena coscienza dell'importanza di tale presenza in una regione che da sempre è naturale crocevia di scambi e di incontri tra i popoli.

Il nostro auspicio è che il nucleo dei Governi e delle Organizzazioni Internazionali che oggi sostengono attivamente l'Istituto possa ulteriormente ampliarsi, nella condivisa consapevolezza dell'insostituibile contributo che

esso arreca alla ricerca di un nuovo, più forte consenso sui principi umanitari, in un'ottica di attenuazione delle sofferenze e di emancipazione dagli abusi che caratterizzano gli odierni conflitti armati.

Da parte italiana è stata in questi anni salutata con favore la crescente attenzione riservata dall'Istituto a discipline che, in un mondo globalizzato, appaiono viepiù correlate e strettamente collegate al diritto internazionale umanitario. Mi riferisco al diritto internazionale delle migrazioni, al diritto internazionale dei rifugiati, ai diritti umani nel senso più ampio del termine. Ne sono un esempio il Seminario sulle migrazioni nel Mediterraneo svoltosi a Sanremo lo scorso dicembre – che il Ministero degli Affari Esteri ha voluto co-sponsorizzare insieme al Ministero dell'Interno – e l'interessante e attualissima conferenza sugli aspetti giuridici, politici e di sicurezza della pirateria internazionale, che l'Istituto Internazionale di Diritto Umanitario ha organizzato congiuntamente con l'Istituto Affari Internazionali a Roma nel giugno scorso ed alla quale ho avuto il piacere di partecipare.

Vorrei inoltre sottolineare l'importante collaborazione dell'Istituto nel quadro della nostra Presidenza del G8, in particolare per quanto riguarda il fondamentale dossier del *peace-keeping*. L'Istituto ha infatti ospitato due incontri degli esperti G8 sul tema, le cui discussioni hanno contribuito all'elaborazione del rapporto sui progressi delle attività di *peace-keeping* e di *peace-building*, presentato ai Capi di Stato e di Governo al vertice de l'Aquila. Mi sembra significativo che nel rapporto il rispetto dei diritti umani e del diritto internazionale umanitario venga considerato componente essenziale di un approccio di ampio respiro alla gestione ed alla prevenzione dei conflitti armati.

Tra i segreti del successo dell'Istituto di Sanremo vi è sicuramente l'eccellenza dei rapporti che sa intrattenere con alcuni attori chiave del settore: valga per tutti l'esempio del Comitato Internazionale della Croce Rossa, di cui è espressione la presenza a questa Tavola Rotonda del Presidente Kellenberger come "*key-note speaker*". Un sincero ringraziamento vorrei inoltre rivolgere al Professor Fausto Pocar e al Dottor Robert Geiss che, rispettivamente per conto dell'Istituto e del CICR, hanno messo a punto l'agenda dei lavori.

Ricorre quest'anno il sessantesimo anniversario delle Convenzioni di Ginevra. Nell'occasione, il Presidente Kellenberger ha richiamato l'attenzione, nel quadro delle celebrazioni ufficiali, sulla perdurante validità e il carattere universale di tali strumenti, la cui messa in atto ha concorso a salvare migliaia e migliaia di vite umane. Egli non ha sottaciuto, tuttavia, l'opportunità che alcuni concetti siano meglio definiti, che alcune regole di base siano rafforzate, che certe interpretazioni siano ulteriormente affinate per meglio garantire la piena applicazione ed il rispetto di un *corpus iuris* di crescente rilevanza, in una fase di rapida evoluzione degli scenari di sicurezza internazionale.

Condivido da parte mia tale analisi, convinto che ulteriori sforzi vadano messi in atto per diffondere in maniera più capillare le norme essenziali del diritto internazionale umanitario e dei diritti umani e per rispondere agli interrogativi che la sua applicazione suscita nelle nuove forme di conflitto armato cui oggi assistiamo.

Anche qui, l'Istituto di Sanremo – che negli anni settanta ha discretamente ed efficacemente concorso alla risoluzione di alcuni nodi chiave del negoziato di Ginevra sui Protocolli Addizionali – ha per la sua specifica esperienza e competenza un ruolo da svolgere, potendo contribuire attraverso i suoi esperti a quell'opera di chiarificazione richiesta da più parti su specifici aspetti delle Convenzioni di Ginevra e dei Protocolli Aggiuntivi.

Come ci ricorda il tema degli odierni lavori, i conflitti di oggigiorno non sono più, nella grande maggioranza dei casi, conflitti tra Stati.

Il grosso delle violazioni del diritto internazionale umanitario e dei diritti umani concerne conflitti che si svolgono all'interno di uno Stato, dove gruppi di insorti si oppongono a forze armate regolari, in cui una molteplicità di attori diversi dallo Stato opera, nel bene e nel male, sullo stesso terreno, dove alto è sempre il rischio che gli scontri assumano una dimensione transfrontaliera.

Sono questi i conflitti asimmetrici del 21° secolo, che possono aver come protagonisti, isolatamente o congiuntamente, movimenti eversivi, gruppi terroristici, signori della guerra, formazioni armate organizzate di diversa matrice e natura.

Nel contrastare questi fenomeni, l'Italia crede nell'importanza di un approccio coordinato e multilaterale. In questo quadro sosteniamo il ruolo centrale svolto dalle Nazioni Unite e partecipiamo attivamente ai competenti tavoli dell'Unione Europea e degli altri fora interessati.

Proprio in questi settori abbiamo colto l'occasione della nostra Presidenza per rafforzare il ruolo del G8 come "fucina" di iniziative e di impegni politici da realizzare sia a livello nazionale che nel quadro multilaterale, in seno ai consessi internazionali di volta in volta competenti, in primis le Nazioni Unite.

È infatti crescente la varietà di fattori che possono incidere negativamente sulla stabilità internazionale. Fattori che un tempo erano considerati di rilievo esclusivamente interno, come è il caso della criminalità organizzata e dei traffici che essa gestisce, ma che oggi invece non possono essere gestiti se non anche attraverso un forte coordinamento delle politiche degli Stati.

Colpisce e preoccupa, inoltre, come spesso questi fattori inter-agiscano e si rafforzino a vicenda. Basti pensare a come il terrorismo tragga risorse ed alimento dalla criminalità organizzata, ed a come questi fattori risentano di una forte recrudescenza in periodi di grave crisi economica.

L'inter-relazione tra questi elementi può dunque avere effetti seriamente destabilizzanti, sul piano regionale o addirittura su quello globale. Sicché, da un lato ci dobbiamo impegnare per neutralizzare gli effetti negativi di questi fenomeni ma, dall'altro, dobbiamo essere consapevoli che la soluzione definitiva di certi problemi si avrà solo con la rimozione delle loro cause profonde.

Per meglio mettere a fuoco questi fenomeni, lo scorso aprile la Farnesina ha organizzato una "Conferenza sui fattori destabilizzanti", che ha raccolto le esperienze e le riflessioni maturate a livello operativo ed accademico non solo all'interno del Gruppo G8, ma anche in Paesi africani, asiatici e latino-americani, nonché nelle Agenzie specializzate del sistema ONU e nelle principali organizzazioni internazionali e regionali.

I risultati della Conferenza – da cui sono emerse valide indicazioni su come ci si dovrebbe muovere in questo nuovo quadro così complesso – si sono dimostrati estremamente utili nei negoziati che hanno portato all'adozione di importanti documenti, sia alla riunione dei Ministri degli Esteri G8 di Trieste che al Vertice de l'Aquila. Documenti che contengono forti impegni politici con riferimento alle sfide globali alla sicurezza.

Ad esempio, con riferimento alla lotta al terrorismo, i Leader G8 hanno adottato una dichiarazione "*ad hoc*" nella quale è stata posta particolare attenzione alla lotta alla radicalizzazione ed al reclutamento, alla prevenzione del finanziamento del terrorismo e all'importanza del coordinamento nelle attività di assistenza tecnica e di *capacity building*. Ma il principale impegno assunto nella Dichiarazione – e mi fa molto piacere poterlo dire proprio qui a Sanremo – è relativo alla necessità di contemperare l'efficacia degli strumenti di lotta al terrorismo internazionale con il necessario rispetto della legalità internazionale e dei diritti umani. Principale esito operativo in questo settore è infatti l'incarico dato dai Leader agli esperti G8 di approfondire gli aspetti relativi alla salvaguardia dello stato di diritto, e più in particolare dei diritti fondamentali della persona, nella lotta al terrorismo. Nella dichiarazione i Leader respingono "*l'idea di un trade-off tra la sicurezza e i principi fondanti delle nostre democrazie*" e chiedono agli esperti di contribuire al processo, già avviato in ambito ONU ed UE, di miglioramento delle garanzie di "*trasparenza*" e di "*giusto processo*" nel quadro della definizione e del rinnovo delle liste ONU ed UE di individui e gruppi collegati al terrorismo (cui come noto viene imposto un serio regime sanzionatorio).

In quest'azione di contrasto alle nuove minacce alla pace e alla sicurezza internazionale, operano – accanto agli eserciti governativi e alle forze internazionali di pace – con un'agenda non sempre prettamente riconducibile all'interesse umanitario una miriade di attori: organizzazioni non governative, gruppi di volontariato, società paramilitari, rappresentanti dei

media, compagnie di sicurezza private. A questo proposito, sono lieto di annunciare che l'Italia ha recentemente deciso di sostenere il Documento di Montreux sulle buone pratiche e gli obblighi giuridici internazionali relativi alle operazioni condotte da parte delle imprese militari e di sicurezza private in situazioni di conflitto armato, promosso dal Governo svizzero e dal Comitato Internazionale della Croce Rossa, cui va il mio ringraziamento per tale opportuna iniziativa.

La presenza sul terreno di un così variegato e composito numero di attori mette il diritto internazionale umanitario di fronte a nuove prove, suggerisce un'attenta riflessione sulla adattabilità delle diverse norme ad ogni specifica situazione, postula l'individuazione e la condivisione di parametri e livelli di garanzia minimi applicabili in ogni circostanza. L'Italia, che è presente attraverso le proprie Forze Armate nelle principali missioni internazionali di pace, conosce bene queste sfide.

Tra le missioni più significative, l'Italia prende parte, sin dal 2002, all'impegno della comunità internazionale in Afghanistan, Paese segnato da decenni di violazioni dei diritti umani. Tale impegno si è andato articolando in più forme, innanzitutto attraverso la Missione ISAF in quadro NATO. La missione ISAF, oltre alle nuove sfide poste alla sicurezza internazionale, deve confrontarsi con le tattiche asimmetriche dell'insorgenza afghana che colpisce con attacchi improvvisi, sempre più insidiosi, che fanno un numero crescente di vittime civili. UNAMA ha pubblicato in luglio un proprio rapporto sulle vittime civili (*Mid-Year Bulletin on Protection of Civilians in Armed Conflict, 2009*) che registra un vasto numero di episodi ma anche le iniziative adottate dall'Alleanza Atlantica per prevenire il ripetersi di altre tragedie. In termini politici resta centrale proteggere la popolazione, sostenere la *governance* e l'avvio di progetti di sviluppo.

Sempre nel contesto dello sforzo per contrastare le nuove minacce alla sicurezza, vorrei ricordare l'impegno dell'Italia per promuovere una risposta multilaterale contro il fenomeno della pirateria al largo delle coste somale, basata sulla dissuasione militare e sul rafforzamento delle capacità dei Paesi della regione nel settore della sicurezza marittima. Come Presidenza G8 abbiamo sostenuto il ruolo del Gruppo di Contatto sulla pirateria, istituito nel gennaio scorso ai sensi della Risoluzione 1851 del Consiglio di Sicurezza. Il Gruppo di Contatto ha favorito il coordinamento tra le missioni navali UE, NATO e della *Combined Task Force*, promossa dagli Stati Uniti, con le altre unità presenti nell'area a titolo nazionale (Russia, Cina, India, Giappone, Malesia) e promosso misure di assistenza tecnica per lo sviluppo di capacità nella regione nel settore della sicurezza marittima. L'Italia ha attualmente impegnate due fregate in teatro, una nella Missione UE *Atalanta* ed una nella Missione NATO *Ocean Shield*.

Proprio con la partecipazione a questo tipo di missioni internazionali, il nostro Paese ha acquisito un importante capitale di prestigio. Perché i nostri soldati sono innanzitutto operatori di pace. Perché la tutela dei diritti umani e delle popolazioni civili è una preoccupazione prioritaria costante.

A questi ideali di solidarietà e di fratellanza – che sono alla base del disegno di Henry Dunant e della nascita della Croce Rossa Internazionale maturata 150 anni fa sul campo della battaglia di Solferino – l'Italia intende continuare ad ispirarsi nel far fronte ai propri obblighi internazionali in tema di sicurezza e di ricerca della giustizia e della pace.

È con questo impegno che intendo rinnovarvi, a nome mio personale e del Ministero degli Affari Esteri, un buon lavoro. Confido vivamente che da questa Tavola Rotonda possa scaturire ancora una volta un costruttivo dibattito: che possano germogliare proposte concrete, intese a favorire un più efficace rispetto del diritto internazionale umanitario in situazioni spesso inedite, a rendere i conflitti – ove possibile – più umani.

Welcome address

Massimo Donzella
Presidente del Consiglio Provinciale, Imperia

Onorevole Vincenzo Scotti, Sottosegretario agli Affari Esteri, Presidente Ambasciatore Maurizio Moreno, Autorità militari e civili, autorevolissimi relatori, convenuti tutti. Da parte mia, mi trovo oggi qui a rappresentare, contestualmente, il Comune e il Sindaco di Sanremo e il Presidente dell'Amministrazione provinciale di Imperia.

Voglio rivolgere non soltanto un saluto, ma un sincero senso di gratitudine a coloro che, nel 1970, ebbero questa straordinaria intuizione di creare l'Istituto Internazionale di Diritto Umanitario. Vedo qua presenti alcuni di loro, li saluto e li ringrazio. Sanremo ha davvero una grande fortuna, il Comune è componente di diritto del Consiglio dell'Istituto insieme alla Croce Rossa Italiana. La presenza dell'Istituto Internazionale di Diritto Umanitario dà veramente alla città di Sanremo un senso di ampio respiro, di città internazionale, che si dedica e vuole dedicarsi alla cultura, alla sicurezza, al diritto, agli affari giuridici. Non voglio fare accostamenti suggestivi, ma se è vero che nel nostro Paese ci sono monumenti, bellezze nazionali che appartengono al patrimonio dell'umanità, sicuramente l'Istituto Internazionale di Diritto Umanitario è un elemento fondante che appartiene al Comune di Sanremo, al patrimonio di tutti i cittadini. Molto è stato fatto e tutto è stato detto da coloro che mi hanno preceduto.

Le molteplici attività dell'Istituto, che passano dall'insegnamento alla formazione, al perfezionamento nel diritto umanitario, con l'organizzazione di tavole rotonde, convegni, congressi ed anche la pubblicazione di importantissimi testi e manuali – quello relativo ai conflitti armati in mare del 1994, punto di riferimento per le accademie militari navali di tutto il mondo ed il manuale di diritto internazionale applicabile ai conflitti armati non internazionali – credo che sia una prova di quanto è importante, essenziale, specifico e molteplice l'impegno del nostro Istituto sul piano del diritto umanitario, della tutela dei diritti civili e dei diritti dei rifugiati. Mi colpisce come queste vicende siano davvero attualissime. Dal 1970 ad oggi for-

se non si sarebbe potuto pensare che questi temi, che fanno parte integrante del quotidiano impegno dell'Istituto, sarebbero stati così attuali.

Tutti noi abbiamo avuto tristemente modo di vedere le stragi che hanno colpito l'ex Jugoslavia, il Ruanda e la Somalia. Compito dell'Istituto è stato anche quello di portare all'attenzione questi temi e di trovare delle soluzioni ai problemi giuridici di natura sostanziale e procedurale, promuovendo l'applicazione del diritto umanitario in quegli stati che non vogliono o si rifiutano di recepire, all'interno del loro ordinamento, quelle che sono le disposizioni di diritto internazionale. Ma l'attualità la vediamo, ed è stato detto pocanzi, in quelli che sono gli atti di pirateria che inizialmente parevano casi isolati, i pirati nelle coste somale, ma poi la preoccupazione si è estesa, come diceva il Sottosegretario, perché se questi interventi diventano attacchi di gruppi terroristici internazionali, allora il fenomeno non è più isolato ma diventa di grande preoccupazione. In questi giorni abbiamo tristemente avuto modo di verificare quello che è accaduto, per esempio, con i rifugiati, con i problemi relativi ai diritti dei rifugiati ed al diritto di asilo. È compito anche di queste tavole rotonde, di questi convegni, di questi congressi contribuire a rendere più pregnante l'applicazione delle norme che disciplinano questi temi particolarmente delicati. Io concludo, vi ringrazio ed esprimo a nome delle Amministrazioni che rappresento il più vivo senso di riconoscimento e gratitudine.

Keynote address

Jacob Kellenberger
President of the International Committee of the Red Cross, Geneva

Sixty years ago, the establishment of the four Geneva Conventions was a reflection of the firmly-held belief around the world that even in times of armed conflict there are limits on what humans may inflict upon each other. The number of lives saved and the suffering alleviated by the Geneva Conventions, in short, their service to humanity, is immeasurable. We must be grateful to all those who have so courageously fought over the past sixty years for better compliance with the rules of international humanitarian law (IHL). Clearly though, this is no time for complacency. The nature of armed conflict and other situations of violence is continuing to evolve. So are the causes and consequences of such conflict. It is crucial now to anticipate and prepare for the main challenges to IHL in the years ahead – with the sole aim of achieving better protection for the victims of armed conflict.

The extent to which armed conflict has evolved over the past 60 years cannot be underestimated and the line between armed conflict and other situations of violence has become increasingly blurred. It almost goes without saying that contemporary warfare rarely consists of two well-structured armies facing each other on a geographically defined battlefield. One distinct feature of this evolution of warfare is the proliferation and fragmentation of armed groups and, more generally, the increasing involvement of non-state actors in modern armed conflicts. The ICRC, therefore, welcomes the opportunity to spend the next three days with you focusing on the topical issue of "Non-State Actors and International Humanitarian Law", and to look ahead and ask the question how the increasing prevalence of organized armed groups in armed conflicts can best be met in the 21st century.

The challenges the proliferation of non-state actors in armed conflict have brought about are manifold. They span the entire range of IHL, touching upon the question of IHL's applicability as well as on the question

of how to better ensure compliance with its rules. I shall refer to some of these challenges and consider some ways in which they might be addressed, including what and how the ICRC, for its part, is ready to contribute in terms of guidance and advice. While these challenges have a legal and often a political dimension, I must stress that our ultimate concern is purely humanitarian; our only motivation is to contribute to achieving better protection for the victims of armed conflict.

Already the sheer diversity of organized armed groups involved in modern armed conflicts poses a specific challenge of its own. Organized armed groups encompass a range of identities, motivations and varying degrees of willingness to observe IHL. Some are highly centralized and hierarchically structured, striving for governmental and territorial control. Some control an area, others do not. Yet again, other groups may be motivated exclusively by economic gain. While some groups operate only in a specific region, others have extended their operations to a trans-national or even global level. Even more worrying is the fact that some groups have deliberate strategies to directly attack or commission violations against civilians, aiming to destabilize societies. Better understanding these different actors, their characteristics and motivations, is a fundamental prerequisite to better meeting the challenges set by their increasing proliferation and involvement in modern armed conflicts.

The proliferation of organized armed groups goes hand in hand with the increasing prevalence of non-international armed conflicts. This is the most prevalent type of armed conflict today, pitting States against non-state armed groups, or two or more such groups against each other. As we know, there is no clear, universally-accepted legal definition of non-international armed conflict. Both Article 3 common to the four Geneva Conventions and the second Additional Protocol, which deal with non-international armed conflicts, give rise to certain questions. What if, for example, a non-international armed conflict spills over a State border and pulls in another non-state actor? What if a State and a non-state actor are fighting each other across the border without having been involved before in an internal armed conflict? In view of modern armed violence patterns we also need to determine how a non-international armed conflict could be more precisely delineated from other forms of violence, in particular, organized crime or terrorist activities. In this respect, the countering of urban violence in some major cities especially in Latin America, and discussions over the applicable legal framework is just one relevant illustration. One thing is certain: the necessity of clarifying key notions of IHL has not ended with the interpretative guidance on direct participation in hostilities.

The lack of clear answers to such questions may potentially allow parties to circumvent their legal obligations. The existence of an armed conflict may be refuted so as to evade the application of IHL altogether. Governmental authorities, for example, might disagree that a particular situation qualifies as an armed conflict. They might claim instead that it is a situation of "tension" or one that involves mere banditry or terrorist activities that do not amount to a non-international armed conflict. They might claim that officially declaring that an armed conflict is taking place would implicitly grant "legitimacy" or even legal status to the non-state party involved. Non-state parties to an armed conflict might likewise deny the applicability of IHL on the grounds that it is a body of law created by States – including the State against whom they are fighting. Conversely, other situations may inaccurately or prematurely be described as an armed conflict, precisely to trigger the applicability of IHL and its more permissive standards regarding the use of force or detention, for example, as compared to the standards set by human rights law. Even where the applicability of IHL in a non-international armed conflict is not in dispute, the fact that treaty-based law applying to these situations is at best limited has led to further uncertainties.

To address the humanitarian and legal challenges, the ICRC has been intensively engaged for the past two years in a comprehensive internal research study. The study aims firstly to identify the humanitarian concerns arising in today's non-international armed conflicts, including the challenge of improving compliance with the law by *all* parties to such conflicts. On the basis of this, its second aim is to evaluate the legal responses provided in existing law to these humanitarian concerns. Based on a comprehensive assessment of the conclusions of this research, which is still underway, a case will be made for the clarification or further development of specific aspects of the law.

Within the scope of this study, the ICRC is also looking at aspects of Article 3 common to the Geneva Conventions that need to be further clarified. Common Article 3 constitutes a "convention within a convention", binding States and non-state armed groups. It encapsulates the essence of the four Geneva Conventions and thus marks a baseline from which no departure, under any circumstances, is allowed. It applies minimum legal standards to the treatment of *all* persons in enemy hands, regardless of how they may be legally or politically classified or in whose custody they may be. We are preparing a consolidated reading of the protective legal and policy framework applicable in non-international armed conflicts that meet the threshold of common Article 3. The fundamental guarantees laid out in common Article 3 have been complemented significantly by virtue of treaty law and customary international law, especially in relation to

procedural safeguards in internment and detention, judicial guarantees and the conduct of hostilities. To provide but one example, as far as judicial guarantees are concerned, it is beyond any doubt that the presumption of innocence must be respected throughout all phases of a judicial process until a final conviction has been rendered. Trials may only be held by an independent, impartial and regularly constituted court. It is equally clear that no one may be compelled to testify against him or herself.

Increasing involvement of non-state actors, especially armed groups, in modern armed conflicts also challenges the humanitarian legal framework pertaining to the conduct of hostilities.

As lines have become increasingly blurred between combatants and civilians, it is civilian men, women and children who have increasingly become the main victims. Combatants do not always clearly distinguish themselves from civilians, neither wearing uniforms nor openly carrying arms, deliberately mingling with the civilian population. At the same time, civilians have progressively become more involved in activities closely related to actual combat. Armed groups recruit their members from within the civilian population. Sometimes this is done forcibly; sometimes civilians join in the quest of an organized armed group on an intermittent basis – becoming farmers by day and fighters by night. Under which circumstances precisely and for how long do these persons lose their protection from direct attack?

IHL stipulates that those involved in fighting must make a basic distinction between combatants on the one hand, who may lawfully be attacked, and civilians on the other hand, who are protected against attack unless and for such time as they directly participate in hostilities. The problem is that neither the Geneva Conventions nor their Additional Protocols spell out *what* precisely constitutes "direct participation in hostilities".

To put it bluntly, this lack of clarity has been costing lives. This is simply unjustifiable. In an effort to help remedy this situation, the ICRC worked for six years with a group of more than 50 international legal experts from military, academic, governmental and non-governmental backgrounds. The end result of this long and intense process, published just two months ago, was a substantial guidance document. This document serves to shed light firstly on *who* is considered a civilian for the purpose of conducting hostilities, *what* conduct amounts to direct participation in hostilities, and *which* particular rules and principles govern the loss of civilian protection against direct attack.

Without changing existing law, the ICRC's Interpretative Guidance document provides our recommendations on how IHL relating to the notion of direct participation in hostilities should be interpreted in contemporary armed conflict. It constitutes much more than an academic exercise. The

aim is that these recommendations will enjoy practical application where it matters, in the midst of armed conflict, and better protect the victims of those conflicts.

The proliferation of organized armed groups standing up against militarily superior enemies has also furthered the increasingly asymmetric nature of modern armed conflicts. Differences between belligerents, especially in terms of technological and military capacities, have become ever more pronounced. Compliance with the rules of IHL may be perceived as beneficial to one side of the conflict only, while detrimental to the other. At worst, a militarily weak party – faced with a much more powerful opponent – will contravene fundamental rules of IHL in an attempt to even out the imbalance. If one side repeatedly breaks the rules, there is a risk that the situation will quickly deteriorate into a free-for-all. Such a downward spiral would defy the fundamental purpose of IHL – to alleviate suffering in times of war. We must explore every avenue to prevent this from happening.

Of course, organized armed groups are not the only non-state actors active on the battlefield. Over the last few years, traditional military functions of the State and its armed forces have increasingly been contracted out to private military and security companies. These companies are contracted for a range of services, from the operation of weapon systems to the protection of diplomatic personnel. Recent years have seen a sharp increase in the use of private military and security companies, and with it the demand for a clarification of pertinent legal obligations under international humanitarian law and human rights law. The Montreux Document, that was adopted in 2008, seeks to meet this demand. This document was the result of a joint initiative by Switzerland and ICRC, launched in 2006, and it recalls existing obligations of States, private military and security companies and their personnel under international law. What is more, the Montreux Document contains a set of over 70 good practices designed to assist States in complying with these obligations.

The lack of respect for existing rules remains, as ever, the main challenge. I hardly need to remind you of the catalogue of flagrant violations of IHL frequently witnessed in armed conflicts around the world today. Enhancing compliance with IHL especially by non-state armed groups certainly amounts to a core challenge for years to come.

The many different causes of non-international armed conflicts and the sheer diversity of actors mean that those hoping to assist the parties involved in respecting the law must bring to their task patience, wisdom and knowledge. Experience has shown, however, that where the requisite conditions exist, certain mechanisms may help to persuade conflicting parties to better comply with the rules. In 2008 the ICRC published a study

on "Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts". This publication sets out the range of legal tools and policy arguments that the International Committee of the Red Cross, and others, have employed with both States and organized armed groups to improve their compliance with the law. For example, the granting of amnesties for mere participation in hostilities – an avenue encouraged by Additional Protocol II – may help to provide armed group members with a legal incentive to comply with IHL. Special agreements, unilateral declarations of intention, the inclusion of IHL in codes of conduct for armed groups, as well as references to IHL in cease-fire or peace-agreements, provide a party to a conflict with an opportunity to make an "express commitment" of its willingness or intention to comply with IHL. Through any of these tools, the hierarchy of a party to an armed conflict takes an affirmative step: it signs, or agrees with, a statement of the applicable law, thereby taking ownership and making a commitment to ensure respect for the pertinent provisions of IHL. These tools can serve as a useful basis for establishing contact and for follow-up action to address violations of the law and to maintain a dialogue. Yet at the same time, we must acknowledge that such tools have at best been adopted sporadically, and even in those instances where they have been employed, violations of IHL have often continued unabated. In other words, these mechanisms alone will not bring about a satisfactory level of compliance with IHL. This should not keep us from employing them – the absence of systematic engagement will almost certainly mean more, not fewer, civilian casualties in current conflicts. Yet, at the same time, in addition to its continuing endeavors to increase respect for the law, the ICRC remains firmly committed to further exploring ways in which persons affected by non-international armed conflicts can be better protected.

Sixty years ago, the Geneva Conventions were born out of the horrors experienced by millions of people during the Second World War and its aftermath. Yet, the essential spirit of the Geneva Conventions – to uphold human life and dignity even in the midst of armed conflict – is as important now as it was 60 years ago. We must do all we can to keep that spirit alive and it is in this sense that I wish all of you a very successful roundtable.

Address

Giampaolo Di Paola
Chairman of the NATO Military Committee, Brussels

Signore e signori buongiorno. Innanzitutto vorrei ringraziare l'amico Maurizio, l'Ambasciatore Maurizio Moreno, Presidente di questo Istituto prestigioso, l'Istituto Internazionale di Diritto Umanitario, per avermi invitato a partecipare ai lavori iniziali di questa XXXII Tavola Rotonda.

First of all, I would like to remind you what day it is today. Today is 11th September, 9/11 as they say in English, and I suppose everybody knows what I mean when I say 9/11. I don't know if it is a coincidence or not, but it is very appropriate that this Round Table, concerning "non-state actors and international humanitarian law," and, in particular, "organized armed groups: a challenge for the 21st century," takes place on this day.

Because, somehow, for all of us, let's say in the collective thinking, 9/11 has begun to symbolize the start of the new security environment in the 21st century. It has become the symbol of the new threat and challenges to our collective security and also a greater challenge for the application of international humanitarian law, as President Kellenberger just reminded us a few moments ago.

But each one has to do his own duty. I am a military man, I am the chairman of the NATO Military Committee, which, for those of you who may not know, is the collective body of the 28 chiefs of defence of the NATO nations. Therefore, in my capacity as a chairman, I will try to address the issue from a military perspective, from the NATO military perspective. I am not a lawyer, I am not a legal expert, I am a military man, and so I think my duty is to address this issue from a NATO military perspective.

First of all, I will start my reflection by indicating what the key principles are that really guide the actions of the Alliance as it engages in operational missions today as is the case in Afghanistan, of course, in Kosovo, off the Somali coast and in anti-piracy operation "Ocean Shield", as was mentioned by the Secretary of State, Mr. Vincenzo Scotti.

Well, first and foremost, NATO always acts in accordance with the spirit and principles of international humanitarian law; that must be clear. This is applied, even more so, in missions like Afghanistan or "Ocean Shield," where, in the latter case, the so-called opponents are not organized armed groups. NATO will continue to apply the key principles of international humanitarian law, the principle of necessity, distinction, proportionality, humanity and non discrimination. This applies, of course, even more so, to non-state actors, I mean, to organized armed groups. Although, as I think Dr. Kellenberger clearly stated in his intervention, it becomes much more difficult. Two of the principles I mentioned have a particular relevance: distinction and proportionality.

Now, regarding Afghanistan, it is not that easy to apply the principle of distinction when the so-called opposing forces, the Taliban, do not wear a uniform and are actually part of the Afghani population, living among the Afghani people as they conduct normal business. Conversely, after they conduct their attacks, discriminately or indiscriminately, at night they go back to their families and to their own clans, so applying the principle of distinction, in this situation, is not that easy. Actually it is very, very complicated. Still, that principle is a polar star for the Alliance men and women engaged on the ground.

Regarding proportionality, somebody would question whether it is proportional to send, in the case of piracy operations off the African coast, a patrol boat or frigate of more than 200 people with large guns, against a five-metre dhow manned with maybe ten or even a dozen people armed just with small-calibre weapons. Well, it is not the size of the ship that really describes proportionality, it is the action, the use of force, the appropriate use of force when we need to use force, when we cannot prevent, when we cannot deter, when we cannot stop them from conducting their actions.

So, this is just an example to show that, notwithstanding the determination of our Alliance or of our nation to do so, it is, sometimes, much harder to apply and implement the key principle of humanitarian law when taking into account military action at sea or on the ground. Secondly, more and more NATO military action is not, actually, I would say almost never, conducted in isolation. NATO intervenes on behalf of and upon request from the international community, and in a context in which we are part of the wider objective of the international community.

So, NATO action cannot be seen and should not be seen in isolation, but just as a part of the wider effort of the international community to resolve the issue, to resolve the problem. In Afghanistan, the International Security Assistance Force (ISAF) is just a piece and parcel of a much wider process, a much wider effort by the United Nations, European Union, international organizations, and non-state organizations, to try to help the Afghanis.

What are the challenges of the 21st century? How are they relevant to the Alliance? Actually, everybody knows that the Alliance was created as a defence against the Soviet Union, in what eventually became known as the Cold War, and since the Cold War ended over 20 years ago in 1989, some question and are even surprised that the Alliance is still here. It is still, in my opinion, a very important, effective and essential organization within the international community. But, even as we, the nations of the Alliance, celebrated its 60th anniversary in April of this year in Strasbourg/Kehl – a very big event – it is a fact that today's security environment has almost nothing to do with the security environment at the time the Alliance was created in 1949.

Actually, today, we are operating in a completely new security environment with new threats such as proliferation, terrorism, weapons of mass destruction, and challenges emanating from the increased gap between those who have and those who have not. These are the new challenges which are characterizing the security environment more and more. These threats no longer, or very rarely, come from States, although there was one case last August, but mostly from non-state actors and organized groups, who represent the greatest challenge and, once again, today's 9/11 anniversary of the attack on the Twin Towers is a powerful, potent reminder of the new situation.

So, therefore, the Alliance has changed. As a matter of fact, yesterday, the Secretary-General of the Alliance, Dr. Rasmussen, reminded the international press that the Alliance was engaged in a big process of transformation and was launching a new strategic concept that would have to track the role, function and purpose of the Alliance in the years to come. It will be a large, open exercise, not just for few experts, but one open to society. Open not only to the Alliance but also to those who are not part of the Alliance, to help track its future role.

So, a tremendous and important effort will be presented at next year's summit of the Alliance, that will, eventually, pave the way for the future. But as I said, the threat and the challenges have changed, non-state actors and organized armed groups are the threat. But even when we look at them, it is not that easy. Organized armed groups can have different ideologies or different characteristics, so not all of them will necessarily call for a single response from the Alliance.

What kind of a threat do they pose? Even the nature of the threat these armed groups are posing is different. They are the masters of IEDs, the famous improvised explosive devices, which are the cause of most indiscriminate killing in Afghanistan. Other threats include suicide bombings of any kind, be it human, vehicle-borne or with the use of aircraft – 9/11, once again – the proliferation of biological, radiological, nuclear or

chemical weapons, and cyber attacks. Globalization is not only bringing information to society but, because we are an informed society, inevitably, information is used as a weapon, and cyber activities and attacks are as destructive as kinetic weapons.

Even when we look at the so-called organized armed groups, there are trans-national global actors like Al-Qaeda, local actors like the Taliban in Afghanistan, or armed groups like the pirates off the Somali coast, where, even if there is a connection with international terrorism, it is sometimes not clear whether they are true terrorists or whether they are just trying to obtain money through illegal activities. What is the relation? Certainly one thing is clear: failed States, in this case Somalia, cannot control their territory, they cannot control their land, and even less their water space, therefore, inevitably, the phenomena of piracy calls for a response from the international community. Sometimes, and I think the reference was also made by Dr. Kellenberger, you can have a situation in which, as is the case of Afghanistan, Al-Qaeda operates from a neighbouring State, or the Taliban operate from the neighbouring State of Pakistan, crossing the border into Afghanistan from Pakistan.

The situation and nature of an attack may produce a range of responses and trigger whether or not the Alliance will become involved. I will provide a simple example. In the case of the famous terrorist attacks of the railway station in Madrid or in the underground of London, an Article 5 response by the Alliance was not generated. Actually, these actions were dealt with as criminal activities under national jurisdiction. But in the case of the Twin Towers terrorist attack, the attack was considered as an attack to all members of the Alliance, which is why Article 5 was invoked.

So you see, the response of the Alliance can be either Article 5 or non-Article 5, predicated upon the situation, the nature of the threat, the moment in which the threat develops, and the reaction of the international community to the threat. But, more and more, you will see the Alliance engaged in a so-called non-Article 5 situation, on behalf and within the context of the international community. That is certainly the case in Afghanistan, with piracy in the Indian Ocean, and it is certainly the case in Kosovo. When we act within and on behalf of the international community, we definitely, and I want to reiterate that strongly, adhere to the spirit and principle of international law.

And how do we do that? We do that through what are known as rules of engagement. What are the rules of engagement? This issue comes up very frequently. Fundamentally, the rules of engagement are acceptable rules, which the Alliance establishes for its men and women, for the soldiers and civilians who operate in the name of the Alliance to follow when they

conduct operations. So they are rules of behaviour and those rules of behaviour are based on the principles of humanitarian law.

And in this case all of the principles are key, but I know that there has been a lot of discussion these days on what is occurring in Afghanistan with regard to civilian casualties, but one thing has to be clear: our rules are set in the full respect of humanitarian law. This does not mean that mistakes cannot be made, but when they are made, they are certainly, without a doubt, unintentional. It is too often easy to criticize what is happening on the ground but we are human beings and we can make mistakes, and sometimes implementing principles in specific situations is not that easy.

I think that international organizations like the United Nations, in their report on Afghanistan, made clear that the adversaries actually have the intention to create civilian casualties – the more the better. For us, one civilian casualty is one too many; for them one civilian casualty is one too less. And that is the fundamental principle, that is why we adhere to international humanitarian law and why they don't.

But there is another important aspect of this fight against terrorists or armed groups, which is a soft aspect of this fight. It has to do fundamentally with public support, because to sustain these missions on behalf of the international community, on behalf of our security and yours, we need your support and support is not something you can take for granted. Support is something you must gain. How? By explaining, through appropriate communications, why we are there, what we are doing, and on whose behalf we are doing it.

So, that is what today is called strategic communication. But the best way to communicate is through action, because our best message is the way we act, not just communicating how we act. Just to quote what, to me, is the most effective statement of strategic communication by one person who, in this case, is the Chief of Defence of the United States, Mike Mullen. He said "*I would worry less about how to communicate our action and much more on what our actions communicate*". That, I think, is a most impressive statement, and if you look at the so-called new strategy that John McChrystal, the ISAF Commander, put in place when he took command in Afghanistan, fundamentally, he wanted to communicate through action that ISAF was there to protect the Afghani people and that we care about the Afghani people.

So, we are there to protect the security and well-being of the Afghani people from the Taliban. We are there to help the Afghani Government find its own way to a viable Afghani State, and from the security point of view the election that has taken place was a success. I am not talking about the election result, that is something that concerns the Afghanis.

They voted, they have the electoral commission and they have the complaints commission, which is responsible for judging the election, *per se*. We were there to help the Afghan national security forces provide security for the election.

I believe that what NATO has accomplished is remarkable, with regard to helping the Afghani people, and the issue that is now emerging is to help transfer the security to the Afghan national security forces. So NATO's action is not only kinetic, as I said, but it is also helping in training, building, and mentoring the Afghan national security forces, army and police to get to the level at which they can assure their own security. The Secretary-General of the Alliance has clearly stated the importance of this new task of helping to build Afghan national security forces. So, security building is also an important part of NATO's action, certainly in Afghanistan, but also helping the international community to build, for example, in the case of anti-piracy, regional capacity. Regional capacity-building is another use of NATO forces to build a framework of security for all.

I think I will stop here. I hope I have been able to make clear how NATO forces behave, how NATO forces adhere to the principle and to the practice of international law. I think that all principles of international humanitarian law are critical, and we need, want and endeavour to respect them in any action we take. Although we do realize the complexity and difficulty of doing so in such a challenging environment I remind you that one of the five principles is non-discrimination, so I would ask you not to discriminate against me because I am a military person and for what I said. Thank you!

Address

Pierre-Michel Joana
Conseiller spécial pour les capacités africaines de maintien de la paix en Afrique auprès du Haut Représentant Javier Solana, Bruxelles

Lors d'un entretien avec M. Ali Bongo il y a quelques mois, alors qu'il était encore Ministre de la Défense du Gabon, ce dernier me disait:

"*Attention, il y a désormais dans la région, des groupes armés illégaux qui sont mieux équipés, mieux payés, mieux organisés et souvent mieux commandés et plus motivés que les armées régulières. Vous, Européens, devriez en prendre conscience et nous aider à redresser cette situation*".

C'était évidemment un appel du pied pour que nous l'aidions à renforcer les capacités nationales et régionales en termes de forces de sécurité, mais cela montre bien le changement important de ces dernières années.

Depuis l'effondrement du bloc de l'Est, et la fin du conflit idéologique qui s'était appuyé sur tous les mécontentements du monde, les contestations violentes n'ont cependant pas cessé. Elles sont, comme toujours sous tendues par des objectifs politiques ou idéologiques, et revendiquent la défense de populations ou de groupes humains ou religieux.

Ce qui a changé, c'est d'abord qu'elles ont accès à un marché de l'armement considérable et facile à approcher.

Leur financement, ensuite, s'est désormais grandement privatisé, ce qui explique le lien de plus en plus étroit entre ces groupes armés illégaux et l'organisation de toutes sortes de trafics visant à s'assurer la logistique qui fut jadis fournie par des états parrains.

Le phénomène s'inverse même parfois: si le partage inégal des ressources est souvent à l'origine de l'action politique violente, il n'est souvent que le prétexte au contrôle, par d'autres, de ces ressources. Ainsi voit-on des groupes armés naître sur des gisements très riches de diamants, or, coltan, cassitérite, ou pétrole.

On voit également désormais des groupes armés illégaux utiliser la production de la drogue ou son trafic comme source de financement de leur fonctionnement.

La piraterie maritime ou les enlèvements et la restitution d'être humains contre rançon, sont également un nouveau mode de financement de ces groupes armés.

Les mois et les années passant, l'image se trouble.

D'une lutte légitime visant à rendre au peuple le contrôle des richesses de son territoire, on passe à la mise en coupe réglée des ressources, et au contrôle des populations. Ce n'est plus vraiment la lutte que l'on finance, même si la rhétorique continue, ce sont de nouveaux systèmes de prédation qui se mettent en place.

De la recherche de financements par la culture, la vente ou le transit de drogues, l'on passe à l'intégration du mouvement dans les circuits internationaux des grands trafiquants.

Du rôle de «garde côte», en substitution d'un état défaillant, l'on passe à l'organisation d'un vaste système de piraterie maritime, accompagné d'autres trafics, avec rackets, enlèvements et demandes de rançons, savamment négociés par des spécialistes à la solde de l'organisation, qui finissent par ruiner complètement les populations littorales qui ont abandonné la pêche.

Notons que dans tous les cas, ce sont les pays riches qui, volontairement, clandestinement ou par la contrainte, fournissent l'argent qui permet d'acheter les armes et d'entretenir la lutte. Une lutte dont les objectifs finissent par être oubliés et ne servent plus que de prétexte pour justifier la spirale du «sale business», faisant fi du droit humanitaire ou des droits de l'homme tout court.

Dans ces conditions, faut il considérer ces groupes armés organisés uniquement comme des criminels, et refuser leur contact, ou faut il leur parler?

Faut-il les aider à se conduire mieux ou se contenter de dénoncer leurs crimes?

Faut il sélectionner les «bons groupes armés illégaux» avec lesquels on travaille?

Faut-il les soigner et soigner leurs familles?

L'Union Européenne, au sein de laquelle je travaille, a développé un concept de gestion globale des crises qui vise à prendre en compte tous les aspects, qu'ils soient civils ou militaires, et établit désormais un lien très étroit entre sécurité et développement. Au cœur des valeurs que porte l'Union Européenne se trouvent le respect des droits de l'homme et l'application du droit humanitaire.

L'expérience africaine de l'Union Européenne ces dernières années, montre bien que cette démarche nous conduit à être en contact avec de nombreux groupes armés illégaux, ne serait ce que parce qu'ils contrôlent des zones ou vivent des populations qui ont besoin de beaucoup d'aide.

Mon expérience personnelle et professionnelle s'est faite au contact de groupes armés aussi divers que les rebelles Tchadiens successifs, dont certains ont d'ailleurs accédé au pouvoir quelques années plus tard, les diverses milices Palestiniennes ou Chrétiennes du Liban, les différentes factions Serbes, Croates ou Musulmanes de Yougoslavie des années 90, les rebelles Ivoiriens de ce début de siècle, les groupes armés ou l'armée de la RDC, les factions et autres pirates Somaliens d'aujourd'hui.

Ma réponse aux quatre questions précédentes est oui, sans hésiter, ne serait ce que pour une seule raison. Cette raison est que la plupart des victimes de la guerre ne sont pas, ceux qui la déclenchent, la font et l'entretiennent. Les vrais vainqueurs ne sont qu'exceptionnellement ceux qui se sont battus. Les vrais victimes sont, à la fois, les populations et les gueux qui exécutent le sale boulot.

Quitte à passer pour un grand naïf, je pense donc qu'il est possible et nécessaire d'améliorer les comportements des pires groupes armés, car ils vivent en général sur le territoire de leurs frères et que ce sont leurs frères que nous devons protéger.

Malgré de fortes réticences, il existe quelques organisations non gouvernementales qui acceptent de trouver la voie entre criminalisation et amnistie, et je connais des gens courageux qui ont obtenus de très beaux résultats en allant expliquer la loi humanitaire internationale parmi des groupes réputés très violents. Je rajouterai à ces groupes armées illégaux, les forces armées nationales, issues de processus de paix et regroupant immédiatement après la sortie de longs conflits, d'anciennes factions, dont les comportements n'ont pas changé en changeant d'uniforme et de chaîne de commandement. Il y a également beaucoup de travail à faire avec eux dans le domaine du respect du droit humanitaire, d'autant qu'on attend d'eux qu'ils servent de référence.

Je vous recommanderai lors des discussions sur les sociétés militaires privées ou les sociétés de sécurité privées, du thème III, de bien analyser pour qui elles travaillent, pour remplir quelle mission, qui les payent et comment sont payés leurs employés?

Ce sont à mon avis les quatre critères qui permettent d'identifier leur profil vis-à-vis de l'état de droit, et leur capacité à respecter le droit humanitaire.

La prolifération de sociétés de sécurité privées, employant du personnel national, ou international, selon des critères de recrutement plutôt opaques, dans des pays en crise ou sortant de crise, me parait inquiétante. Elle est la manifestation de la carence des systèmes de sécurité d'état, mais elle peut être également le refuge ou la réserve de futurs groupes armés illégaux. Leurs fréquentes connections avec les forces de sécurité officielles méritent d'être examinées au vu du droit.

Les nouvelles formes de violence qui font l'objet du thème IV, terrorisme et violence transnationale, s'éloignent souvent des références au territoire et à ceux qui y vivent, rendant encore plus difficile leur approche, et plus complexe les aspects légaux. Je formule des vœux pour que vous identifiez une solution possible entre la nécessité de lutter contre le terrorisme et ses méthodes inacceptables, et le respect du droit humanitaire dans la façon de conduire la lutte. Mais c'est au débat de s'exprimer.

S'agissant de la piraterie, elle constitue désormais l'une des nouvelles préoccupation, en particulier au large des côtes somaliennes et dans le golfe d'Aden. L'Union Européenne s'est fortement impliquée dans cette affaire avec l'opération Atalante. Le fait que les pirates se présentent eux mêmes comme les gardes côtes de la Somalie, montre bien qu'il est nécessaire de les ramener à une conception plus légale, sous réserve qu'il y ait quelqu'un pour leur indiquer la route, ce qui n'est pas le cas dans un pays qui n'est plus gouverné depuis 18 ans. Les problèmes juridiques, assez complexes, concernant les pirates capturés illustrent bien la difficulté de traiter ce problème.

La lutte contre les pirates n'est évidemment pas la seule solution à la piraterie, pas plus d'ailleurs que le paiement de rançons considérables, qui ne sont qu'un encouragement pour ces derniers à prendre de plus en plus de risques.

Le désespoir est souvent la cause de toutes les dérives. Il nous appartient d'aider à recréer un minimum d'espoir dans l'avenir, pour ces populations, souvent captives de ceux qui profitent de la piraterie.

Je terminerai cette brève intervention en revenant à la conversation que je citais au début. Au sein de l'Union Européenne je travaille sur le partenariat stratégique entre l'Union et l'Afrique dans les aspects paix et sécurité. Ce domaine va de la prévention des crises à la sortie des conflits. Beaucoup d'effort sont déployés pour améliorer les systèmes d'alerte précoce, les capacités de médiation, les capacités de gestion des crises et la reconstruction post crise, y compris pour les systèmes de sécurité.

La table ronde d'aujourd'hui traite des groupes armées illégaux dont la naissance n'est souvent que la conséquence de l'effondrement des systèmes de sécurité officiels (armée, police, justice, gouvernance), dont les comportements vis-à-vis de la loi et du droit sont condamnables. Peut-être devraient ils faire l'objet de plus d'attention avant que les drames ne se produisent.

Le sujet de cette table ronde est passionnant et je remercie son Excellence l'Ambassadeur Maurizio Moreno et l'Institut International de Droit Humanitaire de l'avoir organisée.

Je vous souhaite des travaux fructueux, qui seront pris en considération avec beaucoup d'intérêt par l'Union Européenne.

Address

Francesco Rocca
Commissario Straordinario, Croce Rossa Italiana, Roma

Sono grato all'Ambasciatore Moreno per avermi offerto l'opportunità di intervenire all'apertura della XXXII Tavola Rotonda dell'Istituto Internazionale di Diritto Umanitario di Sanremo, per la prima volta dal momento che ho assunto la direzione della Croce Rossa Italiana nel mese di novembre scorso, dopo averne per lungo tempo guidato il Dipartimento delle Operazioni di Soccorso. Desidero inoltre, a nome mio personale e della Croce Rossa Italiana tutta, salutare le autorità politiche, militari e gli autorevoli esponenti del Movimento Internazionale della Croce Rossa presenti oggi, con un particolare saluto al Presidente del Comitato Internazionale, Prof. Kellenberger, che ho di recente incontrato nei luoghi in cui 150 fa nacque il Movimento Internazionale della Croce Rossa e della Mezzaluna Rossa.

Il tema di questa tavola rotonda coglie una delle principali sfide per l'odierno diritto internazionale umanitario. È qui immediato il richiamo a scenari nei quali la già difficile applicazione di questa disciplina viene resa ancora più complessa dalla necessità di confrontarsi con realtà peculiari, dove un ruolo crescente è svolto dalle entità non statali.

Questo ultimo termine, tuttavia, comprende al suo interno una variegata e non omogenea serie di attori, che operano in scenari diversificati e con motivazioni di natura diversa. Quindi, si tratta di una molteplicità di situazioni che non necessariamente richiedono una risposta di tipo uniforme da parte degli Stati e del diritto internazionale: è necessario anzi tenere ben presenti la diversità delle situazioni per dare, in relazione a ciascuna di esse, la risposta normativa adeguata.

Difatti, fra le numerose situazioni che possono rientrare nell'ambito di questa tavola rotonda, si possono individuare scenari che per il diritto internazionale umanitario sono ormai "classici", come è il caso della regolamentazione dei conflitti armati non internazionali. Ma a queste ipotesi ben conosciute si sono affiancate, negli anni recenti, fattispecie ulteriori che hanno assunto un rilievo sempre più spiccato. Si pensi, ad esempio, al

coinvolgimento dei "*contractors*" e delle "*private military companies*" negli scenari conflittuali, e ancora alle attività di gruppi armati di matrice terroristica e neppure può tralasciarsi la tematica del ricorso all'uso della forza da parte degli Stati contro gruppi armati non statali localizzati al di là dei confini nazionali. Al tempo stesso occorre tenere in considerazione anche alcuni temi connessi all'attuale tavola rotonda, come i teatri operativi nei quali più usualmente si opera contro le entità non statali. In particolare è apparso evidente in recenti conflitti, ad esempio con l'operazione "Piombo fuso", che l'azione bellica contro gli attori non statali viene talora a svilupparsi in quello che è il c.d. "*urban warfare*", situazione che apre profondi interrogativi giuridici e umanitari. Infine, sempre più attuale è, per quanto concerne gli attori non statali, il ruolo svolto dalle Organizzazioni internazionali nell'applicazione del diritto internazionale umanitario, stante il rilievo delle *peace support operations* rispetto alla disciplina in oggetto e i numerosi scenari che vengono in considerazione nell'attuale realtà internazionale, come ad esempio le operazioni di creazione e mantenimento della pace condotte sotto comando delle Nazioni Unite, dell'Unione Europea o dell'Unione Africana. Su questo ultimo tema è sufficiente rimandare alle importanti riflessioni svolte lo scorso anno, nell'ambito di questo Istituto, durante l'ultima tavola rotonda.

Rispetto a queste situazioni il diritto internazionale è chiamato a confrontarsi oggi e in ognuno di questi scenari le molteplici problematiche giuridiche aperte rappresentano una costante sfida per gli operatori, sia militari, ma anche civili e umanitari, sul terreno.

Invero, anche dinanzi alla "classica" situazione del coinvolgimento di entità non statali in conflitti armati non internazionali, ipotesi che rappresenta ancora, da un punto di vista quantitativo, la maggior parte dei conflitti armati odierni, il quadro giuridico non è affatto lineare. Le situazioni in oggetto, infatti, presentano alla radice elementi che producono delle evidenti difficoltà per una corretta regolamentazione delle ostilità e che devono essere oggetto di riflessione in questi lavori. Si pensi, ad esempio, al carattere non perfettamente strutturato e disarmonico delle entità non statali coinvolte nel conflitto, che rende difficile la canalizzazione delle responsabilità nell'applicazione del diritto internazionale umanitario. Si pensi ancora alla possibile presenza di fattori che non facilitano il basilare rispetto per l'avversario, come nel caso di fratture etniche, religiose o politiche fra le parti in lotta.

Rispetto ai conflitti armati non internazionali, permane poi tuttora l'esigenza di chiarire la portata degli obblighi giuridici esistenti a carico delle entità non statali. Questi obblighi, specie nell'ambito del diritto internazionale umanitario, sono repentinamente venuti in luce negli ultimi due decenni, grazie soprattutto alla giurisprudenza "creativa" dei tribunali penali

internazionali *ad hoc* per la ex Iugoslavia e per il Ruanda, che hanno dato vita a quel fenomeno esemplarmente identificato in dottrina come "CTV", ovvero "*coutume grande vitesse*", con la definizione di precetti di natura consuetudinaria, atti ad integrare il fino ad allora carente impianto convenzionale relativo a questa tipologia di conflitti armati, dopo gli scarsi risultati raggiunti con la redazione del Secondo Protocollo Addizionale del 1977.

A partire dagli anni novanta del secolo scorso, l'opera di definizione delle regole giuridiche connesse ai conflitti armati non internazionali ha quindi visto un repentino sviluppo, sia in ambito pretorio sia in sede convenzionale, con la progressiva equiparazione, nei termini sostanziali, della disciplina giuridica applicabile a queste due branche della normativa. Tale fenomeno ha perciò condotto ad un nuovo marcato rilievo della disciplina pattizia per la regolamentazione dei conflitti armati non internazionali, come attestato ad esempio dalle modifiche alla Convenzione sulle armi classiche, introdotte nel 2001 con l'emendamento all'originale art. 1, al fine di estendere la portata applicativa di questo strumento e dei pertinenti Protocolli anche ai conflitti armati non internazionali, ovvero dai più recenti trattati che, fin dall'origine, interdicono taluni sistemi di arma "*in ogni circostanza*", quindi anche nei conflitti armati non internazionali, come è il caso del recente strumento della Convenzione di Dublino del 2008 sulle *cluster bombs*.

Questo fenomeno di intervento sull'elemento convenzionale della disciplina attesta perciò la volontà della Comunità internazionale di favorire un *corpus* normativo omogeneo fra le due ipotesi di conflitto armato, stante porre uguali divieti, dato che, riprendendo le significative espressioni del Tribunale penale per la ex-Jugoslavia nel caso *Tadic*, le sofferenze causate dalle ostilità ovviamente non differiscono a seconda della tipologia di conflitto con cui ci confrontiamo e, quindi, anche le regole giuridiche non devono mutare nell'ambito degli scenari conflittuali.

A questa attività di identificazione della normativa applicabile nei conflitti armati non internazionali hanno infine contribuito, in modo rilevante, due significative opere di codificazione, proposte recentemente sia dal Comitato internazionale della Croce Rossa con il volume "*Customary International Humanitarian Law*" (di cui è in preparazione un aggiornamento della prassi), sia dall'Istituto Internazionale di Diritto Umanitario con "*The manual on the law of non-international armed conflicts*", che hanno quindi avuto come finalità l'identificazione delle regole consuetudinarie vigenti in materia. Esse, come attestato in questi fondamentali studi, vanno ben al di là dell'attuale contesto convenzionale, dato che questo ultimo, come pocanzi accennato, sebbene maggiormente rilevante rispetto a pochi decenni fa, si presenta ancora scarso di contenuti e non omogeneo.

Tuttavia, tale opera di "normativizzazione" e di definizione delle regole gravanti sulle entità non statali rischia di porre delle "illusioni" circa il diritto effettivamente pertinente rispetto ai conflitti armati non internazionali, tanto da risultare infine infruttuosa se non accompagnata da un effettivo rispetto delle norme sul terreno. Occorre quindi che queste norme abbiano un concreto impatto e rilevanza al di là dei consessi accademici e diplomatici.

Il Movimento di Croce Rossa avverte fortemente l'esigenza di garantire una diffusione del diritto internazionale umanitario fra le parti in conflitto, al fine di facilitarne l'applicazione e a questo fine, nel quadro di conflitti armati non internazionali, conduce una difficile attività coinvolgente i gruppi armati organizzati, data la volontà di confrontarsi, secondo i principi che ci contraddistinguono, rispetto ad una realtà che, per le motivazioni sopra accennate, rappresenta sicuramente un terreno non fecondo per un corretto rispetto del diritto internazionale umanitario. Tuttavia questa attività trova impedimento concreto nella carenza di effettivi incentivi, per la controparte non statale, all'attuazione del diritto internazionale umanitario, dato che essi non sono adeguatamente presenti nell'attuale quadro normativo.

Da un lato lo strumento di incentivazione al rispetto del diritto internazionale umanitario, offerto a partire dallo scorso decennio dallo sviluppo della responsabilità penale individuale, di matrice internazionale, per crimini di guerra commessi in conflitti armati non internazionali, incontra in molti casi evidenti difficoltà di funzionamento. Sebbene negli ultimi anni si sia assistito ad un crescente rilievo per l'elemento repressivo nel contrasto alle violazioni della normativa umanitaria applicabile in questi conflitti, come da ultimo attestato dall'art. 8 dello Statuto della Corte penale internazionale, numerosi ostacoli giuridici e politici si manifestano continuamente rispetto ad un'efficace azione di contrasto verso questi crimini internazionali, la quale rischia di svilupparsi in modo disarmonico, dato che molti scenari e protagonisti in negativo dei conflitti armati non internazionali tuttora sfuggono a questa attività repressiva.

L'attenzione della Comunità internazionale rispetto a queste ipotesi è altalenante e non retta unicamente da criteri giuridici, anche se talora si possono registrare alcuni elementi positivi, basti pensare al recente deferimento alla Corte penale internazionale, da parte del Consiglio di Sicurezza *ex* art. 16 dello Statuto, della situazione esistente in Sudan, che altrimenti sarebbe stata esclusa dalla competenza della Corte in ragione dei limitati titoli di giurisdizione di questo Tribunale. Tuttavia il vasto eco politico suscitato dalle successive azioni del Procuratore, con commenti affatto positivi da parte di un nutrito gruppo di Stati, attesta le difficoltà di condurre un'azione di dissuasione di questi crimini per il tramite del diritto internazionale penale, situazione che ovviamente non contribuisce a una corretta applicazione del pertinente diritto internazionale umanitario.

Inoltre, a mio avviso, onde garantire il rispetto del diritto internazionale umanitario da parte delle entità non statali, rimane aperto un problema basilare che è opportunamente segnalato in chiusura di questa tavola rotonda: mi riferisco all'asimmetria normativa che si sviluppa per i gruppi armati non organizzati, che, nell'attuale assetto del diritto internazionale umanitario, rimangono prigionieri del paradigma spesso definito del "buon criminale". In altri termini, anche nel caso in cui gli appartenenti ai gruppi armati non statali si attengano ai dettami del diritto internazionale umanitario -quindi non dando vita, ad esempio, a ipotesi di crimini di guerra-, una volta catturati essi restano in ogni caso esposti, specie al termine del conflitto e nell'ipotesi di sconfitta dell'entità non statale, alla responsabilità penale derivante dall'ordinamento giuridico interno in ragione della stessa loro partecipazione o coinvolgimento nelle ostilità.

Questi individui, infatti, potranno essere processati per molteplici reati, previsti nelle legislazioni nazionali, connessi al loro ruolo attivo nel conflitto armato non internazionale. Le loro azioni belliche, come ad esempio un attacco a un convoglio militare delle forze armate governative che conduce alla morte di appartenenti a queste ultime unità, sebbene siano atti indifferenti al diritto internazionale umanitario – se si utilizzano leciti mezzi bellici, non si viola il principio di proporzionalità, ecc. – dato che non si va a violare nessuna norma del diritto internazionale bellico, rimangono invece atti penalmente rilevanti in ogni ordinamento nazionale. A carico dei membri dei gruppi armati non statali catturati, ovvero usualmente contro cittadini dello stesso Stato in cui si sviluppa la guerra civile in oggetto, permane quindi una piena possibilità di esperire azioni repressive per il loro coinvolgimento nel conflitto, dato che, nell'ottica dell'ordinamento interno, queste azioni sono niente altro che atti qualificabili come "omicidio", "danneggiamenti", ecc., senza che si ponga in rilievo il rispetto del diritto internazionale umanitario nella conduzione di queste operazioni belliche.

Questo aspetto necessita quindi di un'accurata riflessione in questa tavola rotonda. È evidente che difetta un chiaro incentivo e vantaggio per i membri dei gruppi armati non statali nel rispettare il diritto internazionale umanitario. Gli appartenenti a queste fazioni non statali, sia che si attengano al diritto internazionale umanitario sia che non vi si conformino, restano nondimeno sotto la scure di una possibile repressione penale, pur di matrice interna, per il loro coinvolgimento nelle ostilità. Di conseguenza, è a tutti evidente il rischio che i membri delle entità non statali vedano il diritto internazionale umanitario come un mero laccio, inutile e anzi dannoso vincolo rispetto al loro primario e veramente vitale obiettivo, ovvero ottenere il potere nello Stato anche tramite qualunque mezzo, compreso quindi un non rispetto delle regole umanitarie, per garantirsi, da vincitori, quella immunità dall'azione penale, almeno di matrice interna, che altrimenti non

godrebbero. Ovviamente, una loro aderenza alla normativa del diritto internazionale umanitario evita a questi individui di incorrere in una parallela, possibile repressione sulla scorta del diritto internazionale penale, ma si è già rimarcato come questa complementare azione sia lungi dall'essere realmente e capillarmente efficace.

Si comprende quindi bene come sia necessario riflettere se, e con che limiti, le aperture che già l'art. 6, comma 5 del II Protocollo Addizionale proponeva in materia di amnistia al termine del conflitto armato non internazionale, debbano essere riprese e incentivate. Tale norma, vale la pena ricordarlo, chiede che "*Al termine delle ostilità, le autorità al potere procureranno di concedere la più larga amnistia possibile alle persone che avessero preso parte al conflitto armato o che fossero private della libertà per motivi connessi con il conflitto armato, siano esse internate o detenute*". Occorre perciò confrontarci con questa disposizione, che a mio avviso apre scenari per una più corretta aderenza dei gruppi armati non organizzati rispetto al diritto internazionale umanitario, dato che offrirebbe a questi individui i necessari e concreti incentivi affinché vi sia una rispondenza alla normativa di nostro interesse. Al tempo stesso, tuttavia, il possibile fenomeno delle amnistie, anche in vista di una pacificazione nazionale, non può e non deve comportare una completa cancellazione delle responsabilità personali, specie ove vi siano state azioni contrarie a precetti internazionali, al fine di evitare, come la prassi recente attesta in alcuni contesti, che questi strumenti si trasformino in un momento di oblio per le vittime.

Se poi passiamo a considerare gli ulteriori scenari indicati dalla tavola rotonda, è evidente come i conflitti armati contemporanei abbiano favorito l'emergere di nuovi fenomeni che necessitano una opportuna riflessione.

Questo è il caso delle attività svolte dalle Compagnie Private Militari o di Sicurezza e del fenomeno dei "*contractors*", che hanno attratto un interesse diffuso non solo fra i giuristi e hanno fatto prefigurare una sorta di "privatizzazione" della guerra. Anche in questo caso è evidente, però, che non ci troviamo dinanzi ad una situazione totalmente nuova per il diritto internazionale umanitario, rispetto alla quale difetterebbero *in toto* gli strumenti di regolamentazione. Al contrario la disciplina vigente delinea – se non altro nelle linee essenziali – le varie ipotesi che possono rilevare negli scenari conflittuali contemporanei. Basti pensare, per molti degli individui non afferenti alle forze armate di uno Stato, ovvero soggetti che, nell'ottica del diritto internazionale umanitario, ricadono nella categoria di "civile" ma che, nondimeno, partecipano allo sforzo bellico di quest'ultimo anche nell'ambito del teatro operativo, alla figura delle "*persone che accompagnano le Forze Armate*", che già nella codificazione proposta dalla Convenzione dell'Aja del 1899 trovavano una loro collocazione, e una partico-

lare tutela, nell'ambito del diritto internazionale umanitario, secondo i termini poi ripresi dall'art. 4 della III Convenzione di Ginevra.

Quello che piuttosto necessita è, da un lato, una corretta definizione di questi fenomeni nei singoli scenari che interessano, per poter provvedere ad una corretta identificazione dello *status* giuridico del personale coinvolto, ai sensi del diritto internazionale umanitario, e delle conseguenti attività che questi individui possono correttamente porre in essere; dall'altro lato serve un'adeguata volontà degli Stati di onorare gli obblighi internazionali in materia, onde evitare che il fenomeno di "*outsourcing*" di attività connesse allo sforzo bellico determini un livellamento verso il basso degli *standard* giuridici vigenti.

In particolare occorre meglio definire le situazioni in oggetto, tramite un esame che non può non partire dai dati fattuali, al fine di chiarire se, specie sulla scorta delle attività e mansioni svolte da questi individui, dalla natura delle medesime, dal loro grado di coinvolgimento nella struttura militare di uno Stato, ecc., questi individui debbano considerasi come "combattenti" o "civili", al di là di qualsiasi volontà statale di escludere questi soggetti dall'ambito delle proprie Forze Armate sulla scorta di elementi di natura formale, ovvero in ragione di una mancata loro incorporazione giuridica nelle Forze Armate. Anche su questi aspetti occorre mantenere fermo il punto che il diritto internazionale umanitario, e quindi la sua corretta applicazione, dipende da criteri fattuali e non da elementi formali o autoqualificazioni delle situazioni in oggetto, ad opera delle Parti del conflitto, aspetto correttamente ribadito dal Comitato internazionale della Croce Rossa nella sua attività sulla nozione di "partecipazione diretta alle ostilità" sulla quale tornerò fra poco.

Si richiede, quindi, a livello di Comunità internazionale, un ampliamento della riflessione sul tema, sulla base, ad esempio, dell'esperienza del "Documento di Montreux" del 2008, che ha visto coinvolto un primo gruppo di Stati attorno alla definizione di un sistema di "buone pratiche" in materia. Sul punto, l'attenzione del Movimento di Croce Rossa è elevata e sicuramente offre un rilevante contributo per la riaffermazione degli *standard* giuridici applicabili a queste situazioni: lo attesta la pubblicazione recentissima della "*Interpretative Guidance*" sulla nozione di partecipazione diretta dei civili alle ostilità, finalizzata dal Comitato Internazionale della Croce Rossa nel maggio scorso al termine di un lungo iter di riflessione. Questo documento fornisce interessanti chiavi di lettura rispetto a un'importante problematica, data ad esempio, appunto, la volontà di riservare la nozione di "civile" a soggetti non organicamente coinvolti in attività di natura prettamente bellica per una Parte del conflitto, dato che, al di là della mancata incorporazione formale nelle Forze Armate di questi soggetti, questi ultimi dovranno necessariamente considerarsi come membri delle

medesime. Tale ipotesi è particolarmente rilevante per lo scenario che attualmente ci è offerto da alcune *Private Military Companies*, stanti talune attività critiche per lo sforzo bellico di una parte del conflitto. È evidente come l'impostazione assunta dal Comitato Internazionale della Croce Rossa riduca sensibilmente lo spazio per aree grigie nella qualificazione giuridica dei membri di queste Compagnie, al di là di qualsiasi volontà di mantenere comodi margini di ambiguità.

Altri rilevanti fenomeni attestano il ruolo degli attori non statali nell'attuale scenario internazionale, come nella ipotesi di attività di gruppi aventi natura terroristica, o nel caso del ricorso all'uso della forza armata contro membri di gruppi armati organizzati al di là del territorio statale. Ancora si pensi al contrasto alla pirateria, in presenza di "*failed States*" come nel caso somalo.

In queste situazioni, però, occorre sempre mantenere una corretta qualificazione giuridica dei fenomeni, dato che possiamo trovarci dinanzi a contesti estranei all'ambito applicativo del diritto internazionale umanitario, in ragione della eventuale assenza del necessario presupposto di un conflitto armato. Rispetto a queste situazioni occorre quindi non abdicare rispetto a eventuali pretese statali di dare estemporanee e selettive applicazioni del diritto internazionale umanitario in contesti non pertinenti: giustamente il Comitato Internazionale della Croce Rossa, nel suo rapporto elaborato in vista della 30ª Conferenza internazionale della Croce Rossa e della Mezzaluna Rossa, ha osservato che è "*dangerous and unnecessary, in practical terms, to apply international humanitarian law to situations that do not amount to war*".

Al tempo stesso appaiono probabilmente superati dalla stessa natura degli eventi storici i tentativi di sviluppare nuove e ardite qualificazioni giuridiche per i conflitti armati, con la surrettizia introduzione di nebulosi concetti che, certamente, non comportavano una sicura applicazione della normativa di diritto internazionale umanitario. Come ribadito dal CICR, che nel 2008 è dovuto intervenire con la preparazione di un utile documento sulla qualificazione giuridica dei conflitti armati, noi possiamo e dobbiamo confrontarci con due sole nozioni di conflitto armato, ovvero quello "internazionale" e quello "non internazionale". *Tertium non datur*, se non si vuole correre il rischio di favorire applicazioni al ribasso dei principi umanitari.

In ogni caso le summenzionate ipotesi necessitano nondimeno di una seria riflessione, specie in ragione della risposta militare talora operata dagli Stati. L'indagine, anche in questi ambiti, deve essere preordinata a garantire un corretto rispetto degli *standard* giuridici internazionali, che in situazioni del genere possono essere rappresentati non soltanto dal diritto internazionale umanitario, ma altresì dalla normativa internazionale sul rispetto dei diritti dell'uomo, basti pensare alle ipotesi, connesse alle privazioni

della libertà personale per individui coinvolti in questi scenari, dove la normativa pattizia sui diritti umani offre importanti elementi di tutela.

Anzi, nelle situazioni di crisi richiamate, una riflessione sulle relazioni e la complementarietà esistenti fra diritto internazionale umanitario e diritti dell'uomo appare particolarmente indicata per giungere a una migliore realizzazione dei diritti della persona, con la continua necessità di analizzare da un punto di vista scientifico gli elementi di contatto e raccordo fra queste due discipline, come anche recentemente attestato dalla Corte internazionale di giustizia nel Parere sul Muro o nella sentenza sulla vertenza fra Congo e Uganda. È in ogni caso da rifiutare con fermezza anche la sola idea che vi siano situazioni che, sotto il profilo dei diritto della persona, ricadano in quel vuoto normativo che talvolta si è affermato nel quadro della guerra al terrorismo.

Infine la rilevanza degli attori non statali e delle azioni belliche coinvolgenti questi gruppi armati permette di riflettere anche sul sempre crescente rilievo delle situazioni caratterizzate come "*urban warfare*", ovvero scontri armati che si sviluppano principalmente, se non esclusivamente, in contesti antropizzati. Questi scenari sono particolarmente rilevanti perché permettono di riflettere ulteriormente sulla valenza e le difficoltà applicative di basilari concetti per la nostra disciplina, come ad esempio la precauzione negli attacchi, il dovere per le Parti in conflitto di non utilizzare la popolazione civile come scudo rispetto alle azioni belliche dell'altra parte, la proporzionalità, ecc. Sono palesi le difficoltà giuridiche e i dilemmi nell'operare in azioni di contrasto verso entità non statali che fanno dello "*urban warfare*" una tattica bellica, ma al tempo stesso non si può non tenere in considerazione l'elevata presenza di popolazione civile in questi contesti durante la pianificazione e la realizzazione delle operazioni militari.

In conclusione, sono certo che i lavori della presente tavola rotonda permetteranno di sviluppare importanti riflessioni sulle complesse tematiche in oggetto, così da contribuire ad una migliore conoscenza e comprensione dei molteplici profili giuridici connessi al coinvolgimento di attori non statali nei conflitti armati contemporanei. L'obiettivo nostro in ultima analisi è di rafforzare – per la possibilità che a noi è data – il ruolo del diritto internazionale umanitario e dei diritti dell'uomo nel mondo contemporaneo. Pertanto, per aver ospitato e organizzato questo rilevante simposio, ringrazio vivamente l'Istituto di Sanremo, al quale la Croce Rossa italiana ha dato, fin dalle origini, e continua a dare oggi il proprio convinto appoggio, in vista degli importanti fini che ci sono comuni.

Address

Sandro Calvani
Director of the United Nations Interregional Crime
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Thank you for this invitation. I would like to present my best wishes for the success of this initiative and compliment the Secretary of State, Mr. Vincenzo Scotti, and Ambassador Moreno for the organization of this Round Table. It is a great honor for me to represent the United Nations in the last minute absence of our Under Secretary General, Mr. Peter Taksoe Jensen. Keeping peace and building peace is the cornerstone of the United Nations and building blocks are freedom from want and freedom from fear. Nowadays, two thirds of our global budget and international civil servants are dedicated to supporting the responsibility of our member States to protect humanitarian rights, refugee rights, peace-building and peacekeeping.

Some critics say the United Nations does not help enough. Well, I have spent 30 years of my professional life in all conflicts in humanitarian scenarios around the world. I have served these principles in 135 countries. I can testify that victims are always at the centre of our attention and we care for victims and that is the reason why we support the International Institute of Humanitarian Law and all of you, professionals and dedicated people, who want these goals to become more central, more of a priority for all the governments of the world.

Yesterday in Rome, the Italian Government with the Presidency of G8 met all the Ministers of Equal Opportunities to make sure that women and children, half of the rights of the world, were better respected, in particular, in the conflict scenario. Thank you for being with us and best wishes for this conference.

II. Understanding organized armed groups

Characteristics and motivations of organized armed groups

*Elisabeth Decrey Warner**

"*Every one of us went to war on the premise of fighting for humanity but, in the process, we have ended up destroying it*". This was a statement by Francisco Galán, former Commanding Officer and Spokesperson of the Ejército de Liberación Nacional (ELN), speaking at the 2nd Meeting of Signatories to the Geneva Call *Deed of Commitment* in June 2009.

What Mr. Galán is essentially referring to is the separation of *jus ad bellum* from *jus in bello*. This distinction may be very clear for most of the readers of this article, but it is certainly far less so for a young man or woman joining an armed non-state actor in order to fight against real or perceived injustice, against persecution on religious or ethnic grounds, against incessant poverty, resource scarcity, or a combination thereof.

From the standpoint of these fighters, does the separation of *jus ad bellum* from *jus in bello* seem quite so natural? And what can be said of their leaders?

If we want to enhance the protection of civilians from the actions of armed non-state actors, we must ask ourselves whether we are doing a good enough job of understanding their incentives to respect humanitarian norms and the challenges they face in trying to do so.

The experience of Geneva Call over 10 years of engagement with armed non-state actors is one example of the process which can be developed to obtain greater respect and protection of civilians in today's non-international, armed conflicts.

Geneva Call is a humanitarian organization dedicated to engaging armed non-state actors towards compliance with international humanitarian norms.

The organization was created in 2000 in response to the realization that the anti-personnel (AP) mine problem would never be addressed effectively until armed non-state actors were included in the process and thereby the solution.

* President, Geneva Call, Geneva.

To this end, Geneva Call developed the *Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action* (hereafter Deed of Commitment banning AP mines). This innovative mechanism allows armed non-state actors, which are ineligible for signatory of the AP Mine Ban Convention, to undertake to observe its norms. The Government of the Republic and Canton of Geneva is the custodian of the Deeds.

Under the *Deed of Commitment* banning AP mines[1], signatory armed non-state actors agree, *inter alia*, to:

- prohibit under any circumstance the use, production, stockpiling and transfer of AP mines;
- undertake and cooperate, in stockpile destruction, mine clearance, victim assistance, mine awareness and various other forms of mine action in areas under their control;
- allow and cooperate in the monitoring and verification of their commitment by Geneva Call, notably by providing information and compliance reports as well as allowing field visits and inspections;
- issue orders and directives for the implementation and enforcement of this commitment;
- consider this commitment against AP mines as a first step towards a wider acceptance of international humanitarian law and international human rights law.

The signing of this engagement is far from the end of the process. On the contrary, Geneva Call monitors compliance with the Deed of Commitment banning AP mines very closely and tries hard to contribute to the implementation of the obligations. Monitoring is not only carried out by Geneva Call, but by local partners and other organizations too, and self-reporting by the armed non-state actor concerned is also required. Supporting implementation primarily takes the form of organizing training workshops on the AP mine ban, facilitating technical assistance for stockpile destruction, and promoting interventions from specialist mine action organizations in areas controlled by signatories.

To date, 39 armed non-state actors have signed the *Deed of Commitment* banning AP mines[2]. Overall, they have complied with their pledge, refraining from using such weapons. Moreover, most signatories are also undertaking humanitarian mine action activities such as de-mining, stockpile destruction, mine risk education and victim assistance, often collaborating with humanitarian organizations.

1. Geneva Call *Deed of Commitment* banning AP mines at: http://www.genevacall.org/resources/deed-of-commitment/f-deed-of-commitment/doc.pdf

2. List of signatories at: http://www.genevacall.org/resources/list-of-signatories/list-of-signatories.htm

In addition, and as a result of Geneva Call's efforts, several armed non-state actors that have not signed the Deed of Commitment banning AP mines have nevertheless pledged to prohibit or limit the use of these weapons. They have done so either unilaterally or through a ceasefire agreement with a government, while some have undertaken mine clearance and victim assistance in areas under their control.

Geneva Call is currently expanding its operations to include engagement of armed non-state actors on the protection of women and children in armed conflict (in particular, the recruitment of child soldiers, violence against women, and gender-based violence).

In its work, Geneva Call focuses on armed non-state actors who operate outside effective State control and who are primarily motivated by political goals. Such actors include rebel groups, liberation movements, guerrillas, and the authorities of entities which are not (or only partially) recognized as independent States, thereby lacking the requisite capacity to become party to international treaties.

1. Characteristics and motivating factors

There may be different factors that influence the decision of an armed non-state actor to commit to humanitarian norms. In 2007, Geneva Call conducted research into the involvement of armed non-state actors in the landmine problem, both in its negative (use of landmines) and positive (contribution to mine action) aspects[3]. The report argues for a holistic view of armed non-state actors, considering both their capacity for destruction as parties to a conflict, as well as their potential to contribute to the solution of human security problems. The results of this research show that, generally speaking, the factors influencing armed non-state actors' openness to engagement with humanitarian norms can be divided into political willingness and ability to implement.

Political willingness:

- Participation/ownership: many armed non-state actors do not recognize international treaties signed by the States they are fighting. As with States, it is more difficult for armed non-state actors to deny the legitimacy of a norm they have themselves participated in forming (through custom) or signed up to (or even been included in negotiating).
- Reciprocity: "correct" behaviour by opponents increases the will to take on and respect commitments.

3. Geneva Call and the PSIO: "Armed non-State actors and Landmines, Volume III, Towards a Holistic Approach to Armed Non-State Actors?" at: http://www.genevacall.org/resources/research/f-research/2001-2010/gc-2007-nov-ansal3.pdf

- Political/conflict situation: an improved situation between the armed non-state actor and its (main) opponent(s) increases the will to take on and respect humanitarian norms (e.g. actors may make goodwill "gestures" towards each other or towards other actors).
- Reputation: striving to actively improve its internal (members, constituency and/or community) and external (national and/or international) reputation.
- Humanitarian and developmental considerations: expected short and long-term beneficial impact on civilians and the territory are potential incentives to take on and respect commitments.
- Material gain: for example, through the facilitation of aid and assistance to conflict-affected areas, employment opportunities and other resources.
- Expected peace-building gains: greater probability of dialogue with the State.
- Use of violence against civilians: when armed non-state actors use means or have aims that contradict humanitarian norms, such factors are clearly a hindrance to negotiations on such norms.
- Financing of conflict: if the armed non-state actor is dependent on the population for financing its war-making capacities, this increases its will to take on and respect commitments.

Ability:
- Chain of command: the existence of a clear chain of command enhances the capacity of an armed non-state actor to respect/implement commitments.
- Territorial control: the control of territory increases the armed non-state actor's ability to respect/implement commitments.
- Capacity: the existence of internal or external expertise (e.g. on humanitarian and human rights' issues and the implementation of such), and resources increase the ability of the armed non-state actor to respect/implement commitments.

For the work of Geneva Call, understanding the motivating forces that encourage armed non-state actors to respect humanitarian norms, as well as the challenges they face in implementing them, is of the utmost importance. That is why, in June 2009, Geneva Call organized the Second Meeting of Signatories to the Deed of Commitment on the Anti-Personnel Mine Ban. The event was attended by 44 senior political and military representatives from 28 armed non-state actors from all over the world. Two thirds of them were signatories to Geneva Call. The focus of the conference was twofold:

1. To discuss with the participants the challenges they face in implementing the Geneva Call *Deed of Commitment* obligations on the AP mine ban.

2. To begin the process of engaging armed non-state actors in the protection of women and children in armed conflict and to hear their reactions to such a development by Geneva Call.

For the very first time, as far as we know, armed non-state actor representatives from around the world met to exchange views on existing norms relating to the protection of these two groups of particularly vulnerable, and specifically protected people: women and children.

The organizers of the conference were really impressed by the amount of preparation undertaken by the armed non-state actor representatives, as well as by the extent of knowledge and interest that many showed towards better knowledge, understanding and opportunities of implementation of humanitarian norms.

During the conference, time was set aside to allow participants to express their points of view and perspectives on the challenges they face in respecting humanitarian norms, and to share difficulties and success stories.

Two major themes emerged from that exchange:

1. The participants clearly expressed their willingness to enhance their capacity to respect humanitarian norms by receiving training and technical support by expert organizations.
2. Generally speaking, armed non-state actors feel prejudiced by differential treatment towards States and armed non-state actors in the mechanisms to enforce humanitarian norms, and sometimes even in the norms themselves.

These two themes are consistent with much of what Geneva Call has learned in its bilateral discussions with approximately 60 armed non-state actors over 10 years of activities in the field.

1. Training and technical support on humanitarian implementation by expert organizations

Under the Geneva Call *Deed of Commitment* banning AP mines, signatories have to disseminate the ban by issuing orders to their ranks, establishing policies and Codes of Conduct, and sending educational information to their constituencies (art. 4 of the Deed of Commitment banning AP mines[4]). Such activities could include the dissemination of Geneva Call's training manuals[5].

4. *Deed of Commitment* banning AP mines, art. 4: To issue the necessary orders and directives to our commanders and fighters for the implementation and enforcement of our commitment under the foregoing paragraphs, including measures for information dissemination and training, as well as disciplinary sanctions in case of non-compliance.

5. Geneva Call's training manual at: http://www.genevacall.org/resources/training-materials/f-training-materials/english/training-manual.htm

Signatories have highlighted a number of difficulties in the communication of norms to their ranks. Such difficulties are not confined to dissemination of the Deed of Commitment, but relate to humanitarian law dissemination in general, where in all cases it is really essential to involve both political and military representatives. Armed non-state actors controlling huge territories, or with multiple command centres, which may operate out of several countries, report that it is difficult to get new policies out to their political and military leaders. After having raised these challenges, they proposed some solutions that might help them to address them:

- In order to overcome challenges to dissemination, armed non-state actors request greater cooperation. They ask local and international organizations to help conduct training sessions and workshops for their political and military commanders.
- They express the need to develop simple, culturally-appropriate, educational kits that might be easily understood in local languages. That would enable all fighters to assimilate and apply the norms they have decided to adhere to.
- They ask for comments and recommendations on the content of their existing codes of conduct. Do these codes correspond to principles of humanitarian norms?
- They ask for the provision of equipment in order to allow them to meet their humanitarian mine action obligations (such as protection for de-miners).

2. Differential treatment

The equality of belligerents is a fundamental underpinning of traditional humanitarian law between States. However, its transition to the law of non-international armed conflict has not necessarily been smooth. This is because under international law, armed non-state actors do not have the same legal status or capacities as States, even though they are deemed to be bound by humanitarian law. Regardless of whether the substance of the law applies equally, disparities of status arise. In many cases, armed non-state actors feel that international mechanisms or processes are biased as they are developed and controlled by States or inter-state organizations.

In view of the above, the participants made the following proposals:

- As in the case of AP mines, a Geneva Call *Deed of Commitment* on the protection of children and another on the protection of women in armed conflict would be important tools as they would belong to armed non-state actors rather than to the UN. They consider that, under the UN system, armed non-state actors are usually only named and shamed.
- They underline that the UN listing process on violation of child recruitment and use obligations lacks due process, including the right to be heard. Armed non-state actors want to express their view of the situation.

- They affirm that it is counter-productive to label armed non-state actors as terrorist organizations and still expect them to respect humanitarian and human rights law.
- They are open to unrestricted 3rd party monitoring of the Commitments as required by article 3 of the *Deed of Commitment*, but think that, in some cases, the concerned State will not allow for such monitoring.

In some cases, armed non-state actors implicate the substantive law itself.

For instance, objecting to the differentiation between "States" and "armed groups" in the Optional Protocol on Children and Armed Conflict, as well as objecting to its unequal standards on age and scope of prohibition.

As a final point on differential treatment, armed non-state actors express concern about the lack of input they have into the substance of the law. They consider that it is essential to get a concrete grasp of the conditions under which liberation struggles are carried out. They request more consultation with armed non-state actors on the ground so that legal standards take into account the subtle realities of field conditions.

2. Recommendations and Conclusion

In most of the discussions that Geneva Call has had with armed non-state actors, they have made it clear that they want to take ownership of their humanitarian obligations. Supporting such a request does not mean being an advocate of armed non-state actors, but rather an advocate for those who suffer as a result of violations of international humanitarian norms.

Certainly, like States, not all armed non-state actors will be seriously committed to respecting humanitarian law. But for those who are willing to consider humanitarian norms, whatever their incentive may be, we can ask ourselves whether we are doing our best to enable them to comply.

To conclude and summarize, Geneva Call consultations with armed non-state actors have indicated a need for:

a) better opportunities for training and technical assistance, and
b) a more equitable application of norms and the mechanisms surrounding them.

From these suggestions, three recommendations could be developed.

First, on training: The International Institute of Humanitarian Law, Sanremo can certainly make a contribution towards the improved understanding of humanitarian norms, by conducting training sessions for military officials from unrecognized or partially recognized States.

Second, with regard to technical assistance, there is a need to work towards articulating common safeguards to help ensure that assistance goes towards humanitarian purposes and is not considered as military support, or worse as support for "terrorist" activities.

Third, towards a better understanding of the perceived differential treatment, it is necessary to learn more from armed non-state actors in order to ensure that legal obligations take reality into account. In fact, this third recommendation may gain inspiration from recent informal processes like the one leading to the Montreux Document on Private Military and Security Companies (PMCs), where the perspectives of PMCs, themselves armed non-state actors, were gathered and taken into account.

In closing, we must not lose sight of the probability that international mechanisms controlled by States will tend towards supporting their own interests. In a world where conflicts occur primarily between States, this would not pose much of a problem. However, we know that this is not the case today. If we want to be able to justify the separation of *jus ad bellum* from *jus in bello* to the most numerous actors in today's armed conflicts, the armed non-state actors, then it is our responsibility to ensure that they do not feel prejudiced either by the separation itself, or by the way in which it is enforced.

The status of organized armed groups in contemporary armed conflicts

*Marco Pedrazzi**

1. Preliminary remarks

Contemporary armed conflicts are characterised by the relevant role played by various kinds of armed groups: their proliferation and their relevance are linked to the fact that most of the conflicts that are fought today are non-international armed conflicts. Moreover, according to some States and to some commentators, aside "old conflicts" (international and non-international) we would also have to deal today with a new kind of conflict, which take place between States on the one side and international or transnational terrorist armed groups on the other. these conflicts would be characterised by a lack of precise territorial and temporal limitations.

Whoever the actors of new wars or armed conflicts or so-called wars, status, as a legal concept referring to the position of a subject within a legal order, is determined by law: in our case by international law (IL). By the existing IL, and the existing IL it is not contemporary in its origin, rather it is the result of the sedimentation of different layers of norms adopted, or formed, in subsequent historical periods, i.e., the evolution of conflicts does not necessarily entail the modification of the status of parties to those conflicts, unless changes are introduced into the law in order to adapt it to new circumstances. In the absence of such changes, the commentator will have to verify if the application of the existing legal framework to contemporary armed conflicts poses any kind of problem, and to try to solve these problems, before suggesting, *de lege ferenda*, the adoption of any new rules.

I will briefly address the status of organised armed groups *qua* groups. First of all, in general IL, and secondly, in specific areas of this law

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directly related to the occurrence of armed conflicts, that is to say, the *jus ad bellum* and the *jus in bello* (or international humanitarian law, IHL). But I will also make reference to other sectors of IL that are directly relevant, such as the international law of human rights (IHRL). Apart from assessing the status of organised armed groups, I will, in fact, also have to deal with the question of how much status is relevant in each of these fields, and insomuch as it is relevant, what its consequences are. In so doing, I will try as far as possible to avoid overlapping with the other contributions.

Clearly, the first step in the whole analysis should be the definition of what, in IL, an organised armed group is. Unfortunately, or maybe luckily, a general definition of an organised armed group in IL is lacking. The concept, therefore, has to be defined in each specific area of IL in which it comes to be analysed.

2. The status of organised armed groups in general international law

Let us come, then, to the first point of our analysis: the status of organised armed groups in general IL. I have already said that there is no general IL definition of the concept. That is due to two reasons: on the one side, as general IL has a customary nature, it is difficult to find accurate and precise definitions in custom, and on the other side, general IL does not accord a particular status to organised armed groups as such. Rather, a status is accorded to organised armed groups that respect certain conditions.

It is traditionally thought that rebel forces that have a sufficient degree of organisation and that have gained a sufficiently stable control on a portion of the territory of the State against which they are fighting, become subjects of IL, the so-called "insurgents", capable of acquiring and exercising rights and obligations on the international plane that are similar to those of States, although necessarily more limited[1]. As for other subjects of IL, the role of recognition of the insurgents from the opposing State and/or from third parties in shaping their legal personality is not clear.

According to some authors, this traditional view would have lost its foundation in the present world, as a consequence of the evolution of armed conflicts, the developments in IHL and the disappearance of the practice of the recognition of belligerency, that, in the past, would have

1. See e.g. A. Cassese, *International Law*, 2nd ed., Oxford, OUP, 2005, at p. 124 and ff.

determined the application of the entire framework of IHL in situations which would have otherwise been treated as civil wars. I do not entirely share this view. If we consider the whole of international rights and obligations, we can easily see how insurgents, whose situation is different from that of a State only from the point of view of the permanence of the power exercised over a territorial community, are in fact capable of applying a whole set of norms and of being held accountable for their violations. This possibility is confirmed, although not developed, by the Commentary to the International Law Commission (ILC) Draft Articles on State Responsibility of 2001[2]. Of course, according to Article 10 of the Draft Articles, the behaviour of a successful insurrectional movement that becomes the new government of the State, or that establishes a new State by means of a secession, will be attributed, *ex post*, to that State (the old or the new one), which in fact confirms the personality of the insurgents beforehand[3].

As for other subjects of IL, recognition from States will not be a condition *sine qua non* of legal personality, but it will be all the more important in the case of insurgents in order to open to them the possibility of entertaining a certain, albeit limited, network of international relations, thus strengthening their legal capacity. This may be one of the main reasons why the practice is scarce, as States are reluctant in recognizing not only their insurgents, but also the others' insurgents.

I personally do not think that general IL attributes a general legal personality (although more limited than the State's personality) to other organised armed groups, apart from the case of insurgents. In particular, and contrary to some authors' view, I do not think that the personality of National Liberation Movements (NLMS) would be a necessary outcome of the general IL right to self-determination[4]. I rather think that national liberation movements will be considered, on the basis of customary law, as any other organised armed group. Obviously, if the movement controls a portion of territory, it will qualify as insurgents, with all the legal consequences that this entails. Truly, it may happen that a national liberation movement acquires a certain measure of legal personality even while not controlling any portion of territory. I am sure that was the case of the PLO, at least before the agreements with Israel and the ensuing elections came

2. See International Law Commission, *Draft articles on responsibility of States for internationally wrongful acts*, Comment to Article 10, para. 16, in *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 52.

3. See briefly, on the point, L. Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge, CUP, 2002, at p. 156 and f.

4. See, in particular, A. Cassese, *International Law*, note 1 above, at p. 140 and ff.

to complicate the picture. That is simply true on account of the principle of effectiveness which dominates the question of international subjectivity. Any entity is in fact able to become an international subject whenever it manages to establish a network of international relations *qua* entity not representing any other subject and not depending on any other subject. Needless to say, the measure of personality of an organised group not controlling any territory will be necessarily decidedly reduced with respect to the case of insurgents.

3. The status of organised armed groups under the *jus ad bellum*. Consequences

Let us now come to consider some specific areas of the law, in order to see how general principles come to apply or if specific principles relating to the status of organised armed groups do apply. Let us start with the *jus ad bellum*. Generally speaking, organised armed groups are not bound by the *jus ad bellum* and therefore they cannot violate it. If rebels take up arms against the State, that is a fact for IL, it is not something happening according to the law, or against the law. I, personally, would not consider wars of national liberation an exception to this principle, because the content of the customary rule according to which wars of national liberation are "legitimate" can easily be construed as an obligation of States (governments oppressing peoples under colonial or foreign occupation or racist domination are bound not to repress by means of the use of force the right of those peoples to self-determination) rather than as a right of NLMS.

However, we know that in certain cases the acts of organised armed groups can be regulated by the *jus ad bellum*. First of all the transboundary use of armed force by an organised armed group against the territory of another State may determine a violation of the prohibition of the use of force, amounting to an act of armed aggression, whenever certain conditions are met. According to the Definition of Aggression adopted by the UNGA in 1974, an act of "indirect military aggression", as it is usually known, occurs whenever there is "*the sending by or on behalf of the State of armed bands, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed*" in the above part of the Declaration, "*or its substantial involvement therein*"[5]. This means that it is not the organised armed

5. UNGA Res. 3314 (XXIX), 14 December 1974, Art. 3(*g*).

group *per se*[6] which is violating the prohibition of the use of force, but rather the foreign State to which the acts of the organised armed groups are attributed (in this case the organised armed group is acting as a *de facto* agent of that State) or which, at least, is "substantially involved" in those acts. So it is the involvement of another State that puts *jus ad bellum* into play. And the question here arises if the concept of "armed attack" adopted by Art. 51 of the UN Charter is totally coincident with this notion of armed aggression, and so if the aggressed State can act in self-defence only against the State to which the acts of the organised armed group are attributable, or even against the State which is substantially involved in those acts. I will not try to answer this difficult question here. I will only remark that practice is not totally coherent and that, as is well known, even the concepts of attribution and of "substantial involvement" are the object of divergent interpretations, even in international jurisprudence, although the ICJ (International Court of Justice) firmly maintains a restrictive vision. I will only add that recent practice, especially with the Afghan war of 2001 or the 2006 Israeli armed operation in Lebanon, may show a tendency in softening the limits of the notion of substantial involvement, also as a justification for resort to self-defence[7].

Are organised armed groups capable of violating the *jus ad bellum*? There would seem to be no reason why insurgents, occupying a position *in toto* similar to that of a State, would not be bound by the *jus ad bellum*, and therefore would not violate the prohibition of the use of force if they were committing any of the acts listed in the Definition of aggression against a third State. And, if that were the case, the State under attack would be entitled to exercise its right of self-defence against the aggressor insurgents, on the territory controlled by them[8]. But it has to be recognised

6. It has to be noticed that the norm equally applies to *non* organised armed groups.

7. Also the notion of self-defence would seem to be the object of considerable stretching. See, among others, T. Ruys and S. Verhoeven, "Attacks by Private Actors and the Right of Self-Defence", in 10 *Journal of Conflict and Security Law* 2005, p. 289 and ff.; C.J. Tams, "The Use of Force against Terrorists", in 20/2 *European Journal of International Law* 2009, p. 359 and ff. For different points of view see A. Tancredi, "Il problema della legittima difesa nei confronti di milizie non statali alla luce dell'ultima crisi tra Israele e Libano", in XC/4 *Rivista di diritto internazionale*, 2007, p. 969 and ff.; P. Palchetti, "La qualificazione dei conflitti armati contro gruppi non statali tra 'guerra al terrorismo' e (pretese) modifiche delle regole internazionali in materia di uso della forza", in P. Gargiulo and M.C. Vitucci, *La tutela dei diritti umani nella lotta e nella guerra al terrorismo*, Editoriale Scientifica, Napoli, 2009, p. 207 and ff., at p. 218 and ff.

8. The same might be true for other entities exercising *de facto* control over a territory, although they could not technically qualify as insurgents. For some hints see E. Cannizzaro, "La legittima difesa nei confronti di entità non statali nella sentenza della Corte internazionale di gjustizia nel caso *Congo* c. *Uganda*", in LXXXIX/1 *Rivista di diritto internazionale* 2006, p. 120 and ff.

that this position, however logical, does not seem to find a firm support in State practice.

Furthermore, in all other cases of use of armed force by organised armed groups against a State, and notwithstanding different positions among States and legal experts[9], I do not think that present IL has yet elaborated norms calling *jus ad bellum* into play. Therefore, any international or trans-border armed activities by organised armed groups not possessing the qualities of insurgents and not being attributable to a State nor committed with its substantial involvement, would not qualify as acts of aggression. On the other hand, the State under attack would certainly be entitled, whenever necessary, to respond to those acts by means of coercion on its own territory or in areas outside national jurisdictions, which would not trigger the application of the *jus ad bellum*, but it would not be entitled to use force on the territory of other States without their consent[10].

Finally, use of armed coercion against any armed groups in any territory could be decided or authorised by the Security Council under Chapter VII of the Charter.

Needless to say, the application of IHL would be totally independent, whether or not *jus ad bellum* would be applicable in the different circumstances. And also the identification of the applicable norms of IHL in the different circumstances remains totally unprejudiced.

I will not go further into the consideration of the *jus ad bellum*, which is not the main object of my contribution, but I will conclude saying that the status of organised armed groups in the present *jus ad bellum* does not seem inadequate to me in the light of the experience of contemporary armed conflicts. I don't see any real progress in rendering all organised armed groups full subjects of the *jus ad bellum* and in enlarging, consequently and unlimitedly, the States' right of self-defence. I think that adjustments to the *jus ad bellum* may be achieved, if necessary, and as it is possibly already happening, without any need to affect the status of organised armed groups as such.

9. See also Y. Dinstein, *War, Aggression and Self-Defence*, 3rd ed., Cambridge, Cup, 2001, in particular at p. 213 and ff.

10. See, in particular, O. Corten, "L'interdiction du recours à la force dans les relations internationales est-elle opposable aux groupes "terroristes"?, in R. Ben Achour and S. Laghmani (dir.), *Acteurs non étatiques et droit international*, Paris, Pedone, 2007, p. 129 and ff.

4. The status of organised armed groups under IHL. Consequences

Organised armed groups are taken into consideration by different norms of IHL. Without using the terminology, Art. 1 of the Hague Regulations refers to organised armed groups whenever it deals with "*militia and volunteer corps … commanded by a person responsible for his subordinates*". Similarly, Art. 4 of the III Geneva Convention, refers to "*members of... militias and members of... volunteer corps, including those of organized resistance movements... being commanded by a person responsible for his subordinates...*". These norms, applicable in international armed conflicts, have the aim of identifying combatants and, consequently, those who are entitled to the prisoner of war (POW) status when captured by the adversary. These are the persons belonging to organised armed groups who fulfil all the conditions laid down in the rules. These groups are allowed to take part in the hostilities because they "belong to a Party to the conflict", furthermore their acts are referred to that Party to the conflict[11], and because they fulfil all the other conditions: Art. 43 of Protocol I goes even further, assimilating these groups to the regular armed forces into a unified and enlarged concept of "armed forces". I will not go further into these concepts as not to recall the controversies related to the interpretation of the concept of "belonging to a Party to the conflict". First, it has to be admitted, as underlined by the ICTY case law, that the "Party to the conflict" may also be a State only indirectly involved in such a conflict, by means of such an organised armed group, acting under its overall control[12]. Second, if we accept the possibility of having an organised armed group (for example a resistance movement) belonging to a Party to the conflict also in a situation of occupation where the legitimate government has been ousted or is no more in effective control or does not exist for other reasons[13], then the organised armed group will be the only

11. That would not seem to prevent from possibly also referring these acts to the organised armed groups themselves.

12. See ICTY, Judgment, *Prosecutor* v. *Tadić*, Appeals Chamber, July 15, 1999, at para. 84. On the possible acceptance of the "overall control" test by the International Court of Justice, in the judgment of 26 February 2007 in the *Case concerning the application of the Convention on the prevention and punishment of the crime of genocide*, at para. 404, although only as a criterion determining the qualification of the conflict (and of their Parties) and not as the basis for State responsibility, see P. Palchetti, "La qualificazione dei conflitti armati…", note 7 above, at p. 213 and ff.

13. See N. Ronzitti, *Diritto internazionale dei conflitti armati*, 3rd ed., Torino, Giappichelli, 2006, at p. 158. *Contra* Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, CUP, 2004, at p. 39 and f.

collective entity, at least *pendente bello*, which will have the possibility of being held accountable for the respect of IHL. Obviously, there may also be the case of organised armed groups belonging to a Party to the conflict, but which do not fulfil one or more of the other conditions, as could be the case for Al Qaeda in Afghanistan in 2001, or of organised armed groups, whether or not fulfilling these conditions, not belonging to a party to the conflict[14].

Organised armed groups are then considered by the norms relating to non international armed conflicts, and we can find different definitions in common Article 3, which in fact does not define organised armed groups because it does not even say that the non-international conflict shall involve organised armed groups; in Protocol II, which applies (Art. 1) to all non-international armed conflicts taking place on the territory of a High Contracting 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*"[15], and where it is further specified that this instrument "*shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts*". In the Statute of the ICC, which is not an instrument of IHL, but has a bearing on it, Art. 8 (d) specifies that the violations of common Art. 3 of the Geneva Conventions do not apply in "*situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature*", while Art. 8 (f) specifies that "*other serious violations of the laws and customs applicable in armed conflicts not of an international character"* apply in *"armed conflicts that take place in the territory of a State where there is protracted armed conflict between governmental authorities and organized armed groups or between such groups*"[16].

Organised armed groups do benefit in another occasion from the application of the norms relating to international armed conflicts: that is the

14. See on this issue, among others, M. Sassòli, "Transnational Armed Groups and International Humanitarian Law", Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, Winter 2006, No. 6, at p. 14 and ff. On the status of these groups see further.

15. Emphasis added. From the text of the norm it is clear that dissident armed forces are included among organised armed groups.

16. See, among others, A. Cullen, "The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2) (f)", in 12 *Journal of Conflict and Security Law* 2007, p. 419 and ff., where that threshold is considered equivalent to that of common Article 3.

case of NLMs, if the conditions set by Arts. 1.4 and 96, Protocol I, are complied with. That, however, has never happened in practice and it is highly questionable that these provisions have acquired the status of customary law.

While the possibility of a non-international armed conflict regulated by common Art. 3 (and by other IHL norms adopting the same definition, such as the 1980 Conventional Weapons Convention and its Protocols, on the basis of the 2001 Amendment, or the Hague Convention on Cultural Property of 1954, Art. 19, or its Second Protocol of 1999, Art. 22) taking place between a State and non-organised armed groups or between non organised armed groups[17] is disputed, it is clear that any military confrontation between a State and an organised armed group or between two or more organised groups, which cannot be qualified as an international armed conflict, has to be qualified as a non-international armed conflict. It is also generally maintained that in order to have an armed conflict, a certain intensity of fighting, or a protracted violence is required[18]. On the contrary, situations such as internal tensions, riots, isolated or sporadic acts of violence, as referred to by various norms, are never to be considered an armed conflict.

The level of organisation required in an organised armed group will vary according to the applicable norms: while the level is very high in Protocol II, it is lower in common Art. 3 unless we accept that this norm does not require any organisation at all.

What about the condition that a non international conflict takes place "*in the territory of a High Contracting Party*" (Protocol II, Art. 1.1)? Which norms are applicable if the conflict takes place between a State and an organised armed group within the territory of another State? I agree with the thesis according to which nothing prevents a non-international armed conflict from taking place over the border, the above provision only requiring that the State involved be a party to the Protocol[19]. However, the law of non-international armed conflicts applies only if the law of international armed conflicts does not. Now, if a State fights an armed conflict against an organised armed group on the territory of another State without its consent, whether the law of international or non-international armed conflicts applies is controversial: however, if the organised armed group is

17. See, among others, M. Sassòli, "Transnational Armed Groups…", note 14 above, at p. 13 and f.

18. See in particular, ICTY, Decision on Jurisdiction, *Prosecutor* v. *Tadić*, Appeals Chamber, October 2, 1995, at para. 70 and M. Sassòli, "Transnational Armed Groups…", note 14 above, at p. 6 and ff.

19. See ibid, at p. 8 and ff.; L. Zegveld, *Accountability of Armed Opposition Groups*, note 3 above, at p. 136.

supported by the territorial sovereign or if the conflict is otherwise also directed against the territorial sovereign, *de jure* or *de facto*, as was the case in Afghanistan in 2001, the only possible conclusion is that the law of international armed conflicts shall apply. Differently, if the other State gives its consent, or if there is no legitimate or *de facto* government in that State able to give its consent, it would seem that the law of non-international conflicts should apply. It has to be recognized, however, that the issue is not undisputed and that the scope of application of the two sectors of IHL could be better delimited[20].

Here comes the issue of the status of organised armed groups in IHL. Insofar as the norms of IHL are applicable in international armed conflicts, those applicable in non-international armed conflicts equally bind all Parties to the conflict. Here lies the paradox of IHL: organised armed groups, which, unlike States, do not have the power to ratify or otherwise accept IHL instruments, are nonetheless bound by such instruments, as much as they are bound by international customary law. But while, to a certain extent, they can influence custom, they have no influence on treaties. The only exception is the role reserved by Protocol I and by the 1980 Conventional Weapons Convention to NLMS. Various reasons have been advanced in order to explain the foundations of these obligations. I will only recall that, without such a mechanism, the whole reason for having an IHL applicable in non-international armed conflicts, necessarily based on the equality of belligerents (although this equality is much less perfect than in international conflicts), would disappear[21].

This paradox can only be explained in legal terms by recognising in all organised armed groups a degree of international personality necessary to be bound by and to benefit from IHL, and not only those possessing a high level of organisation and control of territory to which Protocol II applies, and which are already subjects of IL. That means that IHL in fact enlarges, for its purposes and within the limits of its purposes, the circle of legal persons, as it also does with individuals, who are bound not to commit serious violations of the laws of war. Another way of expressing this "functional personality" is given by the fact that, on the basis of common Art. 3, organised armed groups also have the capacity to enter into agree-

20. See, among others, M. Sassòli, "Transnational Armed Groups…", note 14 above, at p. 4 and ff.; R. Kolb, *Jus in bello. Le droit international des conflits armés*, 2e éd., Bâle, Helbing Lichtenhahn, and Bruxelles, Bruylant, 2009, at p. 156 and ff. ; P. Palchetti, "La qualificazione dei conflitti armati…", note 7 above, at p. 218 and ff.

21. See, among others, L. Zegveld, *Accountability of Armed Opposition Groups*, note 3 above, at p. 14 and ff.; M. Sassòli, A. Bouvier, *How Does Law Protect in War?*, 2nd ed., Geneva, ICRC, 2006, vol. I, at p. 266 and ff.; R. Kolb, *Jus in bello*…, note 20 above, at p. 208 and ff.

ments with the other party to the conflict, and here they recover their *jus contrahendi*, in order to render other norms, chosen among the ones relating to international armed conflicts, applicable to the situation. This being said, by definition IHL exercises no *other* influence at all on the status of organised armed groups, in the sense that this status, apart from the abovementioned aspect, is unprejudiced by the application of IHL, as the text of common Art. 3 and of each Convention and Protocol clearly says. This is another fundamental tenet of IHL: the application of this body of rules is totally independent from recognition of the legitimacy of the adversary's claims, it does not exercise any influence on such legitimacy, and it does not prejudice any solution to the conflict. States should be reassured in their attachment to their sovereignty, independence and territorial integrity. That does not always work, but, once again, it is the only means of having an IHL.

5. The status of members of organised armed groups under IHL

If we depart from the status of organised armed groups as such and direct ourselves to the status of members of such organised armed groups, that status depends on the law applicable to the conflict: if this is the law of international armed conflicts, the members of organised armed groups that do not fulfil the conditions to be recognized as combatants (and, in case of capture, as POWs) will have to be considered as civilians, under the IV Geneva Convention, if they fall into the hands of the opposing party[22]. That is, in case of capture they will be punishable for having participated in hostile acts, but they will have to be accorded the protection due to civilians. Their protection under Protocol I (and customary law) from direct attack is more debated. According to the recent ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*[23], members of organised armed groups belonging to a party to the conflict would be considered as combatants for this purpose, and therefore they would never enjoy protection, unless *hors de combat*: contrary to "civilians" (such as members of organised armed groups *not* belonging to a party to the conflict[24], or individuals taking up

22. See, in particular, M. Sassòli, "Transnational Armed Groups…", note 14 above, at p. 15 and ff.

23. Adopted by the Assembly of the ICRC on 26 February 2009, in 90/872 *International Review of the Red Cross* (December 2008), p. 991 and ff.

24. Unless they can be considered to be parties to a separate non-international armed conflict existing aside the international one: see ibid., at p. 1000.

arms in an unorganised way), who lose protection only if and for the time that they take a direct part in hostilities (Protocol I, Art. 51.3), according to the "revolving door" concept[25].

If the organised armed groups are operating within the context of non international armed conflicts, their members falling into the hands of the opposing party will not benefit from POW status and will be punishable for having participated in hostile acts, but will be entitled to all protections afforded by Art. 3 or Protocol II, according to which instrument is applicable: under the law of non-international armed conflicts there are in fact no (lawful) combatants, and all persons fallen into the hands of the adversary are entitled to the same guarantees. Here too, the issue is more complex when it comes to the conduct of hostilities[26]. The ICRC document opts for a solution analogous to the one envisaged for international armed conflicts: under Protocol II, and the corresponding customary law, members of organised armed groups will never be protected from attack, unless *hors de combat*, while civilians, i.e. individuals not belonging to organised armed groups, will loose the protection due to them only if and for the time that they take a direct part in hostilities[27].

Taking into account the nature and the needs of contemporary conflicts, the ICRC reading of the norms seems more reasonable and realistic than imposing on parties to the conflict to strictly abide in any case by the revolving door rule, however flexibly the terms "for such time" can be interpreted, especially on regular armies having to deal with much less identifiable adversaries. Nonetheless, the application of the criteria accepted by the ICRC would not go without major difficulties, for example, in distinguishing organised and non organised armed groups, or in identifying members of an organised armed group (i.e. individuals exercising within the group a "continuous combat function"[28]) outside of a combat situation, notwithstanding the specific guidelines the document has envisaged to solve these problems[29].

No different status is provided for by the present law and no need to establish such a different status has been demonstrated. The existing contrary practice of some States is not sufficient to modify custom or to overcome the clear text of treaty norms.

25. See ibid., at p. 997 and ff.

26. See, in particular, M. Sassòli and L.M. Olson, "The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts", in 90/871 *International Review of the Red Cross* (September 2008), p. 599 and ff., at p. 606 and ff.

27. See the ICRC *Interpretive Guidance*, note 23 above, at p. 1002 and ff.

28. See ibid., at p. 1006 and ff.

29. Ibid., p. 997 and ff.

6. The status of organised armed groups in other sectors of international law: in particular the IHRL. Consequences

Until recently it was thought, and many still think today that only IHL could recognise rights and impose obligations on organised armed groups that would not otherwise enjoy the status of subjects of IL. Today various elements of practice seem to confirm that other international norms may also be applicable to organised armed groups, and not only to those controlling portions of territory and fulfilling the conditions to be recognised as insurgents. A growing tendency in the international community is that of claiming the respect from organised armed groups of fundamental human rights, whether in armed conflict situations or in situations of tensions or sporadic violence not amounting to armed conflict[30]. I will not go further into a topic that is treated in other contributions, but it appears that organised armed groups should be considered today not only as subjects of IHL, but, to a certain extent, also of IHRL, a body of norms which would be losing its original exclusive inter-State character. This process is certainly attributable to the growing *rapprochement* between IHL and IHRL, which are recognised today as two facets of the same coin, being based on the common aim of protecting the human person in all circumstances from aggressions coming from any and whatever side. Protection then is attached to the persons that need to be protected and should be granted by any entity that comes to exercise power on those persons. The duty to protect human rights[31], in other words, would not depend any longer on the quality of the protectors.

Although extremely interesting *de lege ferenda*, the suggestions according to which organised armed groups could also bear a criminal responsibility under existing international criminal law appears less credible[32].

30. See, in particular, A. Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations", in 88/863 *International Review of the Red Cross* (September 2006), p. 491 and ff. Critically, see L. Zegveld, *Accountability of Armed Opposition Groups*, note 3 above, at p. 38 and ff.; M. Sassòli and L.M. Olson, "The Relationship between International Humanitarian and Human Rights Law…", note 26 above, at p. 602 and ff.

31. Not to be confused with the "responsibility to protect", which is advocated in particular as a basis for humanitarian intervention.

32. See in the issue L. Zegveld, *Accountability of Armed Opposition Groups*, note 3 above, at p. 55 and ff.; A. Clapham, "Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups", in *Journal of International Criminal Justice*, No. 6, 2008, p. 899 and ff.

7. Concluding remarks

In conclusion, the status of organised armed groups in contemporary armed conflicts appears more complex than in the past, in the sense that all organised groups can to a certain extent be considered subjects of international law. Whenever certain conditions of organisation and control of territory are fulfilled, organised armed groups can be considered "fully-fledged" subjects of general IL (although much less relevant, and permanent, subjects than States). But even in the absence of those conditions organised armed groups are to be recognised as subjects of IHL, up to a certain extent on the same footing as States, and they are probably bound by a fundamental nucleus of human rights norms. The application of these norms to them, on the other hand, does not otherwise affect their status or give them any legitimacy. The status of organised armed groups as it derives from the applicable norms would not seem, at least in general terms, inadequate to the needs of contemporary armed conflicts.

Engaging and negotiating with organized armed groups: a field perspective

*Andreas Wigger**

Let me first make two preliminary remarks. Firstly, the title mentions negotiations: Is it, however, correct to speak of negotiations when commenting about the engagement or interactions that take place between armed groups and humanitarian organisations? Raymond Saner in his book "The expert negotiator"[1] suggests the following definition for negotiation: *"Negotiation is a process whereby two or more parties seek an agreement to establish what each shall give or take, or perform and receive in a transaction between them"*.

Negotiation is obviously a wide-ranging concept, always comprising a process of transaction between two or more parties. This process and the nature of the transaction may range from rather robust and simple to very tedious, long and sophisticated interaction and outputs. The large majority of negotiations with armed actors are on the rather unsophisticated end of transactions, meaning that the outputs are mostly oral agreements on very concrete and short term humanitarian actions. They have little to do with negotiations around commercial or political written agreements that are the result of expert meetings.

But they are characterized by another form of complexity: The processes take place in situations of violence, where everybody mistrusts everybody else, where perceptions of the partners are difficult to influence, transparency is often not possible, power games are very a-symmetric and the agenda and the purposes of the engagement and negotiations are rarely openly declared by members of the armed groups.

In my exposé I will focus on the ingredients of this particular complexity.

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1. Saner R., *The Expert Negotiator*, second edition, Leiden 2005, page 17.

Secondly, the title suggests a field perspective: I have decided to speak of the reality that the ICRC is facing. This limitation on one actor from the humanitarian sector is motivated by the fact that I, as an ICRC delegate since 1985, know it best and that the ICRC, within the humanitarian sector, has probably the biggest exposure to armed groups all over the globe.

What is the structure of my exposé? I will concentrate – and therefore limit myself – to two topics that have to be thought through by any individual or organisation that negotiates with armed groups:

a) What is the purpose and objectives of such negotiations?
b) Which questions do we have to address when preparing a strategy for negotiations?

1. Purpose and objectives of negotiations

1.1. *What is the reason for engaging with armed groups?*

Most conflicts begin with armed groups that are in the process of organisational build up. They are often in the first stages of a conflict or in a situation of violence not so well structured, not so efficient in their military activities, and described by the State security forces and the government as criminals or bandits or nowadays preferably terrorists. They indeed often spread fear among the population, because their existence is new, they are in a cloud of mystery, with claims and grievances never before formulated and maybe with some spectacular first actions, such as massive and simultaneous suicide attacks.

Such fragile initial phases may last for some months or years, depending on the capacities of the armed groups on the one hand and on the nature of the reaction from the State security forces and their efficiency on the other. It does not, however, facilitate an interaction with such groups on the run. And there are nowadays a good number of them.

The mission statement of the ICRC says that the "*ICRC is an impartial, neutral and independent organisation whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance*."

Based on this statement, the ICRC reacts rapidly whenever a situation of violence occurs. The delegates will firstly try to understand the nature and the extent of the humanitarian needs and its priorities. Based on that, they will analyse the pertinence of ICRC's services to effectively respond to the given situation. In case of a positive equation, the Institution will offer its services to all parties to the conflict or the situation of violence. Because the organisation will want to refine its initial needs assessment on the

ground and because it will want to address all humanitarian problems in an impartial way, the delegates will quite naturally seek for meetings with all stakeholders in the conflict, be they state or non-state actors.

1.2. *What is the expected outcome of the negotiations?*

Based on the needs assessment, the delegates will know what minimum they will have to achieve in meetings with armed groups. Equally, they will have – from the very beginning – the conviction that there will be a humanitarian action only, if both parties (or all parties in case of more complex situations) accept (explicitly or tacitly) ICRC's neutral and independent approach. So the challenges will be to succeed with both sides. Experience shows that it is often the state actor that does not agree on a humanitarian action. But let us concentrate here on the non-state actor.

The ICRC delegate will concentrate on assisting and protecting the actual victims of the conflict. In most cases he will, therefore, ask for security guarantees for ICRC staff members who carry out missions in the conflict areas. He will also insist on respect for the medical mission, meaning total respect for first aiders, ambulances and medical installations. In case of prisoners, he will plead for their safety and wellbeing, notification to their army and restoring links with their families by means of Red Cross messages or by telephone.

In summary, he will – in a first phase – concentrate on optimizing the whole set up that is meant to protect and assist the most vulnerable groups, the wounded and sick and the prisoners, as well as civilians, that are in dire need of evacuation or immediate support in terms of food, water or shelter. We could also say that the ICRC pleads for the respect of a humanitarian space in the conflict.

At the same time, the ICRC will want to know what the other side is going to fight for in the negotiations. Why did they accept to meet with the ICRC? What was told to them and by whom?

We have to say here that the ICRC is well known by many people in regions that have seen and endured conflicts for many years, such as in Afghanistan and Pakistan, in the Philippines, in Iraq, in Somalia, in Sudan, in the Democratic Republic of Congo or in Colombia.

The Taliban Movement in Pakistan knows what the ICRC has been offering over the last few years to victims of war in neighbouring Afghanistan: visits to prisoners, organising family visits to prisons, organising video conferences for families who cannot go physically to meet the prisoners in detention facilities such as Baghram, offering first aid kits to fighters, transporting bodies of civilians or Taliban fighters from morgues in hospitals

back to the villages for proper burial, etc. They will probably want similar kinds of services. Medical care is always important to any movement, also family contacts with prisoners, either through family visits or through Red Cross messages.

In every conflict the negotiation will concentrate on a good compromise between ICRC's independently established humanitarian needs on the one hand and the expectations for aid and help in areas where the armed groups momentarily face problems and where they need a pragmatic response on the other hand. The art of negotiation in this case is to come to a deal that is non-discriminatory in its response to all the needs and at the same time is flexible enough to cover humanitarian needs that are vital in the perception of the armed groups. Such negotiation may take time before coming to a conclusion.

2. Questions regarding the strategy for negotiations

2.1. *Understand and analyse the armed group*

Humanitarians exclusively address humanitarian needs. They do not interfere in politics (no participation in the spread of democracy all over the globe), nor do they have any agenda for so-called social engineering and they do not interfere in military affairs (i.e. work such as consulting groups on how to fight).

They are, however, carrying out their humanitarian activities not in a non-political environment. Every assistance, in terms of food or water or shelter or in the medical field, is happening in a particular cultural and social environment and may change basic social and economic parameters of a society. And since the ICRC is active on all sides of a conflict, such intended or un-intended changes of situations as a result of external assistance have to be carefully contemplated and addressed in an ongoing action. It is, therefore, also very obvious that the ICRC has to understand very well the given situation and the objectives and functioning of the various stakeholders in a conflict. Where do they come from? What are their initial grievances? What is the ideology behind them that drives these groups? What are the strong real drivers of their ideology and what are the crucial elements that have to be taken into consideration when approaching these groups? Islamic Jihadi groups, to give an example, cannot be understood without having a minimum notion of the concept of Jihad and its very powerful manifestations throughout Muslim history. In addition, one needs to understand the regional and global analysis of great religious and political thinkers of the 19th and 20th century (see Abdullah Wahab in Saudi Arabia in the 19th century, Hassan Al Banna and Sayed Qutb for the

Muslim Brothers in Egypt, or Khomeini as the transformer of the quietist Shia religion into a political theology in Iran). This may help to properly appreciate the grievances and the social and political manifestos of armed groups and their references to notions such as colonialism, secularism, just distribution of resources, etc.

I do not say here that only an expert in history, religious beliefs and political affairs can negotiate with Islamist groups. What is important, however, is a basic notion of the other's profound belief system, to know a bit about what makes him tick and where possible fields for connecting a message are. This is especially important for non-state actors that are legally bound by international humanitarian law (IHL), but who often look at this law as coming from formerly colonial Europe. Every connection between basic notions of IHL, such as humane treatment of a prisoner, and their proper traditions, strengthens the emotional commitment and motivation to abide by it. When at a conference, a contemporary Islamic scholar told me: "*Your so-called grandfather of the IHL, Hugo Grotius, is a latecomer compared to our Shibani, the Islamic scholar who wrote already in the 9th century a whole treaty about the rules of war and the treatment of victims of war*" I was very pleased because he acknowledged the pertinence of IHL for modern warfare and he – at the same time – declared the principles of this law compatible with the tradition of Islamic jurisprudence.

Apart from the political, ideological and social fields to be studied, we need to know about "who is who" inside armed groups.

The risks attached to this part of the preparation are, however, high and need a careful approach. Many of the current active armed groups are very secretive and information about their real organisational structure is often seen as militarily relevant and a danger to their survival. We will have to take this into consideration in our own efforts to understand the power structure and to get face to face meetings with the military commanders who have the say regarding ICRC's demands. Since these direct contacts may be difficult, we have to look for temporary alternatives.

We will, therefore, need to be in contact with as many knowledgeable people of the opposition as possible. This often includes journalists, academics and community leaders. In many instances, the ICRC also needs to be in contact with Diaspora communities. They often have in their midst important leaders who are in temporary or in longer exile and who have usually very pertinent contacts with and considerable influence on people on the ground, not least because of their access to vital resources, such as money, international media, influential governments, and other regional or international allies. However, no such contacts can replace a face to face dialogue in the field with the commanders.

The groups are also gathering information about the ICRC and the delegates. They have nowadays many more possibilities to investigate about the individual delegate in front of them and the Institution as such. Notably through their representatives who may live in the capital or in areas with access to communication means, they will learn a lot about the ICRC. They will analyse the material on the ICRC web site and the articles that are written about the ICRC or what is said in blogs about the ICRC. They will analyse the ideological position of the organisation, the donors and their influence, public statements about violations of IHL (such as ICRC press releases during open conflicts in Gaza in 2008 or in Sri Lanka at the beginning of 2009). They will detect any bias of the organisation and they will try to understand the reputation and position of the organisation in world politics.

2.2. *Perception of humanitarians*

I should like to begin this chapter by a quote by a 51-year old Tajik in 2002. He said: "*Free cheese only comes in mouse-traps. By giving us something they also take away a lot*".

It is quoted in a Study of the Geneva Center for Humanitarian Dialogue "*Humanitarian engagement with armed groups. The Central Asian Islamic opposition groups*", February 2003.

Another Tajik had this to say: "*Humanitarian organisations have good and bad influence. They bring help for the poor but they also collect information about the country*" (idem, page 35).

A wife of a young prisoner in Uzbekistan said: "*They don't keep their promises because they fear for their posts. I would like them to say the truth about the conditions in prison and to say it loud and strong. I want them to help prisoners to have normal rights, so that in prison they are treated like people. We turned to many different organisations. They all gave us their business cards. It was all useless. All those organisations serve the president. Nobody speaks against him*".

Most of the armed groups have some degree of mistrust of foreign organisations and their hidden social, political or even military agenda. As for the ICRC, some of them trust the delegates in the field who discuss with them, but have doubts regarding possible infiltration by unfriendly secret services elsewhere in the Institution. Others believe that some interpreters, delegates or Field officers are double agents and, therefore, observe our delegations very closely. There is again a possible risk of misunderstanding in the fact that the ICRC needs to have good contacts with all sides and they will see us together with Heads of security services or Ambas-

sadors – in their perception – of unfriendly countries. We have to demonstrate to them permanently that all these contacts are kept with the aim of optimizing the humanitarian response. Mistrust can be overcome by successful actions in the capacity of neutral intermediary (see liberation of hostages, exchange of prisoners or repatriation of mortal remains). Any effective activity in the prisons will also take away a lot of this mistrust because they will understand that efficient work leads to improving conditions of detention and treatment.

In most cases, the counterpart will observe the ICRC for a long time and test it before entering into any real dialogue. The test will focus on our neutrality and independence.

What are the consequences of the strategy for negotiations? Humanitarian preaching has almost no effect. What is needed is a long-term investment in relationship building.

Members of armed groups want the delegate in front of them to be humane: They want to know his personal situation, his family situation and they are curious to know what motivates him to do good. They may want to discuss about matters of faith and values. They are not interested in abstract slogans about the mandate of a humanitarian organisation. A personalized conversation is likely to achieve more than a catchphrase wrapped in humanitarian jargon.

2.3. *Useful third party influence*

During the cold war, armed groups acting in proxy wars were often encouraged by the governments behind them to engage with humanitarian organisations and, at least, to let them carry out their assistance programmes for the suffering civilian population. This was the case during the 80s with regard to the seven Afghan resistance groups, present along the Afghan-Pakistan border. Till the late 90s, almost all armed groups were reporting to some government actor. They were often infiltrated and manipulated by the secret services of the various global and regional powers. This is less the case today, although a good number are still associated with friendly governments. But Al Qaeda, for example, made it even an essential trademark of not being funded by countries and introduced very strict measures to detect possible infiltrators.

At least for what concerns the Islamic world, armed groups are nowadays closer to the civil society than they were in the past and I would say it is because of their reference to Islamic concepts, known by the population and being part of their culture and collective belief system. In the past, armed groups were quoting Marx and Mao and other

people who were somehow alien to the rather conservative public in the Arab world.

Interaction with the civil society is, therefore, vital for a humanitarian organisation and engagement with community leaders and other influential people as a means to get general acceptance as a humanitarian actor in an internal conflict. Every armed group, be it even ultra secret, has its public face and its people who can engage with outsiders and who can test the humanitarian actor on some important notions, such as independence and neutrality.

2.4. *Past attempts to engage*

Since the ICRC has been present in almost all conflict situations over the last decades, its delegates have been engaged with many armed actors. The latter have a long memory and remember well success and failures. They sometimes refer, 30 years after an event, to a particular delegate and have either a very positive overall feeling towards the organisation or they remain sceptical, exactly because they believe they were victim of a breach of contract. This has often to do with misunderstandings of promised assistance, unfulfilled expectations as for services (that were unrealistic and often asked for in a discriminatory way, *e.g.* medication for a leader or special surgery for a commander) or failed exchanges of prisoners or worse, cheating from the part of the government as for numbers to be exchanged, etc.

There are also a lot of opportunities in such longstanding relationships, that go from father to son in some cases and are sometimes vital especially when groups ideologically change and become more radical and also more closed towards the outside.

2.5. *Capacity to deliver on promises*

Can we honour our agreement? Can we keep our promises? I speak here deliberately of the ICRC and not of the armed group. It is our responsibility to assess all the parameters that can favour or hamper the implementation of the agreement. And we do have a lot of known unknowns and unknown unknowns. We are carrying out our activities in extremely insecure environments and we, therefore, need to be very transparent with all sides about possible obstacles that may jump up and are beyond our sphere of influence.

But first, we have to ask ourselves: Are we negotiating with all the important stakeholders or is there one missing? Are those at the negotia-

tion table from the government side and the armed group side people with full authority? In addition, have we taken into consideration all security, military, political and logistical factors that may impede the execution of the agreement?

Armed groups rarely operate in stabilized environments. They are often not in full control of infrastructure and security and they are in most cases under pressure from national security agencies or international military coalitions. Therefore, the conditions of safety for ICRC personnel, the availability of logistical means to be used in assisting and the positions of the security or military units in command of the region may change unexpectedly and frequently. Since the ICRC carries out its activities with full transparency with all sides, they may at any moment put their veto, because they may perceive it as a threat to their tactical and strategic positions.

Delayed delivery of assistance or services may create frustration and anger on the part of the beneficiaries and the armed groups. Interlocutors who negotiated the deal have to explain the changes and may be weakened in their position by hardliners within the groups who were never in favour of accepting assistance under the negotiated conditions.

3. Conclusions

1. Engagement with armed groups is necessary for a humanitarian organisation such as the ICRC. Any effective protection and assistance activity needs the consent and participation of all stakeholders in a conflict. In most of the situations the ICRC is *de facto* engaging in a dialogue with members of armed groups through its visits to them when in prisons.
2. Any sustained and productive dialogue with armed groups can only take place with a certain degree of transparency *vis à vis* the State authorities and security establishments. It is the responsibility of the humanitarian actor to demonstrate the necessity of such a dialogue. It is also in his interest to have a secured legal environment with a proper Headquarters agreement that guarantees professional impunity, also for local Field officers, when meeting with "illegal entities".
3. The aim of any engagement has to be strictly humanitarian. Neutrality and independence will be the guiding principles. They may cause a lot of suspicion and even disappointment at the beginning of any dialogue, but they will win acceptance and even appreciation once the function as neutral intermediary will be demonstrated through concrete action (exchange of prisoners, hostage crisis, etc.).
4. Humanitarian organisation should be aware of the permanent threat to be instrumentalized and manipulated by armed groups or parts of them.

Precautionary measures have to be taken: A permanent direct dialogue with various representatives of the civil population and of alternative opposition movements will help the humanitarians to have the full picture of the situation.

5. Humanitarian organisations have to develop a long-term engagement. They have to take the trouble to look back into history in order to understand where these movements come from and to be able to interpret their particular grievances with local, regional and global governments and systems and their main ideas for a just society.
6. The notion of time and good timing is essential in any dialogue. As pressing a humanitarian problem may be, the groups will not want to be dictated to by external pressure and the rhythm of UN Security Council deliberations and possible sanctions. They will carefully analyse any actor that enters into a dialogue with them and detect those with non-humanitarian short-term and opportunistic objectives.
7. Controversial issues, such as certain tactics used in the conduct of hostilities (suicide bombings, taking shelter behind civilians) have to be discussed and strategies of influence have to be developed. But such discussions need a solid basis of mutual trust and should, therefore, be taken up only with interlocutors who are well known.

III. Organized armed groups: legal obligations and accountability

Humanitarian law obligations of organized armed groups

*Robin Geiss**

1. Introduction

How can better compliance with international humanitarian law (IHL) by non-state parties in armed conflict be ensured? This question encapsulates one of the greatest and most persistent challenges in IHL and it is one of the *leitmotifs* of this year's Roundtable. Evidently, if we endeavour to create better incentives for compliance with humanitarian rules by armed groups, as a first, fundamental step, we must understand how these actors are bound by humanitarian law and what precisely this body of law is asking of them. Yet, despite the evident importance of these questions, it seems that for the greater part of the past 60 years the humanitarian law obligations of organized armed groups have led a somewhat shadowy existence. To be sure, the status and treatment of individual members of such groups has been fiercely debated and jurisprudence has developed a panoply of factual criteria in order to define armed groups, which in turn is a prerequisite to identify the existence of an armed conflict. However, the specific and substantive obligations of the group, *i.e.* of the collectivity as such, have only scarcely been analysed in any depth. This is astounding because, by definition, at least half of the belligerents in the currently most prevalent and most victimizing armed conflict around the world, i.e. in non-international armed conflicts, are non-state parties. The reason could be either a) that the issue is well settled in every aspect and thus does not need further elaboration, or quite to the contrary b) that some intricate and politically charged questions have remained open all along. As so often the answer lies somewhere in the middle.

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2. The If and the How

As far as the question of whether non-state parties are bound at all by IHL is concerned, the answer is clear and easy. There is unanimous agreement that IHL binds States as well as non-state parties to an armed conflict. The language of common Article 3 GC I-IV leaves no doubt: "*each Party to the conflict" [– whatever it is called –] "shall be bound to the fundamental prescriptions laid out in this provision and the United Nations have repeatedly recalled the duty of all parties to non-international armed conflicts to respect IHL*"[1]. Of course, as is well known, during the draft stages of Additional Protocol II the inclusion of a provision stating that "*the rights and duties of the parties to the conflict under the Protocol are equally valid for all of them*" was ultimately rejected[2]. In fact, Additional Protocol II does not make any reference to "parties to an armed conflict" at all. States were concerned that such an explicit statement could be interpreted as putting rebellious groups on an equal footing as States. In the specific time frame of the early 70s when many States involved in the negotiations had only recently gained their independence and were eager to emphasize their sovereignty these concerns are readily understandable. However, the Official Records of the negotiations evidence that despite the rejection of this explicit provision States did not mean to rule out the binding effects of the Second Protocol's provisions on *all parties* to an internal armed conflict[3]. Article 1 of Additional Protocol II makes it clear: The Protocol "*develops and supplements*" common Article 3 of the four Geneva Conventions and it is thus equally binding on all parties to a non-international armed conflict. Notably, a subsequent treaty, namely Amended Protocol II to the Conventional Weapons Convention of 1996 again uses the all-inclusive "all parties to an armed conflict" formula and the Second Protocol to the Cultural Property Convention of 1999, although its language is less clear, also applies *vis-à-vis* all parties to an armed conflict[4].

1. See e.g. SC Res. 1193 of 28 August 1998 (on Afghanistan); SC Res. 812 of 12 March 1993 (on Rwanda); SC Res. 794 of 3 December 1992 (on Somalia); SC Res. 1468 of 20 March 2003 (on Democratic Republic of the Congo).

2. Draft Article 5 of AP II, CDDH/219/rev. 1, para. 116. See also A. Cassese, "The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts" (1981) 30 *International and Comparative Law Quarterly* 416 (421).

3. Emphasis added.

4. According to Article 1(3) of Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the CCW Convention: "*In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Protocol*".

One of the more complicated issues is the question: How are non-state parties to an armed conflict bound by IHL? A closer look reveals that views diverge considerably as to how exactly non-state parties are bound to humanitarian law provisions. After all, only States are parties to the respective humanitarian law treaties; armed groups never signed the Geneva Conventions or any other multilateral humanitarian law treaty. A multitude of models – some highly sophisticated – has been brought forward to explain, how non-state parties are nevertheless bound by IHL[5]. Principal among these – leaving aside a number of variations – is the explanation that armed groups – like any other individual in a State's territory[6] – are bound via the implementation of international rules into national legislation[7], the assertion that armed groups derive rights and obligations under IHL in accordance with the rules relating to treaties and third parties[8], and thirdly, that armed groups are bound by IHL by virtue of customary international law[9].

A distinctive feature among these different explanatory approaches is the degree to which the consent of the armed group to be bound by IHL is taken into consideration. Propositions range from zero to full consideration. For a third party to become bound by the obligations of a treaty to which it is not a party, international law requires the third party's explicit acceptance. Evidently, from the perspective of the armed group this approach is rather appealing, treated almost "state-like", without its consent the group would not be bound by IHL. Quite to the contrary, and this is the far more widely endorsed approach, if armed groups are bound via the domestic law of the State in the territory of which they are active, they remain subordinate to the State and are automatically bound to any international obligations the State has implemented into its domestic legal order. Undoubtedly, this is the approach almost all States would prefer. From the perspective of the organized group, however, to require it to

5. Generally see S. Sivakumaran, "Binding Armed Opposition Groups", *International & Comparative Law Quarterly*, vol. 55 (2006), pp. 369-394.

6. See only the intervention of the Delegate of Greece at the Diplomatic Conference of 1949 who emphasized that: "*[i]nsurgents and even bandits were obviously nationals of some State, and were thereby bound by the obligations undertaken by the latter*"; Final Record of the Diplomatic Conference of Geneva of 1949, Vol. IIB, p. 94.

7. G. Abi-Saab, "Non-international Armed Conflicts", in: *International Dimensions of Humanitarian Law*, Geneva and Paris, Henry Dunant Institute and UNESCO, 1988, p. 230; GIAD Draper, "The Geneva Conventions of 1959", *Hague Recueil* 1965, p. 96.

8. A. Cassese, "The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts" (1981) 30 *International and Comparative Law Quarterly* 416 (423 et seq.).

9. M. Bothe, "Conflits armés internes et droit international humanitaire", 82 *Revue générale de droit international public*, 1978, pp. 91-93.

respect IHL because the very government it is trying to overthrow has ratified a multilateral treaty; one may expect the group to reject any binding obligations on this basis alone[10].

Many of the explanations given are not fully satisfying to the mind of the international lawyer, but legal technicalities should not be overrated either. Analytical purity will not ensure the breakthrough in terms of ensuring better respect for IHL. In any case, given that the vast corpus of rules applicable to non-international armed conflict has acquired the status of customary international law, and given that this particular source of law binds any entity even with a limited personality under international law, the debate has arguably lost much of its verve. Non-state parties to an armed conflict are bound to IHL by virtue of customary international law. It is on this basis that the Special Court for Sierra Leone held the Revolutionary United Front bound by IHL, that the International Commission of Inquiry on Darfur considered e.g. the Sudan Liberation Movement bound, and the International Court of Justice (ICJ) the contras in Nicaragua[11].

Still, the dilemma remains that even customary law has been exclusively shaped by State practice. One way around this dilemma would be to include non-state actors in the formation of the rules. The ICTY Appeals Chamber has set a precedent in taking the practice of armed groups into consideration, and we will hear more about this avenue in the course of this Roundtable. In theory, it is a rather promising approach as it would evidently create a better sense of ownership and thus further incentives for compliance among armed groups. *De lege lata*, however, the orthodoxy of international law has not yet accepted the participation of armed groups in the formation of customary international law[12].

For the time being, our best bet is thus to rely on the legitimacy inherent in the substantive content of IHL rules. After all, even if one has not been involved in the formation process of a given provision, a rule may still be compelling and perceived to safeguard one's interest. IHL – perhaps more than any other legal regime – has this potential – for one, because it is predicated on a subtle balance of military necessity and humanitarian considerations precisely because this balance marks the least common denominator on which even the most diverse parties opposing one another

10. J.M. Henckaerts, "Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law", in: *Proceedings of the Bruges Colloquium, Relevance of International Humanitarian Law to Non-State Actors*, n. 27 (2003), p. 127.

11. See S. Sivakumaran, "Binding Armed Opposition Groups", *International & Comparative Law Quarterly*, vol. 55 (2006), p. 369 (371).

12. Th. Meron, "The Continuing Role of Custom in the Formation of IHL", *AJIL* 90 (1996), p. 238 (240).

in an armed conflict should be able to agree on, for another, because many of the rules applicable in non-international armed conflicts today are binding by virtue of universal customary international law. They belong to the humanitarian standard of the international community – and whoever intends to join this international community as a relevant actor must abide by its fundamental humanitarian standards.

3. The Substance of Specific Obligations

Having clarified that non-state parties to an armed conflict are clearly bound to respect IHL provisions and having shed some light on the various explanations of how the binding effects of humanitarian law on these actors can be construed, let me now turn to the actual content of the specific obligations of non-state parties to an armed conflict. Evidently, these obligations should be easily discernible if we want non-state parties to an armed conflict to comply with them. The problem is, not all of them are.

3.1. *Prohibitions*

Certainly, those obligations that are explicitly framed and formulated as straightforward prohibitions usually raise no problems. International treaties and custom leave no doubt that armed groups are prohibited from acts of terrorism, the taking of hostages or direct attacks against civilians or civilian objects. It is equally clear that armed groups must not execute indiscriminate attacks nor use human shields and that they are prohibited from employing landmines against the civilian population.

However, already when it comes to the prohibition of passing sentences without – I am citing common Article 3 GC I-IV – "*previous judgment pronounced by a regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized peoples*", things become tricky. When is a court set up by an armed group a "regularly constituted court"? What are the judicial guarantees "recognized as indispensable by civilized peoples"? Is it at all conceivable that an armed group sets up a "regularly constituted court" and hands down judicial sentences? After all, the judiciary is a state domain *par excellence*. Difficult questions abound. Many would argue that a transient creature like an armed group that can at best administer some kind of "jungle justice" in *ad hoc* proceedings is simply not able to set up a "regularly constituted court". As has been so observantly noted, "Guerrillas are not apt to carry black robes

and white wigs in their backpacks"[13]. However, international law requires us to interpret international treaties in good faith and not to render an obligation entirely meaningless. Given that common Article 3 of the Four Geneva Conventions clearly applies to non-state parties to an armed conflict, it would hardly seem maintainable to argue that armed groups are *per se* incapable of setting up "regularly constituted courts" in the sense of common Article 3. At the same time, we must be wary not to interpret the requirements of common Article 3 too leniently simply because this would allow a broader range of groups to comply. After all, fundamental judicial guarantees admit of no compromise. I would thus argue that the requirement of "regularly constituted courts" admits of a somewhat broader interpretation that does not *per se* exclude courts set up by armed groups, but that these courts certainly would have to afford the entire range of fundamental judicial guarantees.

3.2. *"Positive obligations": How to accommodate differing levels of capacity?*

I will now turn away from outright prohibitions and focus on the so-called "positive obligations" non-state parties are bound to respect in an armed conflict. IHL is not confined to mere prohibitions stating what non-state parties to an armed conflict must not do; in their position as a *de facto* authority these groups are required to undertake a much greater effort to comply with IHL, for example, to take active steps to ensure adequate conditions of detention or to provide care and aid for children[14]. I do not intend to go into these obligations in any detail, but I would like to flag one of the recurrent problems the humanitarian legal order is confronted with when setting up such positive obligations. How to accommodate the vast and diverse range of armed groups with their differing levels of capacity under one set of common rules? Surely, differing levels of capacity must be taken into consideration otherwise the humanitarian rules would be divorced from reality. Such flexibility, however, comes at the price of legal certainty. Additional Protocol II is particularly reflective of this eternal dichotomy, i.e. to craft legal rules that are universal enough to be applicable worldwide and yet specific enough to be effective. For example, according to Article 5 (2) of Additional Protocol II detaining authorities are required to carry out certain duties "*within the limits of*

13. J. Bond, "Application of the Law of War to Internal Conflicts", 3 *Georgia Journal of International and Comparative Law* (1973), p. 345 (372).

14. See Articles 4 and 5 of Additional Protocol II.

their capabilities". Here the strictness of the obligation was – at least to some degree – sacrificed in order to promote compliance by a wide variety of actors – even if in the end this may mean compliance with very little[15]. This compromise is as imperfect as it is inevitable and for the time being it has remained without any viable alternative.

Article 5 (1) b) of Additional Protocol II likewise introduces a standard of considerable relativity. This provision requires that detainees are to be provided with food, drinking water, and safeguards regarding health and hygiene "*to the same extent as the local civilian population*". This standard is far from ideal; in fact it may be awfully low. Yet, given the often disparate conditions in which armed groups operate and the poverty which afflicts most countries where internal conflicts persist, the ideal is rarely a viable alternative. As has been so aptly stated, it may well be that for as long as parties to an internal armed conflict feed, house, and care for their prisoners no less well than they do for their own people, they may have conceded as much to the demands of humanity as the necessity of their circumstances permits[16]. *Nota bene*, the respective customary law rules go further and are more onerous requiring the provision of "adequate" food, water, clothing, shelter and medical attention[17]. The customary law rules also no longer contain the "limits of their capabilities"-caveat; stipulating that women *must be* held in quarters separate from men, that children *must be* separated from adults (evidently not from their own family), and that detention premises *must be* removed from the combat zone and safeguard health and hygiene[18].

3.3. *A recurrent concern: Conferring legitimacy upon armed groups*

Having addressed the prohibitions as well as the "positive obligations" of non-state parties to an armed conflict, in concluding allow me to turn to yet another (perhaps better "the") recurrent problem with which discussions about the obligations of non-state parties to an armed conflict are traditionally imbued, namely, concerns over conferring legitimacy, recognition, or some sort of legal competency upon them. The unequivocal stipulation of common Article 3 of the Four Geneva Conventions that its provi-

15. D. Forsythe, "Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts", *AJIL* 72 (1978), p. 275 (293).

16. J. Bond, "Application of the Law of War to Internal Conflicts", 3 *Georgia Journal of International and Comparative Law* (1973), p. 345 (377).

17. ICRC Customary Law Study, vol. I, rule 118.

18. ICRC Customary Law Study, vol. I, rules 119, 120, 121 (emphasis added).

sions "*shall not affect the legal status of the Parties to the conflict*" has never fully soothed these concerns.

The problem often does not lie in what the rules actually say explicitly, but in what they do not say and what they ostensibly imply. IHL does not expressly confer any authority upon armed groups to detain anybody, nor does it explicitly grant non-state parties the competency to set up courts and hand down judgements. Yet, at the same time IHL stipulates obligations concerning the conditions of detention, the setting up of courts and the passing of judicial sentences. Does this mean that these rules implicitly confer a legal competency, a legal basis for armed groups to detain their enemies, to set up courts and to conduct trials? After all, from a humanitarian point of view the passing of sentences is preferable over summary executions which armed groups, in the absence of any detention facilities and imperatively dependent upon their mobility, could all too easily regard as a logical alternative to detention.

The better view and arguably the only view the States who crafted these rules would currently agree to – is that IHL neither prohibits detention or the passing of sentences by armed groups, nor does it confer any right or legal authority to do so. It simply acknowledges these occurrences as facts of wartime reality. Evidentially, for example, armed groups have convened courts in El Salvador, Sri Lanka and Sierra Leone[19]. Acknowledging these occurrences allows IHL to regulate the modalities in order to ensure a basic humanitarian standard – very much in line with IHL's overall rationale, to regulate behaviour in times of war without legitimizing it.

4. Conclusion

The ambiguities ingrained in many of the obligations of organized armed groups relate back to some long-standing problems that have accompanied the humanitarian legal framework relating to non-international armed conflict all along. Some remain eternally debated and, it seems, eternally unresolved. Guerrilla fighters and armed groups have often been designated as the "stepchild of the laws of war", "grudgingly recognized and poorly treated" – fighting in a twilight zone between lawful combatancy and common criminality. Of course, these designations originated from the period prior to the adoption of Additional Protocol II, when there was only common Article 3 and perhaps a few scattered

19. See S. Sivakumaran, "Courts of Armed Opposition Groups - Fair Trials or Summary Justice", *Journal of International Criminal Justice* 7 (2009), pp. 489-513.

customary law prescriptions pertaining to armed groups. Important normative gaps have been closed in the meantime by virtue of treaty law and customary law, but the quintessence of these statements largely remains valid. At the beginning of the 21st century armed groups remain only grudgingly recognized. Evidently, as far as the creation of better incentives for compliance is concerned, this is rather counterintuitive. At the same time it shows that without the inclusion of States as the legislators of IHL and without their conviction that armed groups are a fact of wartime reality that deserves regulation, prospects to ameliorate remaining shortcomings remain remote.

Human rights obligations of organized armed groups

*Andrew Clapham**

I think there are three problems when one tries to address the question of the human rights obligations of non-state actors. The first is a preliminary problem, and I shall call it the legalistic argument. The previous speaker referred to it as a legal technicality. I consider it an argument in the sense that, when one addresses this question, people often make the argument that non-state actors have not ratified any human rights treaties and therefore they cannot have human rights obligations.

And we have quite rightly heard that there is a difference here with humanitarian law in the sense that all four Geneva Conventions say in common Article 3 that it is binding on '*each Party to the conflict*', and that apparently is enough to bind the other side. Whereas the human rights treaties do not explicitly state that they are binding on a non-state actor.

I think there is an answer already to this first problem – the legalistic argument. There are, in fact, some human rights treaties that do cover the acts of armed non-state actors. Indeed, we saw earlier the matrix up on the screen which showed a number of treaties which covered child soldiers, and one of those is the Optional Protocol to the Child Rights Convention, and that treaty specifically addresses armed non-state groups. Now, a legalistic counter-argument will sometimes respond by saying that the treaty states that those armed groups 'should' respect this norm, not that they 'shall' respect the norm.

A few years ago, I was sitting in this very room in the audience and there was a distinguished member of the panel who was from a Foreign Government, in fact, the Swedish Government, and, of course, she said she was speaking in her personal capacity, but she said that this difference between shall and should makes no difference in today's real world.

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Armed opposition groups are expected to respect the norms in the human rights treaty. The human rights treaty is addressed to them.

And I think the way in which it was presented by Elisabeth Decrey-Warner on the first day makes it clear that in practice it is assumed that this is a norm found in a human rights treaty which is binding on the non-state armed group. Another example is the more recent treaty on disappearances, which again refers to the fact that non-state actors should be brought to justice for carrying out acts of enforced disappearance. So I think the traditional approach which says the human rights treaties are exclusively about the acts of state actors needs to be revisited.

That would be one counter-argument to the legalistic argument. The second counter-argument I think would be found in international criminal law. When international law states that it is an international crime to commit the act of genocide or the act of torture, no one is concerned whether the duty bearer has accepted the treaty, one says that international law has created this as a crime and, therefore, if you violate that norm you have committed an international crime. The issue of the consent to be bound does not arise.

I think that this logic applies to genocide and it would apply to crimes against humanity (as we know, the Rome Statute clearly envisaged these crimes being committed by non-state actors as it requires a State 'or organizational policy') and it could apply even to the individualistic crimes of torture, disappearances and hostage-taking. Now, it is true that those international crimes have traditionally been thought of as crimes that have to be committed by State actors, but I would like to mention one case where this issue arose in stark terms.

That is the case of Mr. Zardad who was an Afghan war lord and was found to be living in London. He was eventually arrested and tried at the Old Bailey in London. When his defence team were preparing the legal arguments before the judge at the Old Bailey, they focused on the notion that the crime of torture in international law, according to the Convention against Torture, has to be committed by a public official. And they reflected that this man was a non-state actor, and they asked how could he be tried for the crime of torture when his actions were all against the public authorities; one could not possibly argue that he was a sort of offshoot of the Government in the way that would give rise to state responsibility, he was fighting against a Government. So it was absurd to suggest that he was a quasi-state actor. This then came before the judge who determined that it was a question of law, not a question of fact, and the jury were sent out and the judge delivered a legal finding which I would like to read to you:

It seems to me that what needs to be looked at is the reality of any particular situation. Is there sufficient evidence that Hezb-I-Islami had a sufficient degree of organisation, a sufficient degree of actual control of an area, that it exercised the type of function which a Government or a Governmental organisation would exercise? It seems to me that I have to take care not to impose Western ideas of an appropriate structure for Government, but to be sensitive to the fact that in countries such as Afghanistan different types of structure may exist, but which may legitimately come within the ambit of an authority which wields power sufficient to constitute an official body[1].

So, for the judge this non-state actor looked enough like a Government for the individual to be tried as a torturer.

Now, personally, I think that approach is rather problematic because it forces us to consider that the non-state actor looks a bit like a Government even if it does not look like a western European Government, and here comes the real problem: when one starts to do that, one starts to touch on the two other problems that I am now going to raise. One starts to enter into the legitimacy problem, you start to label groups as looking like Governments, or Governments in waiting, and that is obviously offensive to the Government that they are fighting against. And it seems that as a human rights judge or human rights advocate or criminal law judge you are bestowing some sort of special status on this group, and I understand it does not lift them to any special status in international law but politically we have a problem. I call this second problem the legitimacy problem.

Now, what could one do about this problem of legitimacy? I think here there is a way around the matter, by suggesting that human rights are not necessarily about the relationship between a citizen and his or her Government. Human rights are the rights that one has, that are inherent to the individual because of what you were earlier on calling legitimacy, which some people might call natural law, while others might suggest that the origin of the whole idea of human rights is that there are some things which are sacred and there are some ways in which individuals should not be treated. And if we can get away from the legalistic problem of suggesting that these groups have to be assimilated to a Government and accept that they have these obligations as entities, not because they look like a Government or might become a Government, I think that one can actually avoid this legitimacy problem.

Let me now just quickly present some of the developments that I think suggest that, rather than holding these groups liable as state-like entities, we are moving towards a realization that the legitimacy problem can be

1. Reproduced in A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford: Oxford University Press (2006) at pp. 342-3.

tackled by suggesting that these non-state actors actually have human rights obligations in their own right. To call them a human rights violator is not to legitimize them by cloaking them with quasi-state authority. To call them a human rights violator is to recognize the suffering of the victims of human rights abuses.

On the first day of this roundtable it was suggested that we can achieve this result by talking about the legal status of certain non-state actors under international law, that because such actors have some degree of capacity to fulfil these obligations they enjoy limited legal personality. And I think that that argument works quite well. But what evidence is there that in international relations or in international law these groups are considered actually to have these human rights obligations?

The case of Zardad works as evidence of individual criminal responsibility but what about the group as such? I think the first piece of evidence I would like to put before you is actually the development of a whole series of scholarly writings. I am only going to mention one and it is by Professor Greenwood, now Judge Greenwood. He writes:

> *The obligations created by international humanitarian law apply not just to States but to individuals and non-state actors such as a rebel faction or secessionist movement in a civil war. The application to non-state actors of human rights treaties is more problematic and even if they may be regarded as applicable in principle, the enforcement machinery created by human rights treaties can normally be invoked only in proceedings against a state*[2].

What I draw from this is that we can, on the one hand, put the human rights treaty mechanisms to one side and say that if you want to bring a case to the European Court of Human Rights you can only bring it against a State. On the other hand, the principles, or what was referred to earlier as the 'legitimacy inherent in the law', can be applied to the organisations, the armed opposition groups as such, even if the treaty does not address them directly and even if you cannot make a complaint against them under the treaty mechanisms.

The second piece of evidence I would like to put before you is that there is a series of cases before the American Federal Courts which complain against violations of the 'law of nations' by non-state actors. This is possible thanks to a complicated piece of American domestic legislation, which most of you are familiar with, so I am not going to try and explain it. The point here is that the judges in America have had to hear

2. 'Scope of Application of Humanitarian Law', in D. Fleck (ed.) *The Handbook of Humanitarian Law in Armed Conflict* (2nd ed., Oxford: Oxford University Press, 2007) pp. 45-78 at p. 76.

complaints about violations of the 'law of nations', and not simply violations of treaties, and those cases have gone forward, so far, on the basis of such an entity having obligations under the law of nations.

At this point I might open a parenthesis and suggest that I think the expression 'law of nations', or *droit des gens*, may actually be coming back into fashion, maybe not for all international lawyers but certainly in the realm of international affairs because international law, as its name suggests, is really rather restricted to relationships between nation States. Whereas the law of nations and other concepts, such as the *droit des gens*, the more original and historic notion, obviously cover the sorts of international law that we have been talking about in the last two days, international law that creates a war crime for an individual or the offence of piracy. This international law is not really about the relationship between States at all but about creating or imposing obligations on individuals and non-state actors.

The last piece of evidence I put before you for this argument that non-state actors are now seen as having human rights obligations, is the work of the United Nations (UN). The UN Human Rights Council, when it sends its Special Rapporteurs on a mission to Lebanon to discuss the situation of human rights and to report back, is faced with the problem that if the report only refers to the Governmental abuses, it would be considered as biased and some Governments will say we don't want to have this one-sided conversation, so such a mission and the report have had to work out how to address the obligations of the relevant non-state actors.

When the Council's Special Rapporteur on Summary and/or Arbitrary Executions focuses on Sri Lanka, he cannot come back and only talk about the behaviour of the Government. He has to address the violations committed by the Tamil Tigers, and so politically what has happened is *de facto* we now have human rights reporting on these groups, because otherwise it would not make sense, even if legally one can make a legalistic argument that, of course, those groups have not ratified the human rights treaties in question. The approach has been to say that human rights operate at the level of obligations of States under the treaties, but they also operate at the level of rights of individuals, and I would encourage everybody to go back and read the Universal Declaration of Human Rights where the references to States' obligations are very few and far between. The Universal Declaration of Human Rights is written in a language proclaiming that every individual has the right to this or that, it does not set out who has the obligations.

To give two more UN examples, this time with regard to the work of the High Commissioner for Human Rights who has an office in Colombia, you can imagine that the annual report to the Human Rights Commission, and now to the Council, would make little sense if the report only detailed

misbehaviour by the Government and made no reference to the multiple complaints that they had had about hostage-taking or abusive acts by non-state actors. And lastly, the Office of the High Commissioner for Human Rights in Nepal had to clearly deal with the violations of human rights by the Maoist groups. They may sometimes be called Maoist insurgents, but much of the time that the High Commissioner was operating there was no armed conflict and so the easy route of resorting to common article 3 was not available to the Office. They had to develop their approach to the groups in human rights terms.

The third problem which I should like to address is what we might call a dilution problem. When there have been attempts at the United Nations to bring in resolutions which condemn the human rights violations by a non-state actor, Governments have been frightened that this would dilute the attention to the obligations of States.

The argument runs that if you start to talk about the human rights obligations of a group which is operating in a territory, somehow you suggest that the Government is not responsible for protecting the civilians in that part of its territory. As second variation of this, is that there is a fear that you risk actually legitimizing not the non-state actor group but the actions, the counter-terrorism actions of the State concerned. By pointing to the human rights violations committed by the non-state actors, you actually give arguments to the State as to why it has to intervene in the way that it is intervening. It is fighting to protect human rights. 'We have to intern people because they are violating human rights; we have to spy on people because this is the only way to protect the rights of our citizens.' And that has been the traditional reticence for allowing the language of human rights to be used in this context.

But I think these risks are exaggerated. I think it is possible to do two things at the same time: I think it is possible to focus on the actions of the Government and to focus on the actions of the non-state actor without diluting attention on what the Government has done.

The question arises regularly at the Human Rights Council in Geneva, and Governments are fearful that by allowing resolutions on human rights violations committed by non-state actors Governments would somehow be 'let off the hook'. By focusing on rebel group A in State B, State B will not get as much attention from the international community as it might do if we do not focus on the rebel group. That I think is doing a disservice to the victims of the atrocities committed by that group. If you are raped or tortured by a rebel commander, the harm done to you from a human rights perspective is almost identical to the harm done to you if it is the chief of police of the official Government. This dilution argument should not be allowed to distract us.

In closing, I would like to try to suggest some ways forward. I think we should avoid the distraction of examining the theoretical bases or the political problems when looking at non-state actors and their human rights obligations. I think we should concentrate on trying to decide what those obligations should be. I think, in human rights terms, there is less experience, in some ways, than among those who have been working with international humanitarian law, of what those obligations should be. But when it comes to effectiveness both branches of law suffer from the same challenge: how does one ensure that the non-state actors feel ownership of these norms?

The Academy of International Humanitarian Law and Human Rights in Geneva, together with the Swiss Foreign Ministry's Political Affairs Division IV, will be working on a project to study what happens when different entities appeal to rebel groups to respect international norms and how to create a greater sense of ownership over these norms for the actors concerned. I would encourage everyone who is interested in this field to stay in touch with us.

Accountability of organized armed groups

*Liesbeth Zegveld**

The title of my presentation as printed in your programme is 'Accountability of organized armed groups'. If I were to limit myself to the accountability of these groups, I would be quickly done. There is little accountability of these groups under international law.

Unfortunately so, because armed groups are important players in non-international armed conflicts, with considerable impact on the fighting and human suffering. It is for that reason that these groups have a range of obligations under international humanitarian law.

It seems logical that with obligations responsibility – or the wider concept of accountability – comes in. But that appears not to be the case, or to a very limited extent.

A better title for this presentation would therefore be: accountability *for acts of* armed groups. Because that brings in state accountability and individual criminal responsibility for the acts of these groups.

My aim today is to explore these three levels of accountability: state accountability for acts of armed groups; accountability of the armed groups as such; accountability of their individual members, in particular, group leaders.

Let me start with the lowest level of accountability: that of the group leaders.

1. Accountability of the group leaders

The role of leaders is decisive in order to ensure observance of international humanitarian law by armed groups. Whether the norms are concerned with military operations, places of internment or detention,

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superiors of armed groups must supervise their proper application. Otherwise there will be a fatal gap between the obligations of the armed group and the conduct of its individual members. If the leaders permit or condone violations of humanitarian law, this law is unlikely to have any effectiveness.

Accountability of group leaders manifests itself in the form of individual criminal responsibility of these persons.

The principle of command responsibility for the leaders of *state* armed forces is well established in traditional international law. And since 1990 this is also true for the leaders of armed groups. The statutes and case law of the ICTY, ICTR, ICC, Special Court for Sierra Leone show that the nature of the conflict -international or internal- is irrelevant for the question of superior responsibility. And this is also true for the status of the superior: state agent or member of an armed opposition group.

Accountability of group leaders is by far the most promising level of accountability for acts of armed groups. International criminal law has become a very popular means of enforcing international rules, including humanitarian rules.

Still, I do not find criminal responsibility of leaders of armed groups a wholly satisfactory answer in the quest for accountability. There are three reasons that prompt my doubt.

First, prosecutions of leaders of armed groups by international tribunals will be few. These tribunals are set up to prosecute only the most responsible for the most serious violations of humanitarian law. Given the number of internal armed conflicts and the number of armed groups active therein, these tribunals will serve to set the example rather than to handle many cases involving group leaders.

A second argument underlying my doubt about relying too much on criminal responsibility of group leaders is that, in many cases, acts that have been labelled as international crimes are, in reality, acts of a collectivity, rather than of isolated wayward individuals. Such crimes are not effectively dealt with by punishing individuals. Crimes against humanity, in particular, can *only* be committed in the framework of a broad policy of repression.

Finally, while international *law* centers on individuals, the international *political order* emerges through a huge variety of actors. These range from multinational companies to indigenous and tribal groups – including armed opposition groups. Armed groups sometimes negotiate with territorial governments and participate in peace conferences organized by the United Nations.

The international legal and political orders thus do not operate along parallel lines. This is problematic. When there is no law to implement

political decisions, or when political agreements deviate from judgments, the effectiveness of both international law and international politics in dealing with the problem of armed groups is likely to be low.

Therefore, the accountability of the individual leaders should be integrated with accountability of these groups themselves.

2. Accountability of armed groups as such

The principle that armed groups *as such* may be held accountable for wrongful acts has been recognized. The International Law Commission has acknowledged that conduct of the organ of an insurrectional movement may be attributed to that movement[1]. Also the 'Basic Principles on the Right to a Remedy for Violations of Human Rights and Humanitarian Law' state that entities other than States may be liable to pay reparation. Another relevant development is the assertion of the International Commission of Inquiry on Darfur that not only States are obliged to pay compensation, but that a '*similar obligation is incumbent upon rebels for all crimes they may have committed*'.

Accountability of armed groups involves, however, a host of problems. I name four of them.

The first problem concerns the definition of armed groups. Holding them accountable implies that they are to be regarded as international legal entities. No clear definition exists, however, of armed groups subjected to international law. The confusion surrounding the concept of armed groups is illustrated by the multifarious terminology which is used in denoting them. Apart from the notion 'armed groups', it ranges from 'insurgents', 'rebels', 'terrorists', 'subversive groups', 'guerrillas', 'criminals', 'non-governmental groups', 'movements', and 'clans' – to name only a few.

The difficult question is whether groups should fulfil some set of minimum objective conditions to qualify as international legal persons. Should they be of a certain size or should they exert a particular degree of power? On this issue, States and international organizations are pulled in different directions by different considerations. Reasons of humanity demand that international law put a low threshold to qualifications as a legal entity. States, however, are typically very resistant to granting international status to insurgent groups, preferring to regard them as mere domestic-law criminals.

A second problem of accountability of armed groups is the absence of rules of attribution of acts and omissions to armed groups. Attribution is a

1. Article 10 of the International Law Commission Draft Articles on State Responsibility (2001).

central aspect of accountability. Armed groups are abstractions. Like States, they act only through human beings. To hold a group accountable for the act of an individual that act must be attributable to the group on some objective ground.

The only rule on attribution that can be found in international practice is that *members* of armed groups can engage the responsibility of such groups.

But who are members of these groups? Should persons have subscribed to the group in order to be a member of the group? Must they carry identity cards with them? Are only persons who actually participate in the hostilities members of armed groups or can civilians also be counted to the membership? If civilians can be qualified as members of armed groups, what contribution must these persons make in order to be qualified as a member, and, in consequence, be able to trigger the responsibility of the armed group as a whole? International law has provided no criteria that can be applied to identify members of armed groups.

In the absence of any practice on attribution of conduct to armed groups, the question arises whether the International Law Commission's articles on State responsibility may be applied by analogy to armed groups. This question is legitimate in view of the fact that a degree of similarity exists between armed groups and States. They are both collective entities with a certain degree of organization. Further, armed groups resemble States in that they pursue to exercise political power and commonly aim to become the new government or form a new State. Does this imply that agencies of armed groups can be equated with organs of the State for the purpose of the application of the articles on State responsibility?

Some groups can be said to have 'organs' as States do. An example is provided by the Taliban. A White House Executive Order of 4 July 1999, imposing sanctions on the Taliban for refusing to extradite Usama bin Ladin, defines the Taliban as:

> *the political/military entity headquartered in Kandahar, Afghanistan that as of the date of this order exercises de facto control over the territory of Afghanistan..., its agencies and instrumentalities, and the Taliban leaders.*

The order carefully avoids qualifying the Taliban agencies as organs, a term generally used for the State. But the description of the Taliban does make clear that the movement has certain factual characteristics of a State. It follows that Article 4 on State responsibility may be applied by analogy to armed groups exhibiting state-like features.

Difficulties will arise, however, when applying State responsibility law to smaller armed groups, lacking a clear organizational structure. These

groups will generally lack territorial control. International practice suggests that responsibility of these groups is based on their *effective control over persons* rather than on control of territory or on a predetermined concept of internal organization.

Another, fourth, question when considering the accountability of armed groups under international humanitarian law is: in what kind of forum could a claim be adjudicated? No international body is expressly mandated to monitor compliance by armed groups with the applicable law.

Although not explicitly so mandated, several international bodies on their own initiative have extended their mandates to actions of armed groups. These are the Inter-American Commission, the UN Security Council, and the UN Council for Human Rights (before: the Commission on Human Rights).

However, the absence of international bodies that are formally competent to review armed groups' compliance with international law accounts, in part, for the primitive state of the accountability of these groups under international law. What may be needed is a forum to which individuals can submit complaints of breaches of international humanitarian law by armed groups.

In sum, in its current form, international law is unable to make armed groups themselves fully accountable for their abuses against the civilian population.

The question is, therefore, legitimate – in addition to individual criminal responsibility of group leaders – whether the territorial State can fill the accountability gap.

3. State accountability for acts of armed groups

The State has supreme authority over all persons and things within its territory. It is the primary subject of international law. This status justifies the decision to extend the quest for accountability with the State. This choice is also warranted by the fact that international courts and other bodies consider primarily the conduct of the State.

A survey of international practice shows that the State may indeed be accountable for acts of armed groups. It may be so in primarily three situations.

The first situation is when armed groups are fighting each other and the established government makes no effort to shield the civilian population from the effects of the hostilities.

A second situation in which State accountability may exist, is when the government armed forces fight armed groups with the sole aim of defeating them militarily, at the cost of putting civilians at risk, whether by

the government or by the armed groups. Attacks on civilians by armed groups may even contribute to the government's aim to defeat these groups. The hope is that by bringing them into disrepute with the civilian population, the population will then side with the government.

Finally, State accountability may apply when the State, after the conflict has ended, adopts a general amnesty law. The State, thereby, grants immunity to members of armed groups for abuses committed by them.

The question arises as to the division of accountability between the territorial State and armed groups.

This division appears to be determined, in part, by the effective power of these entities. The State must take the measures within its material ability to prevent or repress acts committed by armed groups. Similarly, accountability of armed groups for violations of international norms may vary according to the degree of effective military and political power that they possess.

Closer analysis of international practice reveals however that, in addition to effectiveness and humanity, other factors play a role in the choice for either form of accountability. International law, to some extent, is biased in favour of established governments and against armed groups. Article 3(1) of Protocol II, for example, provides:

> *Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.*

The provision implies that the territorial State represented by the existing government remains the lawful authority until it is overthrown. And nationals of a State remain subjected to the established government until that moment.

The centrality and superiority of the State serves the aim of stability and security in international law. If international law should seek to break through the veil of the State and give equal treatment to armed groups, this would amount to the recognition of the belligerent status of these groups. It would undermine the perception of the State as a single entity.

Also the clarity in international relations would be affected when injured parties would have to look inside the State to find what entity actually committed the harmful acts concerned.

Nevertheless, I believe that the heavy focus on the territorial State is no longer appropriate to modern conditions. Rosenne's criticism of the International Law Commission's (ILC) articles on State responsibility for their one-sided focus on the State underlines this point. I quote:

The more I look at the Draft Articles on State Responsibility, the more I find them inadequate, if not flawed. On the whole, they do not take sufficient account of the consequences of the breakdown of the traditional State system of the nineteenth century, nor of its replacement by a new system which is slowly taking shape before our very eyes. In this new configuration, … [I]nternational responsibility can be attributed to entities, which are not deemed States… It is a system in which the interests of the international community as a whole are to be balanced against the traditional sovereignty of the States. That, I submit, should be the focus of political and academic interest during the coming years, before the final consummation of the codified law of international responsibility[2].

4. Conclusion

Accountability of armed groups as such would be the most appropriate answer to the abuses committed by these groups. Grave difficulties, however, centre on this kind of accountability.

Accountability of individual leaders and the State, in contrast, are less problematic. Indeed, the accountability of the State is firmly rooted in international law. More recently, the trend of accountability of individuals has entered the body of international law, and has been constantly supported in practice. Similar developments have, however, not taken place with regard to armed groups – their accountability being a grey area in international law.

Holding armed groups accountable for humanitarian law violations is considered to be incompatible with the fundamental right of the State to preserve its existence and to remain the only authority. These considerations make the prospects of further development of the international accountability of armed groups very small indeed.

I propose that States and other international actors assigning accountability in internal conflict respect the principle of political non-discrimination *vis-à-vis* civil war parties. I do not deny that there is a sovereign sphere inside the State which must be protected. However, this sphere must not be exploited to the point of endangering lives of persons affected by the conflict.

2. S. Rosenne, "State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility", 30, *NYUJ Int'L. & Pol.* (1997-8), pp. 165-166.

IV. Private Military and Security Companies

The Swiss initiative on private military and security companies

*Paul Seger**

Let me begin by thanking you for inviting me to talk about private military and security companies. It is a pleasure to be here in San Remo. Private Military and Security Companies (PMSCs), as we call them, are and continue to be a subject of great interest to my office. As you probably know, together with the ICRC, we have been very active in promoting a joint initiative on the matter that, roughly a year ago, resulted in the so-called Montreux Document.

In what follows, I will try to give you an overview of the rationale behind what we have done and to what extent the Montreux Document contributes to meeting the regulatory challenge that PMSCs continue to pose to this day.

1. Background

By way of introduction, let me recall the motivation of my Government's initiative in the subject matter of PMSCs. As depository of the Geneva Conventions, host State of the International Committee of the Red Cross and out of a humanitarian tradition, Switzerland has a particular interest in the continued relevance of the law of armed conflict. We, so to speak, see ourselves in the role of looking after this branch of international law.

Some time ago, we came to realise that recent years have seen a sharp increase in the number of PMSCs operating in situations of armed conflict as well as a significant change in the nature and scope of their activities. We also came to understand that this trend towards PMSCs, which started in the early 1990s, was an enduring one, in other words, that it is reasonable

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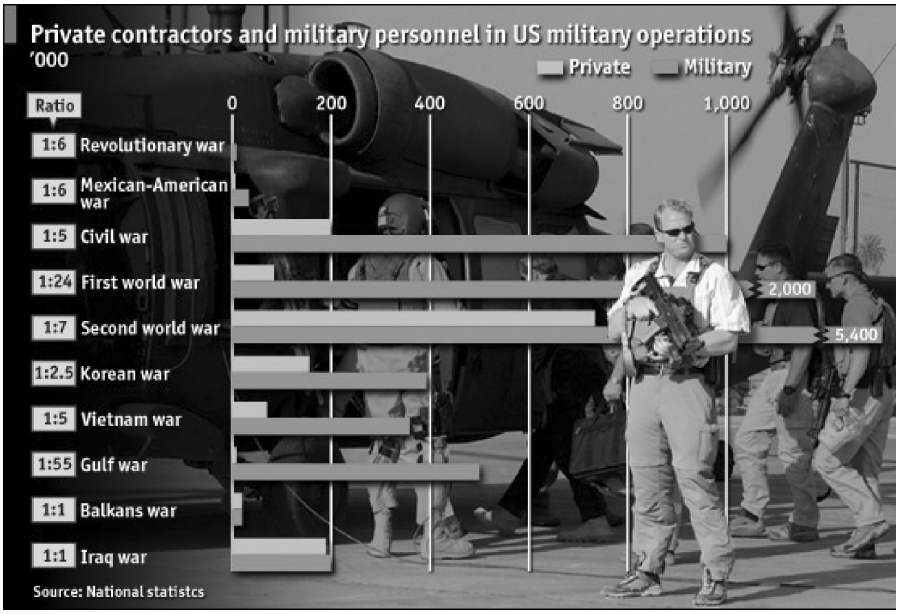
to assume that private contractors will continue to play a prominent role in future armed conflicts.

2. The Rise of PMSCs

An impressive illustration for the long-term nature of the trend towards PMSCs is this graph. It shows that the ratio between ordinary military personnel and private contractors has changed dramatically in the case of US military operations. The ratio is now about 1:1.



This expansion of private activity has raised a range of legal, political and practical questions. What rules apply to PMSCs? How should they best be regulated? Who is responsible for seeing to it that existing rules are implemented? What aspects of State authority should not be entrusted to private contractors? What national regulations do exist for PMSCs? From an international law perspective, questions in regard to state responsibility, the status of PMSCs personnel under the Geneva Conventions, individual accountability for misconduct in different jurisdictions, and the specific duty of authorities to survey and screen the actions of firms for potentially abusive behaviour have been particularly pressing. There has also been much confusion on these questions.

3. Is there a legal void?

Particularly, it has often been asserted – both in the popular press and in expert publications, as this example shows – that PMSCs operating in war zones somehow escaped the grasp of the law.

It is against this background – on the one hand, the growing trend towards PMSCs and, on the other hand, a demand for clarification on the legal front – that our initiative is best understood.

3.1. *The Swiss Initiative*

Out of a traditional commitment to international humanitarian law we, together with the International Committee of the Red Cross, launched an intergovernmental initiative in early 2006 with the aim of addressing and clarifying the international legal issues raised by the use of PMSCs in conflict situations. In so doing, we wanted to demonstrate that particularly international humanitarian law and human rights law clearly do apply to PMSCs operations, thus that the thesis of the gaps in international law is false. By compiling a description of good practices, we also wanted to make a practical contribution.

When launching the initiative, we were keenly aware that the use of PMSCs is a politically very sensitive issue. Some States clearly were and remain sceptical of what they see as essentially a rebirth of mercenary activity, in the worst case leading to the downfall of the State's time-honoured monopoly on the use of force. There was thus a substantial risk of politicising the initiative, with the result that nothing could be achieved.

As a result, we opted for a narrowly defined mission. We have spent considerable time and effort to explain that our goal was not political but of a strictly humanitarian nature. It proved to be particularly important to explain that we did not intend in any way, shape or form to either legitimise or condemn the PMSCs business, but simply saw it as a fact to which the existing body of international law needed to be spelt out for. Our narrow goal was to make, through what came to be the Montreux Document, a practical and concrete contribution towards the respect of international legal standards that are already applicable.

With this objective in mind, we deliberately set ourselves three guiding principles:

1. We wanted to achieve a result which is simple, clear and oriented towards practical implementation.
2. We wanted to have a representative number of those States on board who are most directly and concretely confronted by the phenomenon of

PMSCs, either as States who mandate them, as host States or as States of origin of such companies.

3. We wanted a result in a reasonable time limit.

This approach limited our ambitions in two ways: First, we refrained from proposing the elaboration of a legally binding international convention; the risk of politicization and delay seemed to us too great. We also felt that the existing body of international humanitarian law and human rights law is not in need of revision. For PMSCs, it simply needed to be spelt out and reaffirmed, not rewritten. What counted for us above all is the substantive commitment of an important group of States to certain existing standards irrespective of the form in which it is expressed. This the Montreux Document could achieve very well in its present form.

Second, we limited ourselves to a small number of States which, based on experience, have a particular interest or experience in the subject matter. The alternative would, of course, have been to open a wider discussion, but this certainly would have significantly complicated and delayed the process. What was most important to us was to gather around the table a "core" of the principal States concerned and thus to ensure that the document would be of real relevance from the very beginning.

After two and a half years, after four intergovernmental meetings and several technical workshops, our process — carried out in close collaboration with the private sector, academia and civil society representatives — ended in the achievement of the Montreux Document. On 17 September 2008, 17 States participating in the initiative finalised it by acclamation. Since then, many more States – 15 so far – have joined, the latest one being Uganda.

4. The Montreux Document

Let me now turn to the contents of the Montreux Document. What does it say? The Montreux Document is a text divided into two parts.

4.1. *Legal Obligations*

Part One recapitulates the existing rules of international law that are relevant to private contractors, namely, the Geneva Conventions and their Additional Protocols, international human rights instruments, and the customary law governing these spheres. The text explains, for example, that the employees of PMSCs are themselves directly bound by international humanitarian law, or that States retain their obligations under international humanitarian law and human rights law, even if they contract PMSCs to

perform certain activities. The document also recalls that under international law, the conduct of PMSCs employees can trigger the responsibility of the State if that conduct is attributable to the State; and it recapitulates that States have an obligation to take measures to prevent misconduct and to ensure criminal accountability.

The Montreux Document also explains what rules apply directly to PMSCs and their personnel, as opposed to States as the primary subjects of international law. I will not elaborate this here. Basically, the idea behind Part One of the document is to draw together what existing international law does have to say on the subject of PMSCs and that is relevant for decision-makers to know. In compiling these obligations, we were careful to recall rules that already existed and were universally accepted.

4.2. *Good Practices*

Part Two contains a set of good practices designed to assist States in complying with the obligations set out in Part One. The practices described consist mostly in national administrative, legislative or other measures. A good practice listed in Part Two is, for example, the establishment of an authorization system for PMSCs, the establishment of procedures and criteria for the selection and contracting of such companies, and the establishment of both criminal jurisdiction and non-criminal accountability mechanisms.

This picture is intended to illustrate one out of several very practical aspects in the field that Part II also discusses: the difficulty for the local population (and for members of armed forces, for that matter) to distinguish between ordinary military personnel and employees of PMSCs. One good practice described in the Montreux Document is thus to require easy identification.

Taken as a whole, the good practices of Part Two are really about making sure that if PMSCs are relied on by a government, it should ensure that only reputable and properly trained companies are hired. These are more likely to work professionally in the field and so the risk of misconduct is reduced. This implies a role for the State to exercise a certain degree of control and oversight over the companies it hires or otherwise has to deal with.

In both parts, the Montreux Document highlights the responsibilities of three types of States: contracting States, territorial States and home States. If you leaf through the text, you see that for reasons of easy reference, we address each of these States separately. A contracting State is a State that hires PMSCs. A territorial State is one where PMSCs physically operate, such

as Afghanistan and Iraq today. A home State is the State where PMSCs are registered or incorporated. The document recognises the special ability – and responsibility – of these types of States to ensure that international humanitarian law and human rights law are respected, while recognising that certain differences exist between these States. For example, a contracting State has the contract with a PMSCs at its disposal to screen and control their activities, while a territorial State has to rely on a system of authorisation to achieve a similar result.

5. Outreach

Now that the Montreux Document is here, we strive to ensure that the document is disseminated, explained and, above all, applied in practice. For starters, it is now available as an official document of the United Nations in English, Spanish, French, Chinese, Russian and Arabic. In co-operation with the ICRC, we have also presented the document within regional organizations such as the OSCE, NATO, the EU and the Council of Europe. We are also planning regional seminars in different areas – as you can see from this map (map is missing Uganda as 32nd and newest participating State).

5.1. *Participating States*

The document is not yet that well known, for example, in Asia, Africa, and also within Latin America. Again, our goal in all these efforts is to make the document known as widely as possible and, at the end of the day, make a positive difference in the field.

6. Outreach

We are currently also bringing the Montreux Document to the attention of governments on a country-by-country basis. We are quite happy with the results this has yielded so far. Many States are open to the Montreux Document and recognise its value in supporting international humanitarian law and human rights law.

On a parallel basis to these inter-governmental efforts, we hope that the Montreux Document will serve as a point of reference for the industry itself, and that there will be a follow up such as an industry-wide code of conduct and the introduction of effective accountability mechanisms. We are encouraging the industry to take the idea of an industry-wide code of conduct further. We believe that from an international perspective, effective regulation must also involve the concerned industry itself.

7. Summary

Having heard all this, you might rightly ask where this leaves regulation on a global level. After all, the Montreux Document does not contain the blueprint for a coordinated, top-down approach to regulation, say, through the United Nations. It simply reiterates the existing international legal standard and explains what States each on their own can do to implement these standards.

Here it is probably correct to say that the Montreux Document is primarily a first step in the right direction, not a solution in itself. But from my Government's perspective, this somewhat misses the main point. We see the Montreux Document as an instrument, as a toolkit which is primarily addressed to States. It allows governments and national administrations to understand what the existing norms under international law in relation to PMSCs are. It also helps them in assessing what steps on the legislative, administrative or organisational level should or could be taken in order to comply with existing international obligations. We thus hope that the Document will be of service to national authorities when they are confronted with the question as to whether they should regulate the use of PMSCs or not.

This brings me to the final point of my presentation. The Montreux Document is not written in stone and will need to be reviewed in time according to the developments in this area. We do not claim exclusivity or a copy-right on this product. If this text is taken over on the national or international level and inspires the work in other fora, we will be all the happier about it. Looking into the future, it is this openness to further

developments that we hope will secure the document's usefulness in the context of other international or national measures that might be eventually adopted, and thus, in the context of meeting the challenge of non-state actors in international humanitarian law.

8. Background information on legislative options

Where can we learn more about the Montreux Document?
Consult www.eda.admin.ch/psc, which is updated as soon as new States join the document.

What does Switzerland do in terms of regulation?
- 5 December 2005: the Federal Council adopts a report on private security and military companies.
- 31 October 2007: the Federal Council adopts the ordinance on the assignment of Federal Government tasks to private security companies. The ordinance sets out minimum conditions for the use of private security companies through the Federal Government.
- 21 May 2008: the Federal Council decides that for the time being, Swiss-based private military and security service providers operating in foreign crisis and conflict region will not be subject to registration or licensing requirements. The decision is based on an external study on the PMSCs market in Switzerland. (Available online at the website of *Bundesamt für Justiz*).

What other legislative approaches are currently under way elsewhere?
- On 29 January 2009, the Parliamentary Assembly of the Council of Europe recommended that the organisation's Committee of Ministers draw up a Council of Europe instrument aimed at regulating the relations of its member States with PMSCs and laying down minimum standards for the activity of these private companies.
- In its newest report of 21 January 2009, the UN Working Group on Mercenaries in Geneva proposes that a new convention on private military and security companies be negotiated within the United Nations.
- Code of conduct approach. Currently, efforts to encourage an industry-wide code of conduct are under way.

Private military and security companies

*Philip Spoerri**

PMSCs: the legal framework

- *Not a legal limbo!* but need for:
  - Awareness of IHL
  - Actual respect of IHL during operations
  - Mechanisms for accountability for violations
- *Outline:*
  1. Obligations of States
  2. Status of stall of PMSCs

1. It is often said that private military companies (PMCs) and private security companies (PSCs) operate in a "legal limbo", especially in situations of armed conflicts and occupation. This is incorrect, since their activities are governed by international humanitarian law, which binds all parties to a conflict as well as individuals.

Furthermore, States are, of course, bound by international human rights law (which continues to apply in situations of armed conflict, albeit subject to derogations) – and have to ensure that private parties, including PMCs/PSCs, do not impair the human rights of persons in their territory or within their jurisdiction.

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2. The discourse on PMCs/PSCs often revolves around their "legitimacy" and their use as mercenaries to undermine weak States. For the ICRC, it is not the lawfulness or "legitimacy" of PMCs/PSCs that is at the heart of the preoccupation. Our concern lies elsewhere:

Respect for IHL by PMCs/PSCs and their staff requires the following minimum elements:

- Awareness of IHL.
- Actual respect of IHL during operations.
- Mechanisms ensuring accountability for any violations.

In order to ensure these needs, it is important to be aware of:

- The status and obligations of the employees of PMCs/PSCs.
- The obligations of States under IHL.

There are several States involved

- *Respect and ensure respect* for IHL
  - States that contract PMSCs
  - States where PMSCs are incorporated
  - States on whose territory PMSCs operate

The first, legal part of the Montreux Document is a reaffirmation of these important obligations.

States that contract PMSCs

- Obligations of States remain under IHL
- Obligation to *ensure respect for IHL* by the PMCs/PSCs they contact
- *State responsibility* for violations of IHL committed by the PMCs/PSCs
- Obligation to *investigate and prosecute*
- *Human rights obligation* to protect persons: to take appropriate legislative and other measures to prevent, investigate and provide remedies

The Montreux Document addresses the obligations of these three types of States, one by one, so that each State can recognise its own obligations. This approach is mirrored in the Good Practices part, which is also divided in contracting, home and territorial States.

This group of States is the first one addressed in the Montreux Document, since the contracting State has the closest link to the company – through the contract – and is, therefore, best placed to control the company's behaviour: Part One A, principles 1-8.

a. States cannot absolve themselves of their obligations under IHL by hiring PMCs/PSCs.

Example: prisoner-of-war camp, a detaining State Article 12(1) of the Third Geneva Convention which provides that: "*[p]risoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them*".

b. States are under an obligation to ensure respect for IHL by the PMCs/PSCs they contract, requiring that the staff of PMCs/PSCs they hire are properly trained in IHL (concerning prisoners of war and protected persons during occupation in Articles 39 and 127 of the Third Geneva Convention, and Articles 99 and 143 of the Fourth Geneva Convention respectively), also requiring that PMCs/PSCs' standard operating procedures/rules of engagement comply with IHL.

c. States may be responsible for violations of IHL committed by the PMCs/PSCs they hire

- their agents, including members of their armed forces;
- persons or entities empowered to exercise elements of governmental authority, even if they act contrary to instructions;
- persons acting on the instructions of a State or under its direction or control.

d. States must investigate and, if warranted, prosecute violations of IHL alleged to have been committed by the staff of PMCs/PSCs they hire (suppress; bring to justice).

Problems: immunity; unable/unwilling to exercise extraterritorial jurisdiction; practical problems of evidence.

Home States and States where PMSCs operate

- *Respect and ensure respect* for IHL

Possible measures:

- Licensing/regulatory system
  - Prohibition of certain activities
  - Requirements such as training, standard SOPs/ROE, disciplinary measures
  - Authorisation for every contract depending on nature of activities
  - Sanctions (withdrawal of operating licence, loss of bond, criminal sanctions…)
- Bringing to justice individuals/companies
  - *Human rights obligation* to protect persons: to take appropriate legislative and other measures to prevent, investigate and provide remedies

These obligations are also recalled in the legal part of the Montreux Document (Part B and C of Part One):

Common Article 1

Obviously, the obligation to comply with the local regulatory framework would not apply to PMCs/PSCs "brought in" by a State fighting against the host State in an international armed conflict, including a situation of occupation.

Furthermore, States on whose territory PMCs/PSCs operate, i.e. States affected by armed conflict, are often weak and lack the practical means to enforce the law.

Courts in countries where the PMCs/PSCs are operating may not be functioning because of the conflict.

Here lies another reason for impunity when PMCs/PSCs do not respect IHL or human rights.

These States also have an obligation to criminalise and prosecute grave breaches, other war crimes and other crimes under international law, such as torture or hostage-taking.

Status of staff of PMSCs

- Members of the armed forces?
- Members of other "militias or volunteer corps belonging to a State Party to an armed conflict" (Article 4(A)(2) of GCIII)?
- Civilians accompanying the armed forces (Article 4(4) of GCIII)?
- Civilians?
- [Mercenaries?]

Lastly, the first part on legal obligations also addresses PMCs themselves and the status and rights and obligations of the staff of PMCs (Part One E):

While the Montreux Document emphasises the obligations of States, this is nonetheless an important part, as there is often confusion about the status of PMCs staff.

Also, when deployed in armed conflict, PMCs staff are not always aware of their rights and obligations – for instance, that they are also bound by IHL, not only States.

Principles 24, 25 and 26 of the Montreux Document address the status of civilians.

Principle 24 states clearly that their status "*is determined by international humanitarian law, on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved*".

The status can be one of the following.

Members of the armed forces

If they are formally incorporated into these forces. PMCs usually work outside the chain of command and on a mandate basis only. They thus rarely qualify for this status. But if they do, they are bound by human rights law (see statement 26d below).

Militias or other volunteer corps belonging to a State party to an armed conflict:

in the sense of Article 4A(2) of the Third Geneva Convention or Additional Protocol I. This is the case if, in a situation of international armed conflict, PMCs constitute an organized armed group "belonging to" a party to the conflict and fulfil the four criteria defining that group: to be under responsible command, to have a distinctive fixed sign, to carry arms openly, and to obey the laws and customs of war.

Civilians

This is probably the case for the large majority of PMCs personnel. As such, they benefit from the protection afforded to civilians in situations of armed conflict.

The status of PMCs staff is not without controversy. The formulation found in the Montreux Document was a compromise formulation, while keeping with existing law: principle 25 does not say that PMCs are by default civilians, but only states the consequences if they are; principle 26(c) explains when people are civilians, namely when they do not fall under any of the other categories.

People who carry arms can still be civilians. Their participation in hostilities is addressed in the next slide.

Civilians accompanying the armed forces in the meaning of Article 4A(4) of the Third Geneva Convention are a category that only exists in international armed conflicts, which are rarer than non-international armed conflicts. To qualify, civilians must have a real link with, i.e. provide a service to, the armed forces, not merely the State. This means that, for instance, contractors employed by civilian State authorities or by private companies do not fall into this category. The status of civilians accompanying the armed forces does not apply in non-international armed conflicts. On the privileges associated with the status, see statement 26c below.

Mercenaries

Mercenaries are very narrowly defined in international law. Article 47 of Protocol I additional to the 1949 Geneva Conventions describes a mercenary as someone who:

1. is especially recruited in order to fight in an armed conflict;
2. in fact takes a direct part in hostilities;
3. is motivated essentially by the desire of private gain;
4. is neither a national of a party to the conflict nor a resident of the territory controlled by a party to the conflict;
5. is not a member of the armed forces of a party to the conflict;
6. has not been sent by a State which is not a party to the armed conflict on official duty as a member of its armed forces.

That definition excludes most PMCs personnel, most of whom are not contracted to fight in military operations. Many are nationals of one of the parties to the conflict (the locally recruited). Moreover, it is difficult to prove the motivation of private gain; presumably, not all of them are thus motivated. Lastly, while some private contractors are reportedly very highly paid, it would be very difficult to verify if they receive a substantially higher wage than soldiers.

This being said, PMCs employees do sometimes meet the conditions for definition as mercenaries. If that is the case, they are not entitled to combatant or prisoner-of-war status in an international armed conflict.

Legal consequences for staff of PMSCs

- Status and rights upon capture
- Obligations of individuals:
  - Bound by IHL
  - Criminal responsibility for serious violations of IHL
- Civilians:
  - Direct participation in hostilities
  - "Collateral damage"

1. Status and rights upon capture

For status see last slide: Status and activities are linked, but even if people are civilians, they sometimes directly participate in hostilities – which they are not supposed to – and as a consequence lose their protection against attack.

The only consequence of being a mercenary under IHL is loss of right to be treated as a prisoner of war.

2. Obligations (Principle 23)

It is important that they are bound by IHL – often, staff of PMSC are not aware of this, and see their respect for IHL more as a policy choice.

3. The consequences if civilians directly participate in hostilities (principle 25 is very important in the Montreux Document!)

This is an issue of major humanitarian concern, since it appears that PMSCs staff sometimes do directly participate in hostilities. In the view of the ICRC, PMSCs should not be employed for services involving direct participation in hostilities (DPH).

What is Direct participation in hostilities?

- Simply put, it means participation in combat operations or activities aimed at weakening the enemy's military capacity, and specifically meant to support one party to the conflict against the other. Guarding military bases against attacks from the enemy party, gathering tactical military intelli-

gence, operating weapons systems in a combat operation are examples of direct participation in hostilities in which PMSCs personnel may be involved.

- More precisely: persons participate directly in hostilities when they carry out acts, which aim to support one party to the conflict by directly causing harm to another party, either directly inflicting death, injury or destruction, or by directly harming the enemy's military operations or capacity. If and for as long as civilians carry out such acts, they are directly participating in hostilities and lose their protection against attack.

Examples of causing military harm to another party include capturing, wounding or killing military personnel; damaging military objects; or restricting or disturbing military deployment, logistics and communication, for example, through sabotage, erecting road blocks or interrupting the power supply of radar stations. Interfering electronically with military computer networks (computer network attacks) and transmitting tactical targeting intelligence for a specific attack are also examples. The use of time-delayed weapons such as mines or booby-traps, remote-controlled weapon systems such as unmanned aircraft, also "directly" causes harm to the enemy and, therefore, amounts to direct participation in hostilities.

Not all violent acts occurring in an armed conflict amount to direct participation in hostilities. In order to constitute direct participation, a violent act must not only be objectively likely to directly cause harm, but it must also be specifically designed to do so in support of one party to an armed conflict and to the detriment of another. Violent political demonstrations, a bank robbery unrelated to the war, or an incident where large numbers of fleeing civilians block a road, not helping one party to an armed conflict but trying to protect themselves from the hostilities, are examples of acts that do not amount to direct participation in hostilities.

Obligations of companies?

- No **obligations of companies as such** under IHL or human rights law
- But: **practical measures** to ensure that staff respects IHL:
  - Vetting of staff
  - Training of IHL
  - SOPs, ROEs in compliance with IHL
  - Mechanisms for investigation and accountability

On the other hand, PMCs/PSCs as companies do not have any status or obligations under IHL as such. (This is stated in principle 22). They are only bound by international law insofar as national law imposes it on them.

Nonetheless, they can take useful practical measures to ensure that their staff respects IHL. The following elements would seem useful:

- vetting of staff to ensure they have not committed violations of IHL or relevant criminal offences in the past;
- awareness of IHL: PMCs/PSCs should provide all their staff with general and situation – and task – specific training in IHL. It is not sufficient to rely on training they may have received in their previous careers with the armed forces;
- PMCs/PSCs staff should be issued with standard rules of behaviour and especially rules on the use of force that comply with the relevant rules of IHL and, indirectly, with HR; Mechanisms should be established for investigating any alleged violations and for ensuring accountability for any violations, also by communicating the results of such investigations to the relevant state authority for prosecution.

Challenges for respect of the law

- Practical measures to ensure respect - how to enforce them?
- Sanctions for violations:
  - Lack of extraterritorial jurisdiction and weak implementation by the contracting State and the Home State
  - Weak legal systems of territorial State
- Which rules on the use of force should apply?
  - If contractors act as civilians: more restrictive than rules from rules on conduct of hostilities

There is still a gap between the obligations of States as they stand under IHL and HRL, and their implementation.

1. On the side of prevention:

How to ensure respect. This can only be done if States are willing to regulate the activities of PMCs that they contract, or from whose territory PMCs services are exported or on whose territory they operate.

We can see an increasing awareness of States in this respect, but there is still a long way to go.

The ICRC is engaged in a humanitarian dialogue with interested States to regulate the activities of PMCs:

- Dialogue with States, on the basis of the Montreux Document, to encourage better regulation: for instance, ICRC comments to Iraqi proposed legislation, to UK regulation, to South African legislation.
- Dialogue with representatives of industries, also increasing in the field: seminar with PMCs in Congo Brazzaville.
- Dissemination in many fora, in particular, in its workshops on national implementation of IHL (e.g. Russia, India, etc.).
- Aim of the ICRC: to raise awareness for the relevance of IHL when such companies are deployed in armed conflict situations; to advocate for accountability.

Other initiatives are complementary to the Montreux Document:

1. The UN Working Group on mercenaries is currently drafting an international convention on PMCs.

Background: the Working Group is highly controversial, as it is supported by Cuba and the Non Aligned Movement (NAM) and the European countries voted against its establishment in the Human Rights Council. 5 members of the Working Group from each geographic region: none of them knows anything about international law. The draft convention so far is a disaster. But ICRC does not want to be too negative.

So the message must be formulated diplomatically:

The ICRC is not, in principle, opposed to an international convention on PMCs, if it could contribute to further awareness, to further regulation of PMCs and to better respect of IHL.

The Montreux Document was not meant to be an international convention or the last word on PMCs.

The ICRC stands ready to provide its expertise on international law and to work with the Working Group on the issue of PMCs.

2. The Federal Department for Foreign Affairs (DFAE) is pushing an international code of conduct for the industry. The industry, of course, has an interest in this, as it will legitimise it although there is a problem as it is the umbrella organisations that take part: the British Association of Private Security Companies (BAPSC), the International Peace Operations Association (IPOA), together with the new South African industry association, and they also have members who do not have very clean records.

ICRC, again, is cautiously positive towards the Code of Conduct. We have actively participated in the first meeting and are awaiting further developments.

V. New forms of violence: challenges to the international legal framework

Transnational violence

*Claus Kress**

1. Introduction

In current public international law, 'transnational armed conflict' is not a term of art. And yet, the latter is probably a fairly accurate descriptive term for a phenomenon which may be defined as cross-border armed violence between a State and a (collective) non-State actor. In light of the more recent experiences that States faced with non-State actors such as the *Kurdish Workers' Party (PKK), Al Qaeda*, the *Hezbullah* and the *Hamas*, there can be no doubt that this phenomenon is a current one. However, and contrary to a widespread perception, the phenomenon is not entirely new. If we go back to the 19th century, the *West Florida* incident of 1818 marks the beginning of a line of cases[1] that, in retrospect, appear to foreshadow the debate that gained adequate prominence only after the horrific attack of September 11, 2001.

The study aims at shedding some light on the (emerging) legal framework governing our phenomenon from three angles. First, the applicable *ius contra bellum* rules will be outlined. This will be followed by a somewhat more detailed treatment of the legal issues pertaining to the *ius in bello* and international human rights. The third part of the piece will be devoted to international criminal law. In order not to unduly expand the scope of the article, the reflections put forward will be of a rather cursory nature. In particular, many more technical details will be left aside. Instead, an attempt will be made to indicate in what way the rules of the aforementioned four bodies of international law could work together to provide for an integrated legal framework.

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1. For a perusal of those cases, see Claus Kreß, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (Berlin: Duncker & Humblot, 1995), p. 218 *et seq*.

In the hope that this may facilitate understanding, the legal considerations will be exposed on the basis of the following hypothetical case scenario:

Arcadia is a State without a functioning government (some would call it a 'failed State') and with quite a number of organized armed groups operating on its soil. One of those groups, the *Anti-Utopia Fighters* (*AUF*), entertains a rather efficient command system, bases and training camps on *Arcadia*'s territory. The *AUF* hits the State *Utopia* through continuous cross-border strikes which are directed against the civilian population and include a great number of suicide attacks. After having suffered massive civilian casualties, the State *Utopia*, which is functioning and generally law abiding, decides to launch a military operation in *Arcadia* to target members of the *AUF* with a continuous combat function[2] and to destroy the latter's military bases in *Arcadia*. The political leadership of the *AUF* resides in the State *Oceania*. At a given moment in time, five members of the *AUF* with a continuous combat function are driving through *Oceania*'s desert without posing the threat of an imminent attack against *Utopia*. Still, *Utopia* sends an unmanned drone to target the five individuals to prevent future attacks. It does so without *Oceania*'s consent and after the latter State had informed *Utopia* about its inability to intern the five individuals.

This example has been chosen for two reasons: First, there is no question of attributing the acts of *AUF* to *Arcadia* under the international law of State responsibility[3]. Conversely, in most problematic cases of the recent past, there was an argument about whether or not the acts of the (seemingly) non-State actors could be attributed to their host State[4]. For

2. The term is borrowed from ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (Geneva, 2009), 16, 32 *et seq*. and to be understood accordingly.

3. For the authoritative view of the ILC on attribution, see James Crawford (ed.), *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), p. 91 *et seq*.

4. On *Al-Qaeda* see Derek Jinks, 'September 11 and the Laws of War', 28 *Yale Journal of International Law* (2003), 1 (12 *et seq*.) v. Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), p. 49; on *Hezbollah*, see Tom Ruys, 'Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self-Defense against Hezbollah', 43 *Stanford Journal of International Law* (2007), 265 (274 *et seq*.); on both, see Marco Sassòli, 'Transnational Armed Groups and International Humanitarian Law', *Harvard University Program on Humanitarian Policy and Conflict Research Occasional Papers Series* (Winter 2006) Number 6, 4 *et seq*.; there has been little argument, however, about the non-attributability of *PKK* acts to Iraq; see Costas Antonopoulos, 'The Turkish Military Operation in Northern Iraq of March-April 1995 and the International Law on the Use of Force', 1 *Journal of Conflict and Security Law* (1996), 33 (52 *et seq*.).

the purposes of this study, there is no need to enter into the debate on effective v. overall control[5]. Neither will an attempt be made to explore the emergence of a special rule of attribution for cases of transnational armed violence[6]. Second, in the hypothetical case scenario, the legal status of the State, which has suffered non-State armed violence, is not affected by any argument of (prior) illegal conduct such as colonialism, racism or illegal occupation. This, again, is analytically helpful as the legal and political debate about instances of prior State practice is very often clouded by the controversies surrounding the status of the host State[7]. It is thus hoped that the example will help us to focus on the legal questions pertaining to transnational armed violence pure and simple.

2. *Ius Contra Bellum*

The question whether non-State actors are bound by the prohibition on the use of force shall be dealt with rather quickly. It is submitted, that the answer must be negative[8]. Even the most recent practice does not support the position that the meaning of Art. 2 (4) of the UN Charter has undergone a fundamental extension through subsequent practice. Accordingly, the customary prohibitions on the use of force also remains confined to the conduct of States. In the example, *AUF* has thus not violated the prohibition on the use of force. This, however, is not a legal question of paramount practical importance.

1. The Right to Self-Defence against Non-State Armed Attacks

What matters, is whether *Utopia* is entitled under international law to respond to *AUF*'s violence through the use of armed force on the territory of *Arcadia* without hereby violating the international prohibition on the use of force. It is submitted, that it is so entitled. This position rests on the

5. For the latest pronouncement of the ICJ, see Judgment of 26.2.2007, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), § 385 *et seq*. (and, in particular, § 399 *et seq*.); for a critique, see *Antonio Cassese*, The *Nicaragua* and *Tadic* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *European Journal of International Law* (2007), 649.

6. On this question, see Tal Becker, *Terrorism and the State. Rethinking the Rules of State Responsibility* (Oxford and Portland, Oregon: Hart Publishing, 2006), p. 231 *et seq*. v. Marja Lehto, *International Responsibility for Terrorist Acts. A Shift Towards More Indirect Forms of Responsibility* (Rovaniemi: Lapland University Press, 2008), p. 486 *et seq*.

7. We have demonstrated this at length in our study *supra* n. 1, p. 42 *et seq*. (130).

8. For a (perhaps) different position, see Anne-Marie Slaughter/William Burke White, 'An International Constitutional Moment', 43 *Harvard International Law Journal* (2002), 1.

ground that Art. 51 of the UN Charter enshrines a right to self-defence against armed attacks carried out by non-State actors even when those acts cannot be attributed to the host State. This is a controversial position[9] and the ICJ has yet to pronounce itself clearly on the matter[10]. It is thus a position that would deserve being explained at length. In order not to unduly expand the scope of this article, however, the point will not be argued in detail here. Instead, reference is made to a monograph that this author has devoted to the subject a while ago[11]. Suffice it to say that the reading of Art. 51 of the UN Charter, which is adopted in this study, is borne out both by a textual interpretation and by the close inspection of the international practice since the UN Charter's entry into force. It will perhaps sound provocative to some, but it is respectfully submitted that this reading of Art. 51 of the UN Charter is only confirmed, but does not result from the international reaction to the armed attack on the USA on September 11, 2001. In fact, a right to self-defence against non-State armed attacks already existed before the occurrence of this incident[12].

2. The Conditions and the Scope of the Right to Self-Defence against Non-State Armed Attacks

The crucial question is about the conditions and the scope of the right to self-defence against non-State armed attacks. Those must reflect the specificities of 'transnational' self-defence action to respond to a non-State armed attack.

a) The Requirement of Large-Scale Armed Violence

First, the cross-border armed violence must be large-scale[13]. However, in the case of a series of non-State attacks over time, none of which is large-scale on its own, a State may have recourse to self-defence if it can

9. For only one detailed argument against a right to self-defence against non-State armed attacks, see Christiane Wandscher, *Internationaler Terrorismus und Selbstverteidigungsrecht* (Berlin: Duncker & Humblot, 2006), p. 178, 243; for a nuanced position, see Marja Lehto, *supra* n. 6, p. 492 *et seq*.

10. Cf. the dilatory *dictum* in ICJ, Judgment of 19.12.2005, *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), § 147; cf., however, for the position adopted in the above text, Judge Kooijmans, *ibid*., *Separate Opinion*, §§ 36 to 31, and Judge Simma, *ibid*., *Separate Opinion*, §§ 7 to 13.

11. *Supra* 1, p. 274 *et seq*. and *passim*; developments after 1994, especially after September 11, 2001 have confirmed this position; for a helpful analysis of those developments, see Christian J. Tams, 'The Use of Force against Terrorists', 20 *European Journal of International Law* (2009), 378 *et seq*.

12. For perhaps the clearest position of the same view, see Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: Cambridge University Press, 1988), p. 221 *et seq*. (cf. p. 244 *et seq*. of the 4th ed., 2005).

13. For the same view, see Judge Kooijmans, ICJ, Judgment of 19.12.2005, *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), *Separate Opinion*, § 29; Judge Simma, *ibid*., *Separate Opinion*, § 13.

demonstrate that the attacks emanate from the same non-State group[14]. This requirement of a quantitative threshold, which, contrary to the view held by the ICJ since *Nicaragua*, does not apply in cases of cross-border armed violence carried out by a State[15], mirrors the threshold to be passed to transform internal turbulences into a non-international armed conflict. Such a heightened threshold stems from the critical role of the State on whose territory terrorists operate and the primary responsibility of such a State for the prevention and suppression of such acts. It recognizes that such a State is on the receiving end of a self-defence response and ensures that self-defence and the consequences for public order that flow from a military response are not triggered too soon[16]. Without going into any detail, State practice concerning the transnational violence carried out by the *PKK* against *Turkey*, by *Hezbollah* and *Hamas* against *Israel* and by *Al Qaeda* against the *United States of America* on September 11, 2001 indicates what this quantitative threshold looks like.

b) The Subsidiarity of the Right to Self-Defence as part of the Necessity Requirement

Second, self-defence against a non-State armed attack is necessary only if the attack cannot be repelled or averted by the State from whose territory the non-State group operates[17]. States relying on self-defence, therefore, must show that the territorial State's action is not effective in countering the non-State threat[18]. Whether this is the case depends on circumstances such as the nature and gravity of the threat, including the territorial State's attitude *vis-à-vis* the group operating on its territory.

14. For a detailed argument on the so-called accumulation of events doctrine, see Claus Kreß, *supra* n. 1, p. 196 *et seq*.; for a helpful fresh look at the issue, see Christian J. Tams, *supra* n. 11, 388 *et seq*.

15. For the unconvincing view espoused by the ICJ, see Judgment of 27.6.1986, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), *ICJ Reports* 1986, p. 14 (101 [§ 191]); Judgment of 6.11.2003, *Case Concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), p. 161 (186 *et seq*. [§ 51]); for critiques, see Claus Kreß, *supra* n. 1, p. 187 *et seq*.; Yoram Dinstein, *supra* n. 12, 4th ed., p. 193 *et seq*.

16. This position is not uncontroversial. Although he does not deal with the argument set out in the above text explicitly, it would seem that Yoram Dinstein, *supra* n. 12, p. 244, does not confine the right of self-defence against non-State armed attacks to instances of large-scale non-State violence.

17. It should be noted that a weak host State for the non-State actors may well wish to secure the logistical support of the State that is under the non-State armed attack in order to repel this attack.

18. This requirement is probably implied when Yoram Dinstein, *supra* n. 12, 4th ed., p. 250, writes: 'The absence of alternative means for putting an end to the operations of the armed bands or terrorists has to be demonstrated beyond reasonable doubt'.

c) The Proportionality Requirement of the Right to Self-Defence

Third, and this is true at least where the host State is not actively supporting the non-State group, the self-defence measures must be directed exclusively against the non-State group responsible for the armed attack in question[19]. In addition, as a matter of principle and in light of State practice, a case can be made that the standard of strategic proportionality regarding the acceptable overall damage caused to civilians as a result of the exercise of the right to self-defence must be more stringent than in a case of self-defence against an armed attack carried out by another State[20].

d) The Territorial Limitation of the Right to Self-Defence

Finally, but very importantly, the right to self-defence against a non-State armed attack justifies a forcible response only on the territory of the State from whose territory the non-State armed attack occurs. The mere presence of members of the violent non-State group on the territory of a third State and even isolated armed violence carried out by those members from within this third State do not amount to a non-State armed attack emanating from that third State and do thus not warrant self-defence action by the target State on the territory of that third State.

A possible counter-argument would be that this implies an artificial distinction between several armed attacks while there is in reality only *one* non-State armed attack emanating from two host States. Yet, the distinction drawn is a necessary one in light of the fact that the exercise of the right of self-defence must be specifically justified *vis-à-vis* every State on whose territory self-defence action is taken. It must, therefore, be shown that the non-State armed violence emanating from this latter State has reached (or is about to reach) the required quantitative threshold. In this respect, the situation is comparable to one that raises legal issues of neutrality in a case of inter-State armed violence, i.e. a case where State A, which is under armed attack by another State B, considers taking self-defence action on the territory of a neutral State C. The legality of such action under the *ius contra bellum* presupposes that B's conduct carried out from within the territory of C amounts in and of itself to an armed attack against A[21].

19. Claus Kreß, *supra* n. 1, p. 235, 292; for the same view, see Yoram Dinstein, *supra* n. 12, 4th ed., p. 250.

20. The principle should be that the requirement of strategic proportionality must be most stringent when there is only (and at best) nominal responsibility of the State, from whose territory the non-State armed attack emanates, for this attack. Such is the case where a ('failed') State is unable to prevent the non-State armed attack. The term 'nominal responsibility' is borrowed from Yoram Dinstein, *supra* n. 12, 4th ed., p. 245.

21. Michael Bothe, 'The Law of Neutrality', in: Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford: Oxford University Press, 2nd ed., 2008), p. 581.

The suggested geographical limitation ensures that the right to self-defence against non-State attacks will only exceptionally evolve into a right to use force on the territory of more than one State. To clarify that point with a view to '9/11': If it is assumed that the armed violence carried out by *Al Qaeda* against the *US* could not be attributed to the State of *Afghanistan*, it constituted a non-State armed attack against the *United States of America* emanating from *Afghanistan*. This armed attack carried out by *Al Qaeda* from *Afghanistan* might well have begun before and was likely to continue after September 11, 2001 as long as *Al Qaeda* preserved its quasi-military infrastructure in that country[22].

Returning to our hypothetical case scenario, the situation under the *ius contra bellum* is thus as follows: *Utopia* did not violate the international prohibition on the use of force through its military operation in *Arcadia* against members of the *AUF*'s and against its bases. However, in the absence of a (non-State) armed attack emanating from *Oceania*, *Utopia* could not rely on self-defence to justify the use of force on the territory of *Oceania* directed against the five *AUF* members travelling in that State.

3. *Ius in Bello* and International Human Rights Law

As was stated at the outset, it is the purpose of this article to look at transnational armed conflict from all relevant legal angles. This leads to the question whether *Utopia*, in its forcible response to the non-State armed attack, acted in conformity with the law of armed conflict and/or international human rights law. Now the focus is no longer on the international legal protection of the territorial integrity of *Arcadia* and *Oceania*, but on the protection international law provides for the individuals concerned[23]. The first aspect to clarify is the applicable armed conflict and/or human rights framework once transnational armed violence has

22. There is the famous '*Hamburg*'-argument according to which *Al Qaeda*'s armed attack also emanated from *Germany* because of the substantial involvement of the '*Hamburg* cell' in the violent operation. This argument cannot simply be ignored. It, first, underlines the need to further elaborate the criteria for establishing the territorial origin of a non-State armed attack. Second, if, *arguendo*, *Al Qaeda*'s armed attack of September 11, 2001 also emanated from *Germany*, it is worth stating that there was no indication that this armed attack was likely to be continued from *Germany* with this State being unwilling or unable to suppress it. This, however, would have been necessary to seriously raise the question of a right of the *United States of America* to use armed force in self-defence on *Germany*'s soil.

23. This is irrespective of the more technical legal question as to whether the law of armed conflicts provides for *international rights* of the protected individuals.

erupted. To begin with, the potentially triangular legal relationship between *Arcadia*, *Utopia* and the *AUF* will be looked at from an armed conflict perspective.

1. The Problems with a 'Pure International (Inter-State) Conflict Model'

One way to deal with the matter is to adopt a straight-forward international (inter-State) armed conflict model[24]. According to such a model, there exists only an international armed conflict between the State which suffers non-State armed violence (here: *Utopia*) and the State on whose territory the non-State group operates (here: *Arcadia*). This international armed conflict is triggered not by the transnational non-State violence (here: by the *AUF*) but only by the use of force carried out by *Utopia* on *Arcadia*'s territory without the latter's consent. The lack of actual fighting between those two States is irrelevant[25].

There are at least two noteworthy consequences flowing from such an approach. *First*, the attacks carried out by the members of *AUF* before the forcible response by *Utopia* could not be classified as war crimes because, at this moment in time, there was not yet an armed conflict at all. *Second*, the *AUF* fighters would have to be considered as civilians within the meaning of Article 51 of the First Additional Protocol to the Geneva Conventions (*AP I*) because they did not 'belong' to *Arcadia* within the meaning of Art. 4 § 2 of the Third Geneva Convention (GC III)[26]. As a result hereof, those fighters could be targeted only '*for such time as they take a direct part in hostilities*' (Art. 51 [3] AP I).

There are significant problems with this 'pure international (inter-State) armed conflict model'. It seems highly artificial, to say the least, to qualify the non-State fighters, i.e. those who actually fight on one side of the conflict as civilians taking a 'direct part in hostilities' when there are no actual hostilities between two States. Apart from distorting the actual situation of hostilities, the 'pure international armed conflict model' would severely hamper the exercise of the right to self-defence under Art. 51 of the UN Charter, because it would restrict the power of the self-defence State to target the non-State fighters to the period of time in which they take a direct part in hostilities[27]. In our case scenario, *Utopia* would have to confine the targeting of members of the *AUF* for 'such time' as they

24. This would seem to be the position taken by Yoram Dinstein, *supra* n. 12, 4th ed., p. 245, who specifies that the international armed conflict is 'short of war'.

25. Marco Sassòli, *supra* n. 4, 5; this, however, constitutes a bone of contention to which I shall come back *infra sub* 3.

26. Cf. the analysis conducted by Marco Sassòli, *supra* n. 4, 11 *et seq*.

27. For an excellent elaboration upon this fundamental point, see David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', 16 *European Journal of International Law* (2005), 189 *et seq*. One could, of

take a direct part in the hostilities. It is submitted that such a limited power is inadequate to deal with 'hit and run-scenarios' and that it is not accepted in State practice[28]. Finally, it would appear somewhat incoherent to subject the conduct of hostilities by the organs of the self-defence State to the law of war crimes while excluding the initial armed attack by the non-State forces from this body of law.

2. The Merits of a 'Pure (Transnational) Non-International Armed Conflict Model'

This model[29] would start from the following premise set out by *Roy S. Schöndorf* in an extraordinarily thoughtful study on the subject of transnational armed violence:

> *[C]haracterizing the situation as an armed conflict between states, when the real conflict is between the state and a non-state actor, is an artificial solution which is in many respects a symptom of the larger difficulty with the position of non-state actors in international law*[30].

Instead, the 'pure non-international armed conflict model' would recognize the existence of an armed conflict only between the non-State actors (here: *AUF*) and their target State (here: *Utopia*).

Contrary to the position taken (at least originally) by the *Bush* administration in the *US*[31] and by the *Supreme Court of Israel*[32], this type of

course, try to remedy this problem by a 'membership' approach to the construction of the requirement of 'for such time'. This is, essentially, the line taken by the Supreme Court of Israel Sitting as the High Court of Justice, Judgment of 11.12.2005, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, HCJ 769/02 (for an English translation, see http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf [visited on 10.1.2010]), § 39. However, it is less than easy to reconcile such an interpretation with the natural meaning of the words 'for such time as they take a direct part in hostilities'. Therefore, it is quite plausible that the ICRC's Direct Participation study (*supra* note 2, p. 17, 43 *et seq.*) has essentially endorsed the 'specific acts' approach.

28. Similarly, Yoram Dinstein, *supra*, n. 12, 4th ed., recognizes the possibility of a certain 'interval between the armed attack and the forcible response'. This author does not explain, however, how this exercise of the right of self-defence may be reconciled with his 'pure international armed conflict model'.

29. For an exposition of this model, see Andreas Paulus/Mindia Vashakmadze, 'Asymmetrical War and the Notion of Armed Conflict - a Tentative Conceptualization', 91 *International Review of the Red Cross* (2009), 112.

30. 'Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?', 37 *New York University Journal of International Law and Politics* (2004), 26.

31. See e.g., George W. Bush, Memorandum: Humane Treatment of Al Qaeda and Taliban Detainees, 7.2.2002, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf (visited on 10.1.2010), § 2 c.

32. *Supra*, n. 27, § 18.

conflict would not be classified as international in character just because of its transnational nature. According to Common Article 2 of the *GCs* and the underlying customary international law, the concept of international armed conflict implies the existence of armed violence between two States and because there is no evidence to suggest that this basic requirement could have undergone a fundamental change through subsequent practice and that it now includes every form of cross-border armed violence of a certain degree of intensity[33].

Instead, the transnational armed violence between the non-State actor and its target State would be classified as non-international armed conflict. At this juncture, the legal analysis enters into an area of legal uncertainty because it cannot be denied that the idea of a 'transnational' non-international armed conflict is supported neither by the genesis of Common Art. 3 of the *GCs* nor by the text of Art. 1 § 1 of *AP II*.

And yet, there can be little doubt that the concept of 'transnational' non-international armed conflict captures best the situation of intensive cross-border violence between an organized non-State group and a State: First, it would reflect the basic fact that the actual hostilities are between a non-State group (here: *AUF*) and a State (here: *Utopia*). Second, it would reflect the fact that the State acting in self-defence (here: *Utopia*) is actually doing what the territorial State (here: *Arcadia*) should have done in the first place. Had the territorial State acted according to its international obligation to prevent non-State actors to use its soil to launch an armed attack upon another State and had it been necessary to use the military to fulfil this obligation because of the strength of the non-State armed group, there would have been a non-international armed conflict. It is hard to see why the legal situation should be fundamentally different just because the self-defence State acts in place of the territorial State. Third, and importantly, the classification of the transnational armed violence as non-international armed conflict would allow for the application of a more realistic targeting rule because it is then possible to recognize the existence of non-State armed forces (here: the 'armed forces' of the *AUF*) and to allow the State party to the armed conflict (here: *Utopia*) to target non-State fighters with a continuous combat function at any time during the armed conflict[34]. Only such a rule of targeting complements

33. For early expressions of the same view, see Marco Sassòli, *supra* n. 4, 4 *et seq*.; Jelena Pejic, 'Terrorist Acts and Groups: A Role for International Law?', 75 *The British Year Book of International Law* (2004), 81 *et seq*.

34. ICRC, *supra* n. 2, p. 16, 32 *et seq*., but see also 77 *et seq*. For the purpose of this study, it is not necessary to enter into the debate whether the notion of 'continuous combat function' as developed in the ICRC's Direct Participation study constitutes the best and most

(instead of undermines) the right to self-defence against non-State actors under Art. 51 of the UN Charter. Fourth, the 'non-international armed conflict model' allows for a truly symmetrical application of war crimes law in case of massive transnational armed violence. With the powerful precedent of the US Supreme Court's decision in *Hamdan v. Rumsfeld, Secretary of Defense, et al*.[35], with a sound basis on basic principles of the armed conflicts, and with a growing measure of scholarly support[36] there is now reason to expect that customary law might continue to evolve towards fully endorsing the idea of 'transnational' non-international armed conflicts.

It is readily admitted that the recognition of the concept of 'transnational' non-international armed conflict does not automatically yield answers to all thorny questions that arise. The perhaps most burning issue is that of the legal basis and the conditions for preventive detention of non-State fighters[37]. An argument can be made that the detention regime for non-international armed conflict can be built on the premise that there is an inherent power to detain as a corollary of the power to target. The substantive test for preventive internment should be 'imperative reasons of security' (cf. Arts. 78 and 42 *GC* IV) and the procedural safeguards should include, in particular, a right to challenge the lawfulness of the internment before an independent and impartial body and the right to periodical review of the lawfulness of continued detention on an individualized basis[38]. This, however, is a controversial proposition and the issue will certainly remain open to debate for the time to come. This, however, only underlines the need to come up with solutions for the detention issue in non-international armed conflicts in general. It does not provide for a compelling argument against the concept of 'transnational' non-international armed conflict.

practicable way to define the membership in non-State armed forces; for a sceptical view, see Michael Schmitt, 103 *The American Journal of International Law* (2009), 817.

35. Judgment of 29.6.2006, 548 US (2006), 67.

36. See e.g., Andreas Paulus/Mindia Vashakmadze, *supra* n. 29, 95; Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008), p. 257 *et seq*., 261; Marco Sassòli, supra n. 4, 8 *et seq*.; David Kretzmer, *supra* n. 22, 194 *et seq*.; Jelena Pejic, *supra* n. 33, 85 *et seq*.; Derek Jinks, *supra* n. 4, 1; for a contrary view, see Marko Milanovic, 'Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the Israeli *Targeted Killing*s Case', 89 *International Review of the Red Cross* (2007), 381.

37. For some recent thoughts on this topic, see Geoffrey Corn/Eric Talbot Jensen, 'Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations', 42 *Israel Law Review* (2009), 74 *et seq*.

38. For the best treatment of the issue and for the details, see Jelena Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence', 87 *International Review of the Red Cross* (2005), 375.

It should be added that the 'pure non-international armed conflict model' will necessarily reach its limits in the following three situations which all go beyond our hypothetical (failed State) case scenario: In case of an armed confrontation between the armed forces of the State acting in self-defence (here: *Utopia*) and the armed forces of the host State (here: *Arcadia*), in case of capture and detention of armed forces of the State acting in self-defence by the host State and in case of an occupation of a part of the host State's territory by the State acting in self-defence. In all three cases the law of international armed conflict must apply and hereby 'the pure non-international armed conflict model' would be replaced by a model under which the laws of international and of non-international armed conflict apply concurrently ('concurrency-model'). This, however, does not reveal a flaw of the 'pure non-international armed conflict model'. It simply reflects the basic fact that the 'pure non-international armed conflict model' can only apply as long as its premise holds true, that is the absence of elements of an actual inter-State armed conflict. As soon as this premise fails due to the existence of elements of a genuine inter-State armed conflict, the 'concurrency model' must govern the situation[39].

3. The Doubts Regarding the Need for a New and Sui Generis *'Law of Extra-State Armed Conflict' or 'Transnational Armed Conflict'*

In two recent studies it has been argued that transnational armed violence requires us to overcome the traditional dichotomy between international and non-international armed conflict and to recognize the emergence of a third category of armed conflict. While *Schöndorf* suggests the use of the term 'law of extra-State armed conflict'[40], *Geoffrey Corn* and *Eric Talbot* prefer the term 'transnational armed conflict'[41] (so that the title of this article would finally turn into a term of art).

Yet, a new category of armed conflict law should only be recognized in case of a compelling need and, as of yet, such a need would not seem to have been clearly established. *Geoffrey Corn* and *Eric Talbot* fail to provide an elaborate argument in order to demonstrate the advantages of their suggested model over a 'pure non-international armed conflict model'. *Schöndorf*, however, makes the following point:

39. The considerations in the above text regarding the delimitation between the 'pure non-international armed conflict model' and the 'concurrency model' refine the analysis put forward in Claus Kreß, 'Völkerstrafrecht der dritten Generation gegen transnationale Gewaltakte Privater?, in: Gerd Hankel (ed.), *Die Macht und das Recht. Beiträge zum Völkerrecht und Völkerstrafrecht am Beginn des 21. Jahrhunderts* (Hamburger Edition, 2008), p. 391 *et seq*.

40. Roy S. Schöndorf, *supra* n. 29, 1.

41. Geoffrey Corn/Eric Talbot Jensen, *supra* n. 36, 46.

[D]oubts arise whether the rules regulating the protection of non-combatants in intra-state armed conflicts are appropriate for hostilities that take place outside the territory of the state. In this respect, the parallel to inter-state armed conflicts is more compelling[42].

This is an important argument. It can, however, be countered on two levels. First, it can be argued that the law of non-international armed conflict would have to apply, whatever its limits regarding the protection of non-combatants, where the host State (here: *Aracadia*) would, through the use of the military instrument, fulfil its international duty to prevent the non-State group (here: *AUF*) from attacking the foreign State (here: *Utopia*). If the limits of non-international armed conflict law had to be accepted in this case, why should it be different where the foreign State acts in place of the host State? Second, it is submitted that the premise of *Schöndorf*'s argument, that the law of non-international armed conflict suffers from significant shortcomings regarding the protection of non-combatants, no longer holds true. Irrespective of controversies in detail, there can be little doubt that the *ICRC*'s *Customary Law study*[43] is right to acknowledge that, under customary law, there are no longer important differences between international and non-international armed conflict law regarding the conduct of hostilities. For example, the principles of distinction and of proportionality now apply essentially in the same way in international and non-international armed conflicts[44]. A good case can be made to go even one step further and to argue that a 'non-international armed conflict model' offers a better prospect for enhanced non-combatant protection than an 'international armed conflict model'. The reason for this prospect lies in the fact that the *lex specialis* character of the targeting and detention rules of armed conflict law *vis-à-vis* the much more restrictive standards of international human rights law is much more firmly established in a situation of international armed conflict than it is with respect to all situations of non-international armed conflict. I shall return to this issue shortly (*infra sub* 5.)

4. Transnational Armed Violence and the Threshold for the Applicability of a 'Non-International Armed Conflict Model'

It is of crucial importance to determine the threshold that must be met to apply the non-international armed conflict model to the targeting of non-State fighters in the course of an operation of self-defence.

42. Roy Schöndorf, *supra* n. 29, 40.

43. Jean-Marie Henckaerts/Louise Doswald-Beck (eds.), *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), *passim*.

44. Jean-Marie Henckaerts/Louise Doswald-Beck, *supra* n. 42, Volume I: Rules, p. 3 *et seq*.

It is useful to first place this question in context and to look at it from a perspective of the interplay between the *ius contra bellum* and the *ius in bello* side. When doing so, two theoretical possibilities can be recognized which, for the sake of convenience, will be called 'congruity' and 'discrepancy model'.

Under the 'congruity-model', the *ius contra bellum* threshold for the use of self-defence against a non-State attack and the *ius in bello* threshold for the application of the law of non-international armed conflict are identical. This would mean that the occurrence of a non-State armed attack within the meaning of Art. 51 of the UN Charter would inevitably trigger the applicability of the law of 'transnational' non-international armed conflict. Such congruency would certainly reduce legal complexity. Yet, it must be recognized that the congruity model does not apply as a matter of logical necessity. Given the conceptual distinction between the *ius contra bellum* and *ius in bello* one can also conceive of a somewhat lower threshold for the right to self-defence against a non-State armed attack compared to the threshold for the applicability of the law of non-international armed conflict. Within the area of 'discrepancy', the targeting and the detention of non-State fighters carried out in the exercise of the right to self-defence would then, however, be an exercise of extra-territorial law-enforcement which would be governed by international human rights law[45].

Scholarly honesty requires us to recognize the significant difficulty to deduce from the relevant international practice a clear answer to the question as to whether the 'congruity' or the 'discrepancy model' better reflects the *lex lata*. It can be said, however, that there are two important reasons to believe that any possible area of discrepancy would be rather limited. The first reason is that the right to self-defence against a non-State armed attack requires large-scale transnational non-State violence (*supra sub* II. 2. (a)). The second reason is that the more recent international practice concerning the *ius in bello* suggests that the threshold for the application of the whole body of customary non-international armed conflict law, including the rules on the conduct of hostilities, cannot be far away from that of *ius contra bellum*. This recent practice is illuminating in two respects. First, it does not support the idea that the legal quality of

45. For the purposes of this study, it is not necessary to deal with the controversies surrounding the (possible) extra-territorial scope of application of certain international human rights instruments; for a recent study on the subject, see Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', 8 *Human Rights Law Review* (2008), 411. Instead, it suffices to say that, as a matter of principle and customary international law, the targeting of individuals must be subjected to the limits of the international human right to life if this targeting occurs outside an armed conflict.

non-State party to a non-international armed conflict could depend on the *willingness* (instead of the *capability*) of the respective organization to generally comply with that body of law[46]. This international practice leads to the application of non-international armed conflict law even in the absence of the slightest hope that this body of law will be applied symmetrically on the ground. One may wonder why States clearly tend to accept the applicability of a 'symmetrical legal regime' in cases of 'asymmetrical compliance'. Probably the position of States can be explained by the simple and quite understandable reason that they do not wish to lose the advantages flowing from an armed conflict model in the areas of targeting and detention because the enemy non-State armed group follows a strategy of terrorising the civilian population in complete defiance of armed conflict law[47]. Second, the more recent international practice, including, in particular, the evolution of the law on war crimes committed in non-international armed conflicts[48] starting with the ICTY's landmark decision in the *Tadic*-case[49], suggests that, in terms of the intensity of the violence and the degree of organization of the non-State group, the threshold for the application of the customary law of the conduct of hostilities in non-international armed conflict is now below that of Art. 1 § 1 of the First Additional Protocol to the Geneva Conventions (AP I) and probably tends to become more or less congruous with that of Common Art. 3 *GC*s[50]. At first glance, this expansion of the scope of application of the law of non-international armed conflict may seem surprising because it implies the recognition by States to be bound by quite a wide range of obligations

46. For a very clear statement to this effect based on a careful analysis of the pertinent international practice, see ICTY, *Prosecutor v. Boskoski et al*., Judgment of 10.7.2008, IT-04-82-T, § 205.

47. There is only one viable alternative to cope with this problem. This would be the acceptance of a new asymmetrical legal regime of (extra-territorial) law enforcement which would, despite its theoretical starting point at human rights law incorporate certain armed conflict powers of targeting and detention; for an exposition of the contours of such a new legal regime, see Claus Kreß, *supra* n. 39, p. 397 *et seq*.

48. Claus Kreß, 'War Crimes Committed in Non-International Armed Conflicts and the Emerging System of International Criminal Justice', 30 *Israel Yearbook on Human Rights* (2000), 103.

49. According to the now famous definition suggested by the ICTY, 'an armed conflict exists whenever there is a resort to armed force between States or *protracted armed violence between governmental authorities and organized armed groups or between such groups within a State* (emphasis added)'; ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-91-1-AR72, § 70.

50. For two helpful scholarly statements pointing (with nuances) in the same direction, see Andreas Paulus/Mindia Vashakmadze, *supra* n. 29, 95; Robin Geiß, 'Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties', 91 *International Review of the Red Cross* (2009), 127.

flowing from international humanitarian law already in Common Art. 3 types of armed conflict. Yet, in light of the (perceived) threat posed by violent non-State actors, States seem to be more interested in availing themselves of the wider powers they can derive from the application of the law of non-international armed conflict (compared to international human rights law) than they are concerned by the restraining effect of the ensuing obligations. It follows that the *AUF*, to take again our hypothetical example, can be considered to be a party to a non-international armed conflict although it systematically defied the most basic principles of the conduct of hostilities.

This State practice reveals a fundamental change of perspective regarding the application of the law of non-international armed conflict that has recently been highlighted by *David Kretzmer* in a most important study[51]. In a nutshell: When Common Art. 3 was included in the *GCs* in 1949, the basic question was to what extent States were prepared to accept restrictions in an area which was not yet governed by (hard) international human rights law. Nowadays, however, the primary effect of the application of the law of non-international armed conflict is no longer the imposition of legal restraints because the now existing *lex generalis* of international human rights law contains restraints that very significantly exceed those of armed conflict regarding targeting and detention. Instead, for States which are faced by a non-State armed attack, the resort to the armed conflict model offers the advantage of applying, as the *lex specialis*, a targeting and detention regime which is appreciably more permissive than that under international human rights law.

It is submitted that this crucially decisive point must be borne in mind when the situation arises as to whether a conflict situation is to be classified as one of armed conflict. In particular, the call for 'as wide as possible' a scope of application for 'international humanitarian law' has become dangerously simplistic. Very much to the contrary, a reasonable threshold for the application of the customary law of non-international armed conflict requires the insistence on a degree of quasi-military organization of the non-State party that enables it to carry out large-scale armed violence in a coordinated manner. In that respect, the ICTY has developed a sensible set of indicative factors in *Prosecutor v. Boskoski et al.*[52].

On that basis, *Al Qaeda* may in 2001 have qualified as a party to a non-international armed conflict as long as it was based in *Afghanistan* in the form of a quasi-military organization. This legal status would have

51. David Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts', 42 *Israel Law Review* (2009), 8.

52. *Supra* n. 46, § 194 *et seq.*

certainly been lost, however, as a consequence of *Al Qaeda*'s subsequent transformation into a rather loosely connected network of terrorist cells. And most certainly, individual terrorist action all over the globe carried out on the basis of an '*Al Qaeda* franchise-model' cannot be attributed to *Al Qaeda* as a non-State party to a non-international armed conflict of global reach.

In our little case scenario, however, there can be little question that the organization of *AUF* and the level of transnational armed violence was such that it triggered the applicability of the law of (non-international) armed conflict.

5. Tempering the Application of the Armed Conflict Model or: the (Possible) Relevance of International Human Rights Law

Finally, the above-mentioned fundamental change of perspective regarding application of the law of non-international armed conflict begs the question whether the relationship between the law of non-international armed conflict and international human rights law can be simply one of *lex specialis derogat lex generalis* in the most sensitive areas of targeting and detention in all circumstances. Despite all remaining uncertainties, the jurisprudence of the ICJ suggests such a legal relationship with respect to targeting and detention in situations of international armed conflict[53].

It is submitted that the application of the *lex specialis* rule also makes much sense in situations of high-level non-international armed conflict, that is, in particular, non-international armed conflicts passing the threshold of Art. 1 § 1 *AP II*. The picture becomes more cloudy, however, with respect to low-level non-international armed conflicts. Here, the situation may differ from the typical armed conflict scenario in at least two important respects: The State party to the conflict may exercise a degree of territorial control over the 'zone of operation' and the identification of non-State fighters with a continuous combat function may pose significant difficulties for lack of 'fixed distinctive signs recognizable at a distance'. These differences may well require us to somewhat temper the armed conflict regime of targeting[54]. In its *Direct Participation study*, the *ICRC*

53. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8.7.1996, ICJ Reports 1996, p. 240 (§ 25); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9.7.2004, ICJ Reports 2004, p. 180 (§ 106).

54. In a way, it may be said that the same applies in the case of detention. If we compare the evolving detention regime for individual members of a non-State party to a non-international armed conflict (cf. the text accompanying *supra* n. 38) to the prisoner of war regime in international armed conflict, we recognize that the basic power to detain prisoners of war until the end of hostilities without a continuous review on an individualized basis does not apply in cases of non-international armed conflict. The detention regime

has tried to develop the necessary qualification from within the armed conflict model by reviving the restraining potential of the principle of military necessity[55]. The *Supreme Court of Israel*, in its 'Targeted Killing decision' has reached quite similar results, but has approached the matter from the angle of international human rights law and has arrived at what may be called a mixed armed conflict and international human rights model for certain cases of 'transnational armed violence'[56]. We shall not here elaborate as to which theoretical starting point is preferable. Suffice it to say that both attempts capture an important need for sophistication of the targeting regime in certain low-level non-international armed conflicts and point towards a reasonable solution[57].

6. On the Geographical Scope of a 'Transnational' Non-International Armed Conflict

Until this point of the armed conflict and international human rights law analysis of our hypothetical case scenario, we have not touched upon the fact that *Utopia* also targeted five individuals on *Oceania*'s soil. Before looking into this matter, it is useful to restate the finding under the *ius contra bellum* (from *supra* 2. *in fine*) that this use of force violated the prohibition on the use of force. It bears emphasizing that this conclusion holds true irrespective of the legal conclusions drawn under the law of armed conflict and/or international human rights law.

The question which will be discussed in the following is, therefore, only whether the targeted killing of the five individuals in *Oceania* was illegal for a second reason. This second level of analysis, of course, becomes crucially important where the host State (here: *Arcadia*) consents to an operation of targeting killing. In such a case, there is no violation of the prohibition on the use of force, so that the question of legality or illegality hinges upon the result reached under the law of armed conflict or under international human rights law.

In turn, the law of armed conflict, if at all applicable, could provide for the *lex specialis* concerning the targeting of the five individuals. Under the 'pure international armed conflict model' (*supra sub* 1.), the first question would be whether the targeted killings triggered the application of the law

applying in the latter context may well be significantly more permissive than under stringent human rights standards, but with respect to the basic power it is still closer to a human rights regime than the prisoner of war model.

55. *Supra* n. 2, p. 77 *et seq*.

56. *Supra* n. 27, § 40.

57. For an early statement pointing in this direction, see David Kretzmer, *supra* n. 27, 201 *et seq*.; for more recent statements of a similar kind, see Marko Milanovic, *supra* n. 36, 389 *et seq*.; Andreas Paulus/Mindia Vashakmadze, *supra* n. 29, 119 *et seq*.

of international armed conflict between *Utopia* and *Oceania*. The answer to this question would depend on the acceptance or not of a minimum threshold as regards the intensity of violence also for international armed conflicts. Assuming that there is no such threshold, international armed conflict law would govern the targeting as the *lex specialis*. The five individuals would then have to be qualified as civilians (*supra sub* 1.) and its targeting would be illegal because they did not take a direct part in the hostilities when targeted. As a consequence hereof, the targeted killings could also give rise to individual criminal responsibility as war crimes of intentionally attacking civilians committed in an international armed conflict.

However, as was pointed out above (*supra sub* 2.), the preferred model to deal with large scale transnational armed violence is the 'pure non-international armed conflict model'. Under this model, the five individuals are to be classified as members of a non-State party to the conflict and could, in principle, be targeted at any time under the *lex specialis* of the armed conflict law. The key question is whether this targeting rule also applied in *Oceania* even though the *AUF* had no significant military presence on the latter State's soil and even though, as a corollary hereof, the *AUF* had not launched an armed attack on *Utopia* from *Oceania*'s territory. It is submitted that in light of these factual circumstances, the geographical scope of the non-international armed conflict between the *AUF* and *Utopia* did not extend to the territory of *Oceania*. In other words: The mere presence of non-State fighters on the territory of a third State (here: *Oceania*) cannot extend the geographical scope of an ongoing non-international conflict to the territory of this third State.

One may ask whether this legal position can be challenged on the basis of an analogy to the law of neutrality applying in a case of international armed conflict. There is, of course, the question whether such an audacious analogy may at all be drawn or whether the law of neutrality must remain a peculiar species of the law of international armed conflict. But assuming that there are no compelling arguments on principle against a reasoning by way of analogy, what would be the legal implications? *Oceania* would then be under a duty to intern the five individuals in order to prevent them from returning to the actual theatre of armed conflict (cf. Art. 11 of the *1907 Hague Convention V Respecting the Right and Duties of Neutral Powers and Persons in Case of War on Land*). This, however, does not answer the question whether *Utopia* could target the five individuals on *Oceania's* territory under the law of neutrality analogy because the latter State failed to act in accordance with its obligation as a neutral State *vis-à-vis* the five individuals. In light of the distinction between the *ius contra bellum* and the *ius in bello* it is theoretically possible to recognize such a targeting power based on neutrality law while at the same time

classifying the exercise of this power as a violation of the prohibition on the use of force. However, such a discrepancy between the two levels of legal analysis should be admitted only with great hesitation. It is, therefore, suggested that even on the basis of a quite audacious neutrality law analogy, *Oceania*'s territory should only become open for legitimate acts of non-international armed conflict by *Utopia* against *AUF* targets, if *Oceania*, in violation of its obligations as a 'neutral' power, allowed the *AUF* to establish an actual military infrastructure on its soil that would enable the *AUF* to carry out large-scale armed violence against *Utopia*.

From the foregoing, some conclusions can be drawn as regards the concept of 'global non-international armed conflict' between a State and a non-State organization. As a matter of pure theory, such a conflict can be conceived of. In practice, however, such a globalization is virtually impossible to occur. In particular, there is no (and there was at no time) a global non-international armed conflict between the *United States of America* and *Al Qaeda*. For our hypothetical case scenario, it follows that *Utopia* had no power under non-international armed conflict law to target the five individuals in *Oceania*. Rather, the targeted killings violated the right to life of those individuals under (at least) customary international law and the latter conclusion would have held true even on the assumption that *Oceania* had consented to *Utopia*'s targeted killing operation. Interestingly, under the 'pure non-international armed conflict model', the targeting killings, though illegal, do not constitute war crimes. As was pointed out above, such a classification would be possible on the basis of a 'pure international armed conflict model' without any threshold regarding the intensity of inter-State armed violence.

4. International Criminal Law

In the course of the previous two parts, international criminal law was already touched upon on several occasions. In this part of the analysis, an attempt is made to develop the contours of the international criminal law framework governing transnational armed conflicts in a coherent fashion[58].

1. Transnational Criminal Law and International Criminal law Stricto Sensu

For the purpose of the following considerations, it enhances analytical clarity if a distinction is drawn between *transnational* criminal law and

58. This part of the intervention draws upon and, where necessary, updates our more detailed study *supra* n. 39, p. 323.

international criminal law *stricto sensu*[59] instead of using the concept 'international criminal law' *lato sensu* as covering both bodies of law. The concept 'transnational criminal law', as it is used here, denotes a body of international treaties dealing with crimes of a transnational character. The key components of such treaties are the duties of States Parties to criminalize the prohibited conduct under their national laws and to either investigate and prosecute, or extradite a suspect apprehended on its territory (*aut dedere aut judicare*; criminal jurisdiction of the *judex deprehensionis*). Other typical elements of these treaties are provisions to facilitate extradition by making the offences concerned extraditable ones and by excluding the applicability of the traditional political offence exception. State obligations under the treaties concerned apply only *inter partes*; more precisely, they cannot create titles of criminal jurisdiction opposable to third States that exceed the limits of general international law. International criminal law *stricto sensu*, however, establishes individual criminal responsibility directly under international law. This body of law seeks to protect fundamental values of the international legal community as a whole and articulates a *jus puniendi* of that community.

2. Transnational Non-State Violence and Transnational Criminal Law

Transnational non-State violence which does not pass the non-international armed conflict threshold can be subject to international treaties against transnational terrorism[60]. At this juncture, it may be noted, that the term 'terrorism' has not been referred to very often in the preceding parts. The reason for this is simply that it was not necessary to use the term and that doing so could even have led to confusion. Transnational criminal law, however, is an area of law where the use of the term 'terrorism' has got its proper place – at least since there is a trend towards adopting an overarching definition[61]. This trend could culminate in the adoption of a general definition as part of a '*Comprehensive Convention on International*

59. For a more elaborate exposition of the points made in the following text, see Claus Kreß, 'International Criminal Law', in: Rüdiger Wolfrum (ed.), *Max Planck-Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2010 (forthcoming),); the electronic version can be accessed at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1423&recno=13&searchType=Quick&query=International+Criminal+Law; for a concurring approach, see Marja Lehto, *supra* n. 6, p. 84 *et seq*.

60. For a useful compilation, see United Nations (ed.), International Instruments related to the Prevention and Suppression of International Terrorism (New York: United Nations Publications, 2001), *passim*.

61. For the first attempt to that effect, see Art. 2 § 1 *litt*. b of the International Convention for the Suppression of the Financing of Terrorism; United Nations, *supra* n. 59, p. 115.

Terrorism'[62]. This remarkable legal development surpasses the scope of this study. It is only in place to express one word of caution against extending the scope of such a definition of transnational terrorism to non-State acts of violence committed within a non-international armed conflict[63]. This is not to say that there should be impunity for 'terrorist acts' committed by non-State actors within the course of a non-international armed conflict. In fact, however, there is no such risk, because acts such as the ones committed by *AUF* against the civilian population in *Utopia* constitute war crimes committed in non-international armed conflicts and can be dealt with accordingly[64]. The real question is how to deal with those acts carried out by non-State actors in a non-international armed conflict which do not violate armed conflict law. For those acts, which are not war crimes, but remain criminal under the domestic law of the target State, Art. 6 § 5 *AP II* encourages States to grant 'the broadest possible amnesty' at the end of the conflict. This is a sensible encouragement in order to provide non-State actors with an incentive to conduct the hostilities in accordance with the law of armed conflict. This incentive should not be undermined through the imposition of a strict duty to punish under the transnational criminal law against terrorism. The latter body of law should, therefore, not cover non-international armed conflicts.

3. Transnational non-State Violence and International Law Stricto Sensu

This has cleared the ground to move on to the key question of this part to what extent transnational non-State violence, that passes the level of non-international armed conflict, gives rise to individual responsibility under international criminal law *stricto sensu*.

a) War Crimes Committed in Non-International Armed Conflicts

There is not much left to say on the matter as regards the law on war crimes. The 'Pure Non-International Armed Conflict Model' offers an appropriate legal framework to apply the law on war crimes committed in non-international armed conflict to the conduct of the members of the non-State party. Importantly, this body of law would apply irrespective as to whether or not the target State reacts by way of self-defence to the non-

62. For the draft text, see UN Doc. A/57/37.

63. For an earlier word of caution to the same effect, see *Jelena Pejic*, *supra* n. 33, 76.

64. For the purpose of this study, it is not necessary to decide the question whether there exists a distinct war crime of launching terror attacks against the civilian population (cf. ICTY, *Prosecutor v. Galic*, Judgment of 5.12.2003, IT-98-29-T, § 138). The war crime of launching attacks against civilians applies in any event; for a more detailed analysis, see Marja Lehto, *supra* n. 6, p. 155 *et seq*.

State armed attack. International and national criminal court will be competent to institute criminal proceedings according to their respective scope of jurisdiction[65].

b) The Crime of Aggression

Secondly, it may be asked whether the customary law definition of the crime of aggression[66] reflects the *ius contra bellum* and includes those forms of transnational non-State armed violence that amount to an armed attack within the meaning of Art. 51 of the United Nations Charter (*supra sub* 2.)[67]. From a perspective of legal consistency, it may well be argued that the answer to this question should be in the affirmative. As a matter of the *lex lata*, however, the crime of aggression presupposes a State act of armed use in violation of the prohibition on the use of force. In addition, it is noteworthy that there is also no indication that States wish to develop the law on this point. To the contrary, the draft definition of the crime of aggression submitted with a view to inclusion in the Statute of the International Criminal Court maintains the requirement of a State act of armed force[68].

c) Crimes against Humanity

According to a widespread view, participation in large-scale transnational non-State violence directed against civilians such as the attacks of '9/11' constitutes a crime against humanity under customary international law. For example, *Roberta Arnold* states that 'Article 7 ICC Statute, in fact, proves to be the ideal provision to prosecute acts of

65. On the jurisdiction of the *International Criminal Court* over war crimes committed in non-international armed conflicts, see Hans-Peter Kaul/Claus Kreß, 'Jurisdiction and Cooperation in the Rome Statute on the International Criminal Court: Principles and Compromises', 2 *Yearbook of International Humanitarian Law* (1999), 143; on universal jurisdiction over war crimes committed in non-international armed conflicts, see Claus Kreß, 'Universal Jurisdiction over International Crimes and the *Institut de Droit International*', 4 *Journal of International Criminal Justice* (2006), 561; on the question as to whether the grave breaches regime of the *GCs* applies to war crimes committed in non-international armed conflicts, see Claus Kreß, 'Reflections on the Iudicare Limb of the Grave Breaches Regime', 7 *Journal of International Criminal Justice* 7 (2009), 794 *et seq*.

66. On the crime of aggression under customary international law, see the British *House of Lords* in *R. v. Jones et al.*, [2006] UKHL 16, §§ 12, 19 (Lord Bingham); §§ 44, 59 (Lord Hoffmann); § 96 (Lord Rodger); § 97 (Lord Carswell); § 99 (Lord Mance).

67. For an earlier question to the same effect, see Rolf Fife, 'Criminalizing Individuals for Acts of Aggressions Committed by States', in: Morten Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden*. Essays in Honour of Asbjorn Eide (Leiden/Boston: Marinus Nijhoff Publishers, 2003), p. 72.

68. See draft Art. 8 bis *ICC Statute* in ICC-ASP/7/SWGCA/Annex I.

terrorism'[69]. Yet, more often than not, statements of that kind remain mere assertions and do not really address the key issue whether violent transnational non-State groups can be considered as collective entities that may form the 'organizational policy' referred to in Art. 7 § 2 (a) of the *Statute of the International Criminal Court* (*ICC Statute*)[70].

Traditionally, the collective entity behind a crime against humanity was the State. With good reason, the ICTY has somewhat expanded the realm of crimes against humanity so as to include systematic or widespread attacks committed pursuant to a policy of quasi-State entities in control of territory such as the '*Republika Srpska*'[71]. The term 'organizational' in Art. 7 § 2 (a) *ICC Statute* could be construed narrowly so as to cover only this type of organizations[72]. This would ensure that the application of Art. 7 *ICC Statute* remains within the confines of customary international law. Such a restrictive interpretation would also maintain an intimate link between the law against crimes against humanity and international human rights law. For as long as the obligations under international human rights law are incumbent on States only (or perhaps also on quasi-State entities), one may question the legitimacy of a more expansive interpretation of the law against crimes against humanity to the effect that the conduct of individuals acting for non-State organizations not reaching the level of quasi-States may be criminalized under international law.

Yet, it is possible to make a case for a somewhat broader understanding of the term 'organizational' in Art. 7 § 2 (a) of the *ICC Statute*. Such an

69. Roberta Arnold, *The ICC as a New Instrument of Repressing Terrorism* (Ardsley/New York: Transnational Publishers, 2004), p. 340.

70. According to the more recent jurisprudence of the ICTY, there is no policy requirement for crimes against humanity under customary international law (*Prosecutor v. Kunarac et al.*, Judgment of 12.6.2002, IT-96-23&IT-96-23/1-A, § 98; *Prosecutor v. Blaskic*, Judgment of 29.7.2004, IT-95-14-A, § 120; *Prosecutor v. Kordic et al.*, Judgment of 17.12.2004, IT-95-14/2-A, § 98); this position, however, was adopted without any serious legal argument and, on closer inspection, it turns out to be flawed; cf. William Schabas, 'State Policy as an Element of International Crimes', 98 *Journal of Criminal Law and Criminology* (2008), 930 *et seq*., 981; Claus Kreß, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice', in: Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), p. 148.

71. Admittedly, the formulations used by ICTY in the abstract go further and encompass 'terrorist groups' (*Prosecutor v. Tadic*, Judgment of 14.7.1997, IT-94-1-T, § 654) or even 'criminal gangs' (*Prosecutor v. Blascic*, Judgment of 3.3.2000, IT-95-14, § 205); such formulations, however, have remained unsupported by a carefully prepared customary law argument and are of the nature of *obiter dicta*.

72. For an alternative restrictive interpretation that seems less compelling to us, see M. Cherif Bassiouni, *The Legislative History of the International Criminal Court. Introduction Analysis and Integrated Text*. Vol. I (Ardsley, New York: Transnational Publishers, 2005), p. 151 *et seq*.

approach would include also those organizations that pass the organizational threshold for classification as a party to a non-international armed conflict. Such a 'harmonious interpretation' would ensure that the realm of international criminal law *stricto sensu* governing transnational non-State violence is not too hastily expanded into the realm of the *transnational* criminal law against terrorism.

The case law of international criminal courts, however, continues to reveal little caution in defining the lower limits of the realm of international criminal law *stricto sensu*. Accordingly, a Pre-Trial Chamber of the *ICC* stated in *Prosecutor v. Bemba Gombo*:

> The requirement of "a State or organizational policy" implies that the attack follows a regular pattern. Such a policy may be made by groups of persons who govern a specific territory *or by any organization with the capability to commit a widespread or systematic attack against any civilian population.* [emphasis added][73].

d) Terrorism as a Crime under International Law?

In a similar vein, *Antonio Cassese* opines that transnational terrorism committed outside an armed conflict has become a crime under international law[74]. *Cassese*'s central argument is that there now seems to be agreement about the core elements of a definition of terrorism within the context of transnational criminal law. Such an agreement may well exist and it may well warrant the assertion that there is an (emerging) customary *aut dedere aut iudicare* regime with respect to transnational terrorism. Yet, it is respectfully submitted that, without more, the agreement in question does not give birth to the new crime of terrorism under international law.

4. Transnational non-State violence and the Evolution of International Criminal Law Stricto Sensu

The foregoing remarks reflect our reluctance to recognize the international criminalization of transnational non-State activity as long as the threshold triggering the application of non-international armed conflict law has not been passed. The reason for this reluctance lies in the fact that such criminalization would move international criminal law *stricto sensu* forward into hitherto unknown terrain. We shall elucidate this point through an outline of the historical evolution of international criminal law.

73. *Prosecutor v. Bemba Gombo*, Decision of 15.6.2009, ICC-01/05-01/08, § 81.

74. Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law', 4 *Journal of International Criminal Justice* (2006), 957.

The jurisdiction of the International Military Tribunal (IMT) at Nuremberg was limited to aggression, war crimes in the traditional sense of inter-state armed conflicts and, if committed in execution or connection with one of the preceding crimes, crimes against humanity. By clearly linking all of these crimes with a breach of international peace in the strict meaning of the term, the first generation of international criminal law reflected, despite its revolutionary recognition of criminality directly under international law, the traditional almost entirely State-centred configuration of the international legal order. It was only on 2 October 1995, with the already mentioned and by now historic decision of the ICTY Appeals Chamber in the *Tadic* case[75], that a decisive step towards a second generation of international criminal law was made. In *Tadic*, the Chamber undertook a remarkable analysis of the international practice since the Spanish Civil War, and reached the conclusion that criminality directly under international law had extended to armed conflicts not of an international character. This legal determination was complemented by a second and equally significant finding that crimes against humanity under customary international law may be committed in peace time. Previously, this was settled only for genocide, as defined in the 1948 *Genocide Convention*. The crystallization of customary war crimes committed in conflicts not of an international character, and the emancipation of crimes of humanity by making it an autonomous crime, moved the protective scope of international criminal law beyond *inter*-State incidents to also cover certain forms of *intra*-State strife. It is now firmly established that international criminal law *stricto sensu* encompasses situations where a government and/or armed opposition forces spread terror among the people under its power. The recent instances of large-scale transnational non-State violence have given rise to the question whether international criminal law *stricto sensu* is about to make a third generational step and to move into the area of transnational conflicts between States and destructive private organizations. This would mean that the law's protective thrust, which was hitherto confined to situations of war and internal strife, would extend to protect States and their populations from external non-State threats. It is submitted that international criminal law has undergone a move in this direction. To date, however, this further expansion of the law remains confined to transnational non-State violence of so large-scale a dimension that the armed conflict level has been reached.

75. *Supra* n. 49.

5. Conclusion

Transnational non-State violence of the '9/11' type calls for a reconsideration of the existing concepts of the *ius contra bellum*, of the *ius in bello* and international human rights law, and of international criminal law in order to see whether new concepts such as the category of 'transnational armed conflict law' are needed. On the basis of the foregoing considerations, it is suggested that international law can adequately deal with transnational armed conflicts without having to devise fundamentally new legal categories. Instead, it is possible, though intellectually demanding, to adjust and to fine tune the existing legal concepts and to construe on that basis an overall legal framework that provides for both a coherent and a reasonably balanced answer to the challenges posed.

The problem of terrorism and criminalization

*Gabor Rona**

Despite claiming that they are in United States custody, the United States has yet to hold a single trial of any of the alleged planners of the most devastating terrorist attack in United States history. For a society that claims devotion to the rule of law, does anything more need to be said to prove that the Bush administration's detention and trial policies have been a disaster?

My purpose is not to critique the past, but to address the question "Where are we going?" which requires an understanding of where we are, and in turn, where we came from.

To understand how the US squandered its ability to hold terrorists to account while ushering in an era of official cruelty, it is necessary to bear in mind that because of the United States's professed adherence to the rule of law, the American administration cannot simply act illegally, it must, instead, twist the law to suit its purposes. Consequently, our policies have not only failed to achieve their professed purposes, they have also done grievous harm to the fabric of international humanitarian law (IHL) and human rights law (HRL).

How did this happen? A good starting point is February 7, 2002. On that day, President Bush issued a memorandum that laid out his administration's legal framework for its "war on terror." It consisted of 4 main elements:

1. the dubious conclusion that Taliban members were, as a class, beyond the protection of GC III;
2. the defensible conclusion that members of Al Qaeda were also beyond the protection of GC III;
3. the incorrect conclusion, recognized as such even by the United States Supreme Court in the Hamdan case, that the protections of Common

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Article 3 apply only to internal conflicts, rather than to all armed conflicts that are not between two or more States, regardless of how many States they touch;

4. the outrageous conclusion, differing from history's notorious purveyors of crimes against humanity only in degree rather than in kind, that detainees had no legal entitlement to humane treatment.

No mention of Geneva Convention IV (GC IV). Odd since the explicit but gratuitous statement by President Bush that he would decline to use his power to "suspend Geneva" and the pains taken to deny application of GC III implies acceptance by the United States of the Common Article 2 framework. Clearly, the Bush administration did not want to categorize as a "protected person" under the Conventions anyone it wished to detain and abuse.

Now, I know that there are some among us who would deny application of GC IV to civilians who directly participate in hostilities but do not merit Prisoner of War (POW) status. I think this position is wrong for, as the ICRC commentary has famously said, everyone in enemy hands is protected either by GC III or GC IV. Indeed, the purpose of GC IV's derogation provision, article 5, is difficult to discern if civilians suspected of hostilities against the detaining authority were meant to be excluded from GC IV protected status.

But even if it were generally defensible to deny GC IV protected status to civilians who directly participate in hostilities, the United States policy was much broader. Even those suspected of mere affiliation with, or supporting the Taliban or al Qaeda were deemed detainable strangers to GC IV. More importantly, since they were not acknowledged as civilians, they were designated as "unlawful enemy combatants" in order to justify their detention.

Since the term "combatant" as understood in IHL implies a privilege of belligerency, the concept of "unlawful combatant" is an oxymoron, just as the term "lawful combatant" is redundant. What is more, to apply the term "combatant" to persons who neither possess a privilege of belligerency nor have directly participated in hostilities (DPH) is a dangerous distortion of IHL with harmful consequences to the principle of distinction. As we speak, the Obama administration is considering targeted killings of Afghan drug lords who help finance the insurgency, despite that their conduct is no more direct participation in hostilities (DPH) than that of the American taxpayer.

Back in the Bush years, the United States Supreme Court seemed to instinctively understand that something was wrong with this picture under IHL. But instead of correcting the Bush administration's failure to properly apply either GC III or IV or the principle of distinction, it determined, in the Hamdi case, that something called "the battlefield," which the court did not define, was the context in which law-of-war detention, namely, deten-

tion without judicial review, applied. The closest concept to this in IHL is DPH – the triggering factor for targeting. And thus, US jurisprudence confirmed the administration's direction down a path that equates detention and targeting authority.

IHL, of course, contemplates authority to detain in international armed conflict (IAC) that is much broader than the authority to target. But since the United States has effectively, though not explicitly, used something like DPH for detention authority, and since it justifiably wants to detain people who may not have directly participated in hostilities, it has only one choice – to define DPH broadly. This is not so different than the then-secret Justice Department memos of the Bush administration defining torture to exclude torture, except that the consequence is not only detainee mistreatment, but death.

Lawyers representing detainees and certain advocacy organizations have compounded the problem by arguing in Guantanamo *habeas corpus* cases that only those who directly participate in hostilities, as that term is traditionally understood, are detainable under the laws of war – again, a wholesale rejection of GC IV in international armed conflict and of any IHL detention authority in non-international armed conflict (NIAC). Some academics have added to the problem by also suggesting that standards for targeting should be applied to determine who might be detained.

Speaking of NIAC, it may come as a surprise to some that US military authorities, when pressed, still insist they are engaged in international armed conflict (IAC) in both Iraq and Afghanistan, but that GC III and GC IV do not apply. In other words, although the Obama administration has retired the term "enemy combatant" in connection with Guantanamo, and received favourable reviews for doing so from many who denounced the Bush detention vision, the fundamental architecture that the Bush administration articulated in its infamous February 7, 2002 memo remains in tact in the new lexicon: the Obama administration uses the term "unprivileged belligerent," to describe Guantanamo detainees, which it defines to include those who may have never directly participated in hostilities, but who provide "substantial support" to the enemy.

You may also have heard that the term "global war on terror" has been retired. But the Obama administration still maintains the right to detain anyone, from anywhere in the world, and hold them without judicial review. This claim is being challenged in court, by individuals arrested in countries other than Afghanistan and then brought to the US detention facility in Bagram, Afghanistan where they have been held without charge or trial as "enemy combatants," even though they have not been alleged to take DPH in any traditional sense of that term. And so, by claiming an IHL power to detain without geographic limitation, the Obama administration is still, in effect, asserting a global war.

In addition to consequences in the realms of detention and targeting, there are direct consequences for trials. The United States Military Commissions Act (MCA) is presently under review by Congress. But whether it retains the term "unlawful enemy combatant" or is amended to make "unprivileged belligerent" the trigger for personal jurisdiction hardly matters. The MCA will continue to operate on the false premise that normal federal courts are for peacetime crimes while military commissions are for war crimes. Interestingly, the recent preliminary report of the President's Task Force examining the issue of which cases to send to which system fails to even acknowledge the existence of the United States War Crimes Statute, which creates jurisdiction in our normal federal courts for war crimes, including those committed in armed conflict against non-state armed groups.

So, Obama administration – same or different? Through the lens of accepted concepts of IHL and its relation to other legal frameworks, such as HR law, certain conclusions appear, in the realm of detainee treatment, thankfully, different. On his second full day in office, President Obama denounced all Bush administration policies, practices and legal justifications for detainee mistreatment. One caveat of concern remains the intention to continue renditions, using diplomatic assurances to justify transfer to countries known for torture.

Similar concerns regard detention powers and trials, because of the decision to continue the Bush administration's policies, that fail to comply with applicable IHL and international human rights law. Rather than aiding the essential objective of holding terrorists criminally accountable for their crimes, these policies impede accountability by enabling the administration to detain without charge people who should be (but are not) charged with crimes. And as to those who are charged in military commissions, and I have been to Guantanamo several times to observe them, the only thing that has been proven is what a disaster they are. Even if they do manage to convict a defendant in a contested trial – there have only been three convictions and only one of these in a contested trial – the results will be of suspect legitimacy. On the other hand, the regular United States federal criminal courts have handled well over one hundred international terrorism prosecutions in recent years.

But perhaps the most harmful legacy of the Bush years will be something that is hardly mentioned. It is the decision to define as combatants (under Bush) or belligerents (under Obama) individuals who have not taken any part in hostilities. It is a perversion of IHL that endangers its most sacred purpose, the distinction between combatants and civilians.

The special issue of piracy

*Wolff Heintschel Von Heinegg**

Good afternoon, ladies and gentlemen. Let me start by telling you a story which appeared two months ago in an Austrian newspaper, which informs us that if you spend 5800 dollars per day you can go on a cruise ship off the Somali coast. There you can pretend to be an innocent civilian ship and wait for pirates to attack you. Since you will be equipped with AK 47s and even grenade launchers, which of course you have to pay for, you can shoot the pirates in self-defence. The article is entitled "Rich Russians face pirates off the Somali coast".

Please, do not expect me to endorse that kind of business. There are other issues of piracy we should be aware of and I hope that I won't be boring you too much when it comes to counter-piracy operations, their legal limitations or their legal bases.

I would like to give you an overview of what I will be talking about. First of all, we need to be aware of what piracy is. Then we need to briefly think about possible counter-piracy measures – other than those of the Russian kind. Then we will have to consider the legal bases of such operations.

For some, piracy is a very romantic issue. They may think of Black Beard, "Pirates of the Caribbean" or of Sir Francis Drake. However, Drake was not a pirate but a privateer. Privateering was abolished by the 1856 Paris Declaration and must be clearly distinguished from piracy. The romantic picture some of us may still have in our minds is, of course, not realistic and certainly outdated. I have deliberately chosen figures from the year 2004 of some regions you may not have expected to see, where piratical acts or acts of armed robbery at sea occurred: the Indian Ocean, the coast off Bangladesh, and the Strait of Malaka.

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Piracy is far from being a new phenomenon. If you take into consideration the importance of the sea area affected by those piratical and other criminal acts at sea you will easily understand that these crimes have a tremendous economic and security policy impact, because those sea areas are highly important for international trade and for other purposes.

But, of course, today the focus is on Somalia and we will see that, when it comes to the legal basis of counter-piracy operations, Somalia is a special case. If you look at some figures where criminal acts occurred at sea you see that before 2002 the majority of incidents occurred in the southern area of the Red Sea and in the northern part of the Gulf of Aden. After the commencement of counter-terrorism operations the pirates and other criminals moved further south and east in order to pursue their business. Hence, the mere fact that armed forces are present in the area does not necessarily mean that you will eradicate that form of criminality. To the contrary, they will find other areas to pursue their aims.

When dealing with such criminal acts at sea, the problem we are facing is the definition of piracy as it appears in the 1982 Law of the Sea Convention. What is the meaning of 'private ends'? Of course, the acts concerned must be criminal acts. However, it is far from clear what the drafters intended by inserting the 'private ends' criterion. A freedom fighter will say "*I have attacked a ship for other than private ends*", the terrorist will say "*I am not pursuing private ends*", and many others will put forward their good motives. We were talking about this issue during the break, and we asked ourselves whether, for example, Robin Hood, had he committed his acts at sea, would qualify as a pirate because his motives were altruistic. To give a short answer, there is no consensus on the correct answer. But in my view the answer is rather simple. 'For private ends' means the opposite of public and if the acts are committed for other than public purposes they are, by definition, committed for private ends. Otherwise, we will have to look at the motives and that is the worst thing you can do if you have to do with law, because motives can be changed by anyone and they can be changed within a second and not only within days.

The other problem with the definition is that the criminal acts have to be committed from a private ship or aircraft. So what about State piracy, i.e. criminal acts committed from State ships, not only warships but also customs vessels, police vessels, etc.? The issue of State piracy is not dealt with in the Law of the Sea Convention (LOSC). According to LOSC, Article 102, illegal acts committed from a State ship qualify as piracy only if the crew has mutinied and taken control of the ship. While there are some historical precedents, today the mutiny of crews of State ships will, if at all, be a rare exception.

Moreover, the acts must be committed on the high seas. The term 'high seas' is not to be understood in a technical sense but as relating to all sea

areas beyond the outer limit of the territorial sea of the coastal States. If you keep in mind that the breadth of the territorial sea of most coastal States is 12 nautical miles, a rather big sea area is not covered by the definition of piracy.

Finally, there is the 'two ships' criterion, although it has been challenged recently. Accordingly, the illegal acts must be committed by one ship against another ship whereby the character of the victim vessel is irrelevant. This means that piratical acts can be committed against a warship or other State ship. For instance, some Somali pirates tried to capture a German warship. That, indeed, was a bad idea!

The definition of piracy leads us to the following conclusions: State piracy is not covered. If the acts are committed by a State vessel, including warships, the affected flag States are limited to the usual remedies, such as protest, retaliation, etc. There is no legal basis for taking action against a sovereign immune vessel under the law of the sea. As regards 'private ends', there is no consensus on the exact meaning but I hope that you can agree with my definition otherwise the problem of criminality at sea cannot be coped with adequately. If the illegal acts are not committed in high seas area, i.e. within the territory at sea of another State, they are by definition not piracy. Criminal acts occurring within the territorial sea or the internal waters of another State are not piracy proper. Accordingly, the legal bases provided for in the LOSC and in international customary law do not apply to armed robbery at sea. Any counter-measure within those sea areas is within the exclusive powers of the respective coastal State, unless there is an authorization by the UN Security Council under Chapter VII of the UN Charter.

However, there is one important aspect that may not be forgotten. While there may be legal basis for pursuing pirates, for countering or combating pirates and other criminals, there is always the right to render assistance to victims of a criminal act at sea. The victims of a criminal act at sea are to be considered in a distress situation. According to a well-established customary rule you are not only entitled but you are also obliged to render assistance to those who are in distress at sea. Therefore, you are allowed to even use military force if it is necessary to save a victim of a criminal act at sea. Finally, it may not be left out of consideration that crimes committed onboard a vessel by its passengers, do not qualify as piracy. This kind of crime has been dealt with in the so-called SUA Convention (Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation) that was agreed upon after the *Achille Lauro* incident which involved an Italian cruise liner. Since such acts may not be considered as piracy – they rather constitute acts of terrorism –, we do not deal with them here.

Let us now turn to possible counter-piracy measures. First of all you will, of course, want to know where the pirates are. Therefore, you will patrol the sea areas affected. Surveillance and patrolling of sea areas do not pose any legal problems (unless they amount to marine scientific research). Another possible measure may be to convoy or escort vessels that are of high value and that would be perfect targets for a piratical attack. In practice, many States have ordered their warships to escort merchant vessels or to take other protective measures, e.g. by establishing a corridor. Moreover, you may want to show presence and hope that the deployment of warships to a given sea area will deter the pirates from pursuing their ends. Unfortunately, however, even the presence of numerous warships has not really prevented pirates from continuing their business. Most importantly, the issue of using force against pirates arises because mere presence will only in rare cases deter pirates from committing their illegal acts. Finally, you may want to capture and prosecute the pirates.

As regards the legal bases for such measures, let us start with the LOSC. When there are reasonable grounds for suspicion that a private vessel has been involved or is involved in piratical acts (*i.e.* on the high seas), you are entitled to board that ship in order to inspect it. If it can be established that the vessel is a pirate ship, according to Article 105 LOSC, the warship (or other State ship) of any State is entitled to seize the ship, to arrest the persons, to seize the property and to prosecute the alleged criminals. Hence, there is a rather clear rule under the LOSC, which, by the way, is customary in character. Pirates are considered enemies of mankind, this has been a century long tradition. Therefore, every State is entitled to make use of Article 105 LOSC, including States that do not have a shore, that do not even have a proper navy.

In sum, the following counter-piracy measures have a sound basis in international law: Provided there are reasonable grounds for suspicion, warships and other State ships may verify the true character of a vessel by boarding it. If there is sufficient evidence that a private vessel was engaged in acts of piracy, the vessels may be seized and the persons on board may be arrested. Boarding, capture, and arrest may also involve the use of force, but we will return to that issue in a moment. Finally, it must be borne in mind that there is always the right to render assistance to victims of piratical acts. Of course, that right does not include an entitlement to capture the vessel or to arrest the pirates. Accordingly, the legal bases for counter-piracy operations can be found in the LOSC, some form of law enforcement, sometimes the right of self-defence, and with regard to the right of assistance in Article 98 LOSC and in the corresponding international customary law.

But what about the use of force? Well, in the good old days nobody even dreamt of seriously considering that question. But today we are living in very civilized times and we do not hang pirates any longer. It is, however, important to keep in mind that the rights laid down in the LOSC and in customary international law may be enforced if the pirates render resistance. Hence, if they either resist boarding, capture and seizure or if they try to obstruct an act of assistance, that resistance may be overcome by the use of force. Of course, if the respective warship finds itself in a self-defence situation, the use of force does not constitute a legal problem at all.

Some commentators seem to take the position that counter-piracy operations are governed by the law of armed conflict. That position is untenable, unless measures against pirates are taken on land. We will return to that aspect later. Apart from that, the law of armed conflict does not apply to counter-piracy operations. Piracy and counter-piracy operations will by definition be limited to high seas areas. Leaving aside the elements of extent and intensity, the question is: What kind of armed conflict would that be? Certainly not an international armed conflict because pirates are not States. Neither would such operations qualify as a non-international armed conflict because the hostilities would not occur in the territory of a State, a High Contracting Party. Hence, by definition there would exist neither an international nor a non-international armed conflict, even if the use of force between pirates and naval forces were of an extent and intensity necessary for the existence of an 'armed conflict'. This, however, is a rather academic question because pirates will not dispose of a big fleet able to engage in a classical naval war or to counter the fleet of an alliance or even of a single State.

Since the law of armed conflict does not, in principle, apply to counter-piracy operations, neither the rules and principles on targeting nor the other principles are of relevance. The proportionality principle that applies is not a law of war principle, which, by the way, only prohibits excessive damage to civilian objects and civilians, it is a proportionality principle which is recognised to apply to law enforcement measures. Some guidance as to its content and meaning can be derived from the additional protocol to the SUA Convention that was agreed upon in late 2005. Article 8 bis (9) provides:

> *When carrying out the authorized actions under this article, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.*

The important term is "minimum degree of force" and all the military amongst us know exactly what minimum force is. It includes, but is not necessarily limited to, deadly force. If necessary you may use deadly force

as in a police operation within your territory. Everything that is necessary to either overcome resistance or to save a victim's life, may include the use of deadly force if there are no other similarly effective means to enforce your rights.

The next issue that must be considered is the impact of human rights law. Of course, some States deny an extra-territorial application of human rights by, for example, referring to the wording of the International Covenant of Civil and Political Rights according to which the Covenant applies 'within its territory *and* under its jurisdiction', not 'within its territory *or* under its jurisdiction'. Those States would take the position that the high sea does not form part of their respective territory. But even if the exercise of jurisdiction suffices for a human rights treaty to become applicable this does not necessarily mean that that treaty will always apply extraterritorially. If the judgment of the European Court of Human Rights in the Bankovic case is taken as a yardstick, forcible measures against pirates do not necessarily qualify as an exercise of jurisdiction. While the arrest of pirates would have to be considered as an exercise of jurisdiction triggering the applicability of the European Convention of Human Rights this would not be the case if pirates were shot at from a distance. If an aerial bombardment cannot be considered as an exercise of jurisdiction this must *a fortiori* hold true for shots fired at pirates. If I were cynical I would advise the governments whose naval forces are engaged in counter-piracy operations to sink pirate ships and not to capture the vessel or to arrest the pirates. In order to avoid a misunderstanding: This is not the position taken here. It is just to emphasize that the jurisprudence of the European Court of Human Rights is far from consistent and that it is open to any form of abuse.

The next issue concerns the use of force and hostages. Of course, you must take into consideration that there may be hostages on board, and the Indian Navy encountered that situation when they sank a ship that had been overtaken by pirates, unfortunately, with a number of hostages on board who were killed as well.

Another important question relates to detention of pirates on board a warship. A warship that has captured pirates cannot be expected to immediately return home or to Kenya in order to deliver the pirates to some authorities or prosecutors, because they are deployed in a very expensive mission and it would take a long time to leave the operation for the sole purpose of delivering a handful of pirates. Therefore, it is of utmost importance to establish a consensus of the member States to the applicable treaties that the duration of detention on board may not be measured with the same yardstick as if it were in the territory of a State. The yardstick is 'without any undue delay'. States should agree that this concept must be interpreted in the light of the prevailing circumstances.

This means that such pirates could be detained for up to 14 days onboard a warship. It must be borne in mind in this context that warship commanders are not keen on having pirates on board for a longer period. They want to get rid of them as soon as possible, but for operational reasons they cannot immediately leave an operation. Still, the duration of detention is an issue but I do not think it is an insurmountable problem.

Another problem is the treatment of pirates if the warship's flag State is unwilling or unable to exercise its criminal jurisdiction *vis à vis* the pirates. Many States have adapted their national criminal law in order to have a basis for the exercise of criminal jurisdiction but even seafaring nations had pirates in their hands and had to let them go because they did not have the necessary jurisdiction under their domestic criminal law. There are, however, States who are willing – for whatever reasons – to exercise the jurisdiction. This jurisdiction is universal and there is no necessity to claim that your nationals or your national assets were affected by piracy. Any State willing to exercise its criminal jurisdiction is entitled to do so. The European Union (EU) has concluded an agreement with Kenya which is one way of solving the problem of criminal prosecution. And those who believe that the Kenyan system of criminal prosecution does not comply with minimum standards are simply wrong.

I would like to emphasize that I do not support the idea of establishing a special court for piracy or of empowering the ICC to also deal with piracy, or – even worse – of involving the Tribunal of the Law of the Sea in Hamburg. Certainly, the Tribunal is far from being a criminal court and should be limited to deal with inter-state disputes. Rather, States should be aware of their obligations under customary international law and under the Law of the Sea Convention, they should adapt and modify their domestic legal system in order to be able to prosecute pirates if they are in a condition to do so.

Let me end by briefly referring to Somalia. It needs to be emphasized that Somalia and the acts of piracy and of armed robbery off the Somali coast are a special case. There are Security Council resolutions that authorize States to protect World Food Programme ships and to repress acts of piracy and armed robbery at sea. NATO, individual States, and the EU have based their counter-piracy operations off the Somali coast on these resolutions. As regards the EU operation 'ATALANTA' and the issue of the extraterritorial applicability of the European Convention of Human Rights here, again if I were cynical, I would refer to the Behrami and Saramati cases of the European Court of Human Rights and argue that even after the arrest of pirates the European Convention would be inapplicable because there is no exercise of national jurisdiction. Rather, the jurisdiction exercised is that of either NATO or of the EU which are not Parties to the European Convention of Human Rights.

However, this is of no relevance with a view to the legal basis provided by the United Nations Security Council (UNSC) resolutions. It must be borne in mind that these resolutions not only relate to piracy but also to armed robbery at sea. Moreover, according to the resolutions States are entitled to combat the pirates and robbers on land, i.e. within the territory of Somalia. The resolutions and their reference to IHL must be read against that background. The reference to IHL does not mean that, according to the position of the UNSC, counter-piracy operations *in toto* are governed by the law of armed conflict. Nor does the reference imply that every use of armed force against the criminals on Somali territory is to be judged in the light of the law of armed conflict. Rather, IHL would only become applicable if the land operations against pirates are of such an intensity that they qualify as an armed conflict. Sporadic acts of violence, targeted operations, and other operations limited in scope and duration (e.g., 'hot pursuit' into Somali territory) will never amount to an armed conflict. Hence, for the time being no operations taken against pirates and other criminals in Somali territory have been governed by IHL.

In conclusion, the legal basis we have for counter-piracy operations are rather settled. Somalia is a special case and it may not serve as a precedent for a progressive development of customary international law. The UN Security Council has repeatedly emphasised that there is no way of interpreting the resolutions as adding anything to counter-piracy rights. The impact of human rights law is an issue that needs to be settled at least in those fields that are absolutely necessary for the operating forces, for example, regarding detention onboard. It is, however, a commonplace that the effectiveness of counter-piracy operations very much depends on whether and to what extent their bases on land can be neutralized. Mere presence at sea, and the escorting of vessels that are high value targets for pirates are important measures but they certainly are not sufficient. If States are willing to solve the problem posed by piracy and armed robbery at sea, they must be equally willing to eliminate their bases on land. As seen, with a view to Somalia the necessary legal basis exists in the form of the UN Security Council resolutions which – and it is important to stress – are based on a general request by the Transitional Federal Government (TFG) of Somalia. Of course, the Security Council would have been entitled to act on the basis of Chapter VII without a consent by the TFG. However, it is doubtful whether the Council would pass similar resolutions authorizing the use of all necessary means against pirates and armed robbers in other sea areas. Coastal States are jealously watching and guarding their sovereignty – rightly so, because otherwise we would open the door for some new form of intervention, something we would not like to happen. And this brings me to the end of my presentation.

VI. The specific role of non-governmental organizations: how to better ensure compliance with international humanitarian law

Creating incentives for compliance: between amnesty and criminalization

*Priscilla Hayner**

The International Center for Transitional Justice (ICTJ) – and the field of transitional justice generally – has largely focused on policy options for accountability after the end of a conflict. The range of transitional justice options includes both judicial and non-judicial measures: truth commissions, reparations for victims, vetting of the security forces, institutional reform to prevent further abuse, as well as strengthening national and international courts so that individual perpetrators are held to account.

The subject before us here, however, is whether the behaviour of armed groups can be influenced, and ultimately improved, while a conflict is still underway. Are there any lessons or policy approaches from the transitional justice field which could be useful – and in fact provide an incentive for compliance with the standards of international humanitarian law (IHL)? Indeed, there are a number of intriguing experiences and ideas that may be useful[1].

First, let me take off the table the most internationally well-known example of a policy that sought a middle ground 'between amnesty and criminalization' – the South African Truth and Reconciliation Commission, which offered perpetrators amnesty if they told the truth about specific crimes. I would suggest that this is not the most helpful model for us here. The South African Truth Commission 'truth for amnesty' arrangement was effective for some, and there was remarkable information that emerged from perpetrators in the process of the public hearings. But there was also considerable dissatisfaction and frustration in the process. Many high-level perpetrators did not apply for amnesty, and observers felt that

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1. This paper reflects in-country interviews by the author with former rebel commanders, government officials, independent rights advocates, and others. This research took place in particular in Sierra Leone, Liberia, the Democratic Republic of Congo and Nepal, from 2006 to 2008.

those who came forward did not always tell the full truth. Further, very few prosecutions followed for those who did not apply for amnesty.

For our purposes, more importantly, the amnesty offered in South Africa covered serious international crimes that today would generally be prohibited from receiving amnesty[2]. Thus it is unlikely to be a very useful model for the future. Further, on a more practical level, such an amnesty for truth arrangement does not address the question before us, as it is designed to address truth and accountability after the conflict has ended. The intended question here, rather, is whether any measures of justice can in fact affect how the conflict is fought.

1. Creating Incentives for Compliance

Thus, the question before us: are there models of accountability that could affect compliance with IHL? Or, stated more simply, can we reduce the abusive behaviour of armed groups through some measure of accountability, or the threat of accountability, in the future?

I would like to propose three possible policy approaches to advance compliance of IHL by armed groups. In brief, we might refer to these as prosecution, position, and benefits. Or: the threat of prosecution, the threat of losing access to positions of political power, and the possibility of losing future demobilization and peacetime benefits.

2. Past Behavior, Future Sanction

When there is a clear threat of prosecutions, might there be a deterrent effect on the behavior of armed groups? The past record is unclear. It may be necessary to have a clear and credible threat that prosecutions will follow serious crime, and in many national contexts the national courts are not functioning to a degree to provide such a credible threat. So the possibility of criminal accountability may be left to the international level, which narrows the likelihood considerably.

But there are still quite a number of interesting examples where the threat (or perception of a threat) of criminal accountability may have affected behavior of non-state armed groups. Let us look at three examples, with mixed results. The first was in Liberia. While the peace

2. The United Nations, for example, has established clearly that amnesties for war crimes, crimes against humanity and genocide are prohibited.

negotiations were underway for Liberia in 2003 (taking place in Ghana), the main rebel armed opposition group was shelling the Liberian capital, Monrovia. One of these shells landed in a compound owned by the US Embassy, killing many Liberians who had taken shelter there. In response, the US representative at the Ghana talks received a direct message from Washington. He was asked to extend a clear and unambiguous message to the leadership of this group: "*If you send another shell into a compound owned by the US, we will assure that you are taken before a war crimes court*"[3].

The message was well understood and apparently taken seriously: no US property was thereafter targeted. (As an interesting side point, it wasn't necessarily clear to the US delegate or to others precisely what war crimes tribunal was being referred to. But this didn't lessen the threat.)

A second, very different example is in Afghanistan. Human Rights Watch published a lengthy report in 2002 about the abuses by a well-known warlord, General Abdul Rashid Dostum. This fifty-page report documented the abuses that took place when he chased the Taliban from a sector of northern Afghanistan, and recommended that he be prosecuted. After seeing the report, General Dostum had the report translated, and then read out in its entirety to ninety of his commanders. And at the end of the reading, General Dostum told them: "*This is very important. These are very dangerous people; they can have me arrested and they can take any of us in front of war crimes tribunals. Therefore, I order you not to commit any of these crimes in the future. If you do commit any of these crimes, I will personally kill you*". Over the next weeks and months General Dostum did take specific actions to prevent further abuses, and to integrate his security forces ethnically, for example. From there the story worsens: at the end of that year the UN undertook an investigation into the crimes that had been reported by Human Rights Watch. General Dostum reportedly arrested, jailed and tortured known witnesses, to prevent their cooperation with this enquiry. Since this time, General Dostum has not been held to account for any of his crimes, and has rather been integrated into high levels of the government.

A third example is that of the Democratic Republic of Congo (DRC), and specifically concerns the impact of the International Criminal Court (ICC) on armed groups. There was a direct and clear impact of the ICC on the behavior of armed groups, but this impact is not what was first intended. The first person who was arrested, militia leader Thomas Lubunga, was

3. See Priscilla Hayner, Negotiating Peace in Liberia: Preserving the Possibility for Justice, Centre for Humanitarian Dialogue and International Center for Transitional Justice, December 2007. Available at: http://www.ictj.org/static/Africa/Liberia/HaynerLiberia1207.eng.pdf

charged only with the recruitment and use of child soldiers. As a result, the other Congolese rebel leaders came to fully realize that the use of children within their armed forces was a crime, and that they might be arrested for it. There was considerable nervousness, and many of these commanders made reference to this concern in conversations with international humanitarian organizations, as they virtually all had child soldiers within their ranks. As a result, to protect themselves, when demobilisation began, some commanders chose to leave child soldiers behind in the bush. Some of those children found their way to villages or to safety and assistance of humanitarian agencies, and we do not know in what proportion[4].

The point here is that the threat of criminal accountability does affect the behaviour of armed groups. But we need to be careful in assessing exactly how this behaviour is affected and whether it is increasing their compliance with IHL.

3. Past Behavior, Future Benefits

A second possible way in which we might encourage armed groups' compliance with IHL is through a recognition of their interest in playing a political role in the future. It seems reasonable that persons directly associated with serious rights atrocities in the past should not hold such posts. The main challenge of many peace negotiations pertains to the breakdown of political power post-agreement: who will hold positions in a transitional government or other future political dispensation, whether new political parties will be recognised, and similar questions. Armed groups may be fighting for many different things but one thing they generally share is an interest in political power and the benefits that come with such positions in the future.

Thus one might ask: is there a way to link their past behaviour with the future benefits they are seeking? It is now not uncommon to put in place measures of vetting or screening for members of the armed forces, military or police, in order to remove any persons who committed serious violations in the conflict. But this vetting has generally applied to those who are not at the highest levels. The difficult question, therefore, is: can this somehow be extended to the senior commanders, those most likely to take up key political positions? Those who committed serious abuses (or

4. For further information, see Laura Davis and Priscilla Hayner, *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC*, International Center for Transitional Justice, March 2009. Available at: http://www.ictj.org/static/Africa/DRC/ICTJDavis Hayner_DRC_DifficultPeace_pa2009.pdf

commanded very abusive forces) should not play a role in a future democratic government.

There are no particularly good examples of this to date, and this, therefore, presents a question of policy as well as legality. In El Salvador, over fifteen years ago, the peace agreement included vetting of the military leadership, ultimately helping to remove over 100 senior military personnel from their posts. Then the truth commission in El Salvador named over forty persons, most of them senior political officials, who had been involved in serious human rights crimes, and recommended that they be excluded from running for political office for ten years. But this recommendation was explicitly rejected by the United Nations, who stated that this would be a violation of the political rights of the individuals named.

Policymakers are still grappling with the question of whether and how it might be possible to exclude certain individuals from taking part in elections based on clear information that they were involved in serious crimes in the past. The place where this has been tried quite seriously is Afghanistan, where both in 2005 and, to some degree, in the elections this year, there was an attempt to introduce a system that would screen candidates, focusing on the question of whether they were associated with illegal, armed groups in the past. Although there were many candidates found to have been associated with such illegal armed groups, the system for actually removing them from the electoral polls largely broke down. This was due to logistical reasons, lack of sufficient information for the administrative review process, and, in the end, lack of political will both by Afghanis and by the international community to carry through on a policy that surely would have met resistance.

It has been difficult. It is fair to ask whether the international community may find comfort with the idea of removing people from the possibility of playing a future political role. The lingering discomfort is understandable, given that there are important examples where former rebels or government opponents, associated in some way with serious abuses, were ultimately accepted as critical, democratic leaders, shepherding in a peaceful and precarious transition from war or potentially escalating violence. We might consider the case of the African National Congress (ANC) in South Africa and the Maoists in Nepal.

While presenting a political and policy quandary, this question surely deserves further attention. Beyond the inherent policy issues, there are also practical matters to contend with. How would one get this message through to armed groups, and who would ultimately make the decisions about who would be excluded? What would the process be? Is it feasible to say to armed groups that their commanders cannot play a political role in the future? Could this make the possibility of a negotiated peace agreement more difficult?

4. Future Behavior, Future Benefits

My third idea pertains to the content and conditions of peace agreements. There are some interesting examples of peace agreements that made future benefits conditional on future behavior. That is, any continued violations would risk individuals losing some of the inherent benefits that are outlined in a peace agreement. One example of this would be amnesties that are granted for taking up arms against the State, transporting weapons across borders, and the range of other illegal acts that must be amnestied to allow armed elements to re-enter civilian life. (These amnesties would presumably exclude serious international crimes such as war crimes, genocide, or crimes against humanity.) If members of armed groups committed additional serious abuses, the 'future behavior, future benefits' clause would make it possible for them to be prosecuted not only for the new acts, but for past actions as well. Other benefits at risk would be demobilization and reintegration packages. This could help resolve the dilemma of peace agreements that see numerous violations, but are formally kept in force in order to prevent the full-scale return to war.

Besides needing much further thought and reflection, the above ideas presume the need for two additional elements (in particular, the second and third ideas). First, it would be necessary to have a fairly clear norm that is broadly accepted internationally, although what form this would take is quite open. Second, impact on behaviour would only be possible if a clear message were able to reach the armed groups. The latter aspect is less difficult, given the regular contact that humanitarian and other organizations have with many non-state armed groups around the world.

Disseminating and implementing international humanitarian law within organized armed groups. Measures armed groups can take to improve respect for international humanitarian law

*Olivier Bangerter**

1. Introduction

This paper will focus on measures that armed groups themselves can take to improve respect for International Humanitarian Law (IHL)[1]. It will concentrate on elements inherent to them that will condition their respect of IHL. The role of a number of external actors will be developed in the last chapter. This proceeds from the fact that those who can respect IHL are those who wage war, and not those who tell them what to do.

We shall only look at measures that have a direct and visible link with IHL; this is not to say that other measures, which may seem to have no direct link with IHL, should be forgotten. Some organisational decisions taken by armed groups on very different grounds than the respect of IHL do have a real effect on the potential for respect, or violations. Vetting new recruits and ensuring that enlistment in the group is not a means for common law criminals to escape justice but is one example of measures that can also contribute to a better respect of IHL. Some seemingly purely administrative measures can have the effect of limiting the risk of violations, like providing for the fighters' needs through a decent chain of logistics[2]. We shall, however, limit the scope of this paper to measures that have a direct link with IHL.

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1. It is debated whether IHL is applicable to armed groups, we shall therefore not deal with it, although the measures outlines can serve both purposes. We shall limit ourselves to armed groups party to a non-international armed conflict.

2. Logistics based on cash for kind may be one solution chosen to limit the risks of plunder: *We paid for everything because we did not want to use 'voluntary contributions' from the peasants, for fear of the system being abused* (Museveni 1997, p. 132).

Although all Parties to a non-international conflict are bound by the whole of IHL governing such conflicts[3], including armed groups, we recognise that progress can be made sequentially, as long as progress on one issue is not used as a smokescreen for stagnation on all the others. We shall therefore not distinguish between the respect of IHL as a whole and the respect of some specific obligation, as the measures that can be taken are exactly the same.

Before we can proceed, some objections must be dealt with. The general attitude towards armed groups in Western society[4] is quite negative and a number of people question their ability to respect IHL. They often do so on three counts: claiming that armed groups are by definition de-structured, are by trade the worst violators of IHL[5], or pay no attention to IHL. Before dealing with measures armed groups can take, we must examine each of these objections briefly.

2. Are armed groups "de-structured"?

To take effective measures enhancing respect for IHL, armed groups must have a structure. Yet, propaganda in non-international armed conflict aims at degrading them by calling them "bandits", qualifying them as "a rag-tag bunch" or by questioning the very existence of an organisation. Depicting armed groups as barely functioning bands is, however, just this, propaganda.

An ICRC study on the roots of behaviour in war warns against the use of the expression "de-structured conflicts" and states that "*All armed groups capable of launching operations with some semblance of a military character have structures of one kind or other – one or more leaders and degrees of organization which, though they may vary, exist and need to be identified. They have their own objectives, strategies, diasporas, links with crime, sources of finance, codes of conduct and the like*"[6]. This seems counter-intuitive for those who know armed groups only from some pictures of drugged West African child soldiers. We have, however, to

3. IHL in non-international armed conflicts encompasses both customary law and treaty law. Beyond customary law, common article 3 is the universal basis of accountability, but other texts enjoy an ever-increasing recognition among the international community.

4. Western society being only one example; armed groups do not currently have the aura 'liberation movements' enjoyed before the fall of the Berlin Wall.

5. Some claim that IHL cannot be respected by an insurgency; it is not the author's opinion but raises the question of the applicability and balance of IHL. Should IHL itself prevent armed groups from abiding by it, it would deserve a very serious revision.

6. Muñoz-Rojas and Frésard (2004), p. 13.

acknowledge that even armed groups whose foot soldiers seem least incorporated into a structure do or did possess a functioning organisation behind these appearances. Fighters at the lowest level are usually a bad indicator of a group's organisation; one of the extreme examples is that of the RENAMO; "*looting of civilian property, and killing, […] led the government to label Renamo's members bandidos armadas [sic] (armed bandits), and for much of the war analysts characterized Renamo as a disorganised movement of thieves. Yet Renamo was a highly centralised operation, with each of its many units connected by radio to the central command*"[7].

To be able to function as a group and not as a mob, an armed group needs to have an organisation of some kind, able to recruit, train, and direct its fighters, and able to procure and manage funds destined to feed and arm them. These seem to be easy tasks, but are no small feats for any organisation, especially when one considers the amount of money involved[8].

Beyond the political need for States to demean those who present a threat to their sovereignty, one of the main reasons explaining why armed groups may be considered disorganised are underlying pre-conceptions of what an organisation should be: a pyramidal system, with clear responsibilities for each position (and not person), and a certain 'readability' by outsiders. It is clear that only very few armed groups are 'organised' this way, but this does not mean that they are not organised[9]. On the contrary, a lack of organisation is fatal in the face of organised adversaries, whom most armed groups are facing; an armed group needs to organise, or face quick destruction.

7. Weinstein (2004), p. 230.

8. Using a reasoned approximation, Wennmann demonstrates the significant needs of armed groups in salaries and weapons – without other costs. "*The cost to start an armed conflict is between the bounds of 67,500 USD and 450,000 USD per 1,000 soldiers. The maintenance of a low intensity conflict is between the bounds of USD 2.1 million and USD 11.4 million, […] and a high intensity conflict between USD 4.5 million and USD 34.8 million per 1,000 soldiers per year*" (Wennmann 2008, pp. 14-15). Handling such amounts of money requires serious management capabilities.

9. It is the author's understanding that AP II uses the expression "organised armed groups" to distinguish between groups Party to a non-international armed conflict (in the sense of AP II and likely of common article 3 too) and groups in situations of violence not justifying the qualification of non-international armed conflict, e.g. *riots, isolated and sporadic acts of violence and other acts of a similar nature*. It does not mean that there could be armed groups party to a NIAC that are not organised. As soon as we say that a given situation is a non-international conflict (even only 'common article 3 - type'), we implicitly recognise that the non-state party is organised, because criteria to determine the existence of a NIAC are the organisation of the non-state party and the intensity of violence.

3. Are armed groups the worst violators?

A number of authors implicitly consider that armed groups are *per se* the perpetrators of most abuses and violations of IHL. This is nothing other than prejudice: where reasonably accurate figures are available, they do not support the allegation that armed groups as such commit most, or the most gruesome, violations[10].

On the contrary, they reveal that there is no fixed pattern. In some conflicts, certain armed groups are those to which most violations can be ascribed; this is illustrated by the RUF in Sierra Leone, guilty of most violations during the conflict[11]. In other conflicts, the vast majority of abuses are committed by state forces. The most striking documented example is the case of Guatemala; post-conflict investigations credit state forces with 93% of violations[12]. Examples of Uganda, Mozambique and Peru complete this short panorama: there is no fixed pattern as to which party –state or non state- is responsible for the most violations. The armed group may be a 'minor' violator, as was the case in Uganda (1981-1985): while the Ugandan NRA is credited with 17% of these incidents, the government is charged with 45%. In other cases, the reverse is true, as with the Mozambican RENAMO (Mozambique National Resistance) charged with 82% of violations.

We could continue this demonstration at length, but this is not the place to do so. We should simply acknowledge the fact that where reliable data

10. The accuracy of figures is a difficult question; Weinstein (2007), pp. 210-217, uses recorded cases of violence against non-combatant populations, mostly through media reports. He acknowledges the margin of uncertainty but is still able to demonstrate some patterns that vary from conflict to conflict. Weinstein's figures on various Shining Path (Sendero Luminoso) factions illustrate the difficulty of attributing violations, with around two thirds of incidents not attributable. Reports of Truth and Reconciliation Commissions are more reliable sources of data than media reports, but they are available for only a few conflicts.

11. In its 2004 *Final Report*, volume 2, the Truth and Reconciliation Commission of Sierra Leone credits the RUF of the "majority of violations and abuses" during the conflict; http://www.trcsierraleone.org/drwebsite/publish/index.shtml, pp. 11, 28, and many other occurrences (accessed 14th July 2009).

12. "*Human rights violations and acts of violence attributable to actions by the State represent 93% of those registered by the CEH; they demonstrate that human rights violations caused by state repression were repeated, and that, although varying in intensity, were prolonged and continuous, being especially severe from 1978 to 1984, a period during which 91% of the violations documented by the CEH were committed. Eighty-five percent of all cases of human rights violations and acts of violence registered by the CEH are attributable to the Army, acting either alone or in collaboration with another force, and 18%, to the Civil Patrols, which were organised by the armed forces"* (Guatemalan Historical Clarification Commission *Memoria del Silencio*, 1999; Conclusions, § 82; http://shr.aaas.org/guatemala/ceh/report/english/conc2.html, accessed 14th July 2009).

exists, it is impossible to predict which party will commit most abuses. Violations of IHL can be committed by any Party to a non-international conflict, regardless of its legal status[13].

We should remember that a certain (low) level of violations is unavoidable in armed conflict: even when a Party is most serious about prohibiting and prosecuting any breach of IHL, its commanders and fighters may still choose to act in ways contrary to the law. Parties can, however, take effective measures that will limit the occurrence – and repetition – of violations. Most violations are not unavoidable and a number of examples show that armed groups who take a number of measures can limit the occurrence of abuses[14].

4. Do armed groups not care about IHL?

Armed groups are unlikely to take measures enhancing respect for IHL, unless they care about it. There is no fixed pattern. Some groups have goals that constitute grave breaches of IHL[15], while others consider that respecting IHL is part of their struggle for better rights for the people. Some groups use grave breaches as part of a political strategy, while others express a commitment to IHL for mere political purposes. Some groups do not care what their fighters are doing as long as they are loyal, while others have decided to respect parts of IHL, or have an interpretation of IHL that lawyers and humanitarians consider wrong[16]. One should also remember that violations by an individual do not necessarily reflect the group's position. In a number of cases, the issue is one of command and control, not one of commitment.

Among this variety, groups with a serious commitment to respect IHL are more numerous than a cursory look might suggest. Whether these reasons are the result of a 'spirit of humanity', of a military strategy or of a political calculation does not change the fact that such groups take a

13. This is also true of different armed groups in the same conflict. The Peruvian Truth and Reconciliation Commission states that the Sendero Luminoso was responsible for 54% of deaths during the conflict, while the MRTA was responsible for only 1.5% (*Truth and Reconciliation Commission of Peru Final Report - General Conclusions* http://www.aprodeh.org.pe/sem_verdad/informe_final/english/conclusions.pdf, accessed 14th July 2009).

14. Weinstein (2007) examines measures taken by the NRA in Uganda in terms of control (pp. 140-145).

15. Like groups whose aim is to commit genocide (e.g. Rwandan *Interahamwe* militias in the 1990s) or to enforce 'ethnic cleansing' (e.g. Arkan's Tigers in Bosnia in the 1990s).

16. An armed group may commit actions based for instance on a different interpretation of who is a military objective. That a number of these interpretations are faulty does not mean that the group refuses to abide by IHL as such.

number of measures to prevent and punish violations that benefit, in the end, protected persons. These three dimensions are often intertwined[17].

In a recent event in Geneva[18], Dr. Anne Itto, the SPLM's Deputy Secretary General, gave an impressive speech on the SPLM's commitments to IHL and international human rights law (IHRL)[19]; she stated that the Movement realised it could not claim to fight for the people and not protect them at the same time. It made a number of commitments and enforced them; this boosted its credibility among the population that supported the SPLM, as well as among external actors[20].

Some critics argue that all commitments by armed groups are mere political pronouncements, void of any real content. There are obvious examples of pronouncements aimed at a wide political arena that did not change the policies of a given armed group[21]. There are, however, many examples of commitments that were followed by actions on the ground. The most notable – and public – example is the Geneva Call Deed of Commitment on Landmines, signed by 39 armed groups and non-recognised States[22]. In only three cases were complaints from the government recorded, and no conclusive evidence could be found in the countries where a Geneva Call team was allowed to enquire.

4.1. *Giving orders*

To some extent, a human being in a (military) organisation or structure is not a completely autonomous subject anymore. His or her[23] ability to take decisions is constrained both externally – by the structure's weight-

17. It may be worth remembering that they are also at play when it comes to States ratifying IHL instruments.

18. The second meeting of signatories of Geneva Call's Deed of Commitment.

19. SPLM stands for 'Sudan People's Liberation Movement'; the SPLA (Sudan People's Liberation Army) was its armed wing. Since the 2006 Comprehensive Peace Agreement, the SPLM is part of the Government of Sudan and the SPLA has an official status as armed forces.

20. Armed groups following a strategy of Protracted Popular Warfare (whether they are Maoist or not) tend to be very attentive to the way their fighters treat civilians; such a strategy is not a panacea in terms of preventing IHL violations, but, *overall*, groups using it seem to violate IHL less than those pursuing a purely military strategy.

21. The Liberation Tigers of Tamil Eelam (LTTE) made a number of pronouncements in 1988, notably to the United Nations Commission on Human Rights (28 February), that do not seem to have been followed by long-lasting effects on the ground.

22. Of which 20 were active in 2008.

23. We shall not repeat the feminine henceforth; the reader should, however, remember that in some armed groups, female fighters can represent a sizeable proportion of the troops, up to one third or even one half.

and internally – by what he considers acceptable in the eyes of those deserving loyalty, be they peers or superiors. This is not to say that such a human being becomes a robot, doing anything asked by the organisation, but one should acknowledge the weight of such an organisation in the decisions taken by the individual. It seems much more efficient to have respect of IHL enforced by those who exert such an important influence than by outsiders who try to convince each and every individual fighter to comply.

If we hope for or seek greater respect for IHL by any armed actor[24], we must first recognise that the latter's fighters operate in confusing environments, where a wrong decision can result in deaths and where trust in fellow fighters and/or commanders is paramount to survival. Both fellow fighters *and* commanders set the standards of what is acceptable or not, of how things are done; they do so mostly by their example, through their experience, by repeating their point of view each day and not so much by outright coercion. A new fighter will tend to adapt his ideas and behaviour to such an environment[25]. The credibility of an outsider coming once to give a lecture on IHL is very limited at best compared to what insiders will say and demonstrate with regularity. If this outsider is a civilian without fighting experience, his credibility will be very low; if his lecture seems disconnected from the fighters' reality, he may actually harm IHL's cause more than furthering it. Teaching by outsiders should not be discarded outright, as it may reinforce pre-existing convictions and have an influence on individuals. It may also have the effect of challenging some group mechanisms on the way civilians and persons *hors de combat* are seen, and of encouraging individuals who are in charge[26] to abide by certain standards. But its main impact will be an individual one.

Should external actors desire a wider impact, they must, therefore, recognise that teaching of individuals by outsiders is not as efficient as supporting the willing armed groups as organisations, helping them to carry respect for IHL[27]. This goes far beyond teaching some basic classes

24. In this regard, armed forces, security forces, armed groups and private military or security companies do not differ from one another. The differences only come into play about their organisation, not on the principle.

25. There are always examples of fighters not obeying orders they do not like; most do, however, not oppose the movement's policies outright, but either abide by it or manage not to comply one way or another.

26. Any fighter may be in charge of a small unit at one point; the ICRC's experience with armed groups manning checkpoints is that decisions can be taken at a very low echelon, hence the need to explain the ICRC's identity and action not only to the top commanders.

27. The other side of the coin is to convince the unwilling organisations, which is a different but no less interesting topic. There are limits in what one can do in this area, but

on IHL. Serious violations of IHL are often not caused by a lack of theoretical knowledge but much more by the way the organisation chooses to operate, through its system of command. The end product of these choices is *orders*, or lack of them.

Orders are fundamental for an armed group, as they make the difference between actions led by some key individuals and actions part of a general plan. The second is more preferable for the armed group: no victory, or even survival, can be realistically hoped for without a concerted effort. The capacity to define, give and enforce orders is what differentiates haphazard actions and group activity. To be efficient, both in military and in IHL terms, orders should be complete, clear and precise. It is in the armed group's best interest that its commanders are able to give such orders, whatever their format. Unclear orders lead to different interpretations and, therefore, conflicting actions[28]; lack of orders leads to improvisation by the lower levels[29]. Both cases may be very damaging for the group's action.

It is also critical for the respect of IHL that an armed group issues legally compliant orders; when clear orders command respect of IHL dispositions, the likelihood of violations decreases. In addition, in this case, violations result from individual actions and are much easier to deal with than when they are the result of a concerted policy. On the contrary, as long as an armed group fails to take measures ensuring the compliance to IHL of orders, the root of violations at a lower level will not be addressed; any representation by an external actor such as the ICRC at a lower level will, therefore, tackle the symptom and not the disease. Tackling the symptom is not a bad thing, but tackling the disease holds more promise for the protection of civilians and persons *hors de combat*.

In March 2005, the Nepalese Maoist PLA organised a raid on Beni Bazar in Myagdi district. The orders and planning for the operation have been printed from the PLA chief of staff's notes; they provide instructions for the

strategic argumentation with relevant commanders can go a certain way, with measurable effects.

28. Deliberately unclear orders can sometimes be given as a way to have the subordinate understand what is expected without the superior actually saying anything that could backfire. Saying "*you know very well what to do with prisoners*" is not clear enough to ensure captured people will be spared and is usually understood as an order to kill them. The first SS division in the Ardennes in 1944 was involved in several incidents of killing US prisoners following such an "order" at a pre-operation briefing.

29. Improvisation can be a good thing in military terms when it represents an adaptation to changing circumstances; however, improvisation as the rule is both inefficient in military terms and a recipe for disaster in IHL terms, as those improvising will usually have to take decisions under stress and be less conversant with IHL issues than their superiors.

immediate treatment of prisoners[30], as well as extremely detailed provisions for the treatment of the wounded[31]. Such measures contributed to a better respect for IHL, even more so because they were taken by a respected military leader and not merely advocated by foreigners.

Orders are not given in a vacuum; they are shaped by both political and policy decisions taken by armed groups. They are the result of previous measures, whose cumulative effect shapes the orders and their enforcement, and, therefore, respect – or not – of IHL. We shall now examine four areas where such measures can and should be taken, both at political and policy level.

4.2. *Political decisions*

Political decisions are those taken at the group's highest level, which have a bearing on the whole movement, including its non-military parts (if they exist)[32]. Such decisions are usually taken by senior military leaders if the group does not have an organisation with a military wing distinct of higher leadership. They are strategic in character, defining why the movement wants to wage war and according to which broad principles. They go far beyond conduct of hostilities but shape the latter.

By calling such decisions "political", we intend to stress both the high level at which they are taken, and their strategic character: once taken, they can usually be revoked or amended only with great difficulty. They often take the shape of public pronouncements[33] by one or more leaders seen as representative enough to speak in the name of all. Such commitment is primarily an organisational choice, and the person making it must be representative of the organisation; if this is not the case, the commitment is void.

If the top leadership does not want to respect IHL[34], that is the end of the matter. One cannot hope to change an armed group's practice without

30. *It is not allowed to behave indecently and kill the captured and surrendered people. The unnecessary misuse of the words is not allowed* [verbal abuse is forbidden] (Pasang 2008, p. 206).

31. Pasang 2008, pp. 206, 207-208.

32. The reader should not equate political decisions and decisions taken for political gain. Confusing both leads to suspecting any commitment by an armed group of being a mere public relations move; this dimension exists among armed groups (as among States) but is by no means the only aspect of political decisions.

33. One tends to forget that oral pronouncements can carry much weight as well; while *scripta manent*, *verba* have a definite weight in many cultures, especially if they are repeated at different occasions.

34. Or is not ready to pay the price in terms of limiting military options and in terms of work required.

having its leadership genuinely committed to do so. We have to recognise that some armed groups have goals that in themselves amount to violations of IHL[35] or wilfully choose to violate IHL as part of their way of waging war[36]. For the purpose of this article, we shall consider only the groups who are willing to improve their respect of IHL, recognising that not all of them are[37].

Where there is no genuine commitment, the existence of any of the measures described below will not result in significant and sustainable improvement of the situation on the ground, in terms of respect of IHL. These measures are useful and efficient tools, but can be useful and efficient only when used with the – real – goal of preventing or correcting practice contrary to IHL.

Political decisions come in all sorts of forms; the most usual is the *unilateral declaration*. While armed groups are bound by IHL, there is no formal mechanism allowing them to sign or ratify any IHL treaty. A number of groups have chosen to declare themselves bound by IHL, sometimes encompassing the whole of the four Geneva Conventions. Such statements have been made by a variety of actors, including the ICRC, the Swiss Government, the United Nations (UN), and the media. Unilateral declarations spell out standards that the leadership recognises and considers binding. They do not change the content of a group's legal obligations but commit the group to these existing obligations. In effect, they create accepted standards, instead of what is often considered as imposed standards.

Unilateral declarations are often criticised as mere political pronouncements, backed by no intention of changing the behaviour of fighters. It is true that, of all measures outlined, unilateral declarations bear the greatest risk of abuse of IHL for public relations purposes. This does, however, not mean that each unilateral declaration is made in bad faith; people claiming this should then apply the same cynicism to States signing IHL treaties. The risk is not inherent in the nature of armed groups, but in the nature of unilateral declarations. Unilateral declarations do not come in any unified

35. 'Ethnic cleansing' by armed groups, as illustrated in the former Yugoslavia, may be an example.

36. In this regard, Olsen (2007) is a very sobering reading; his ex-LRA interviewees describe how the movement chose to use direct and indiscriminate attacks on civilians to control the population, and to undermine the government's legitimacy. "*The indiscriminate use of violence allows the group to be seen as a threat while only staging few attacks and as such to remain an important player in national politics*" (p. 5).

37. We sadly have to admit that this is not true only of armed groups: not all States are willing to take effective measures to decrease the number of breaches of IHL committed by their forces, be it in a preventive manner or *post facto*.

form, and can be formulated so as to be vague[38]. This is a weakness in the use of this tool, not of the tool itself which can be very effective when it comes to stating relevant obligations the political leadership considers binding.

> *The terms of a unilateral declaration may, inter alia, contain an accurate and straightforward statement of the IHL provisions applicable in the specific conflict, as well as an express commitment by the armed group to respect and ensure respect for these provisions of IHL, which could be both treaty and customary norms.*
> *If a declaration is issue-specific rather than a commitment to adhere to the full range of applicable IHL, then it could refer only to provisions of IHL related to that issue. If possible, such narrow declarations should include a clarification that this is without prejudice to other applicable rules not mentioned in the declaration*[39].

Unilateral declarations, by their very nature, are general documents. They are perfect tools to express genuine commitment by the leadership to respect IHL, but they are not precise enough to serve the needs of commanders and fighters. They can also be used for a mere diplomatic purpose, for instance, to position a group that has no intention of respecting IHL as a respectable actor in the conflict arena[40]. These declarations can, therefore, be powerful or void. It must be translated (and enforced) at policy level to be effective; it will only be worthwhile if there is genuine commitment to IHL on the part of the leadership. Lengthy discussion to ascertain such commitment and ensure it represents a consensus among the group's leaders is certainly not a bad investment of time. Specific issues at hand in the conflict and the impact IHL has on them must be considered carefully[41].

38. Some groups have committed themselves to respect the entirety of the four Geneva Conventions, in situations where only common article three is applicable, and where they are anyway unable to comply with standards of treatment of prisoners of war (like the advances of pay, art. 60, GC III).

39. Mack 2008, p. 21.

40. After a series of such declarations at the end of the 70s and during the 80s, the momentum decreased during the 90s. There are only few examples in the 21st century. This is evidence to the fact that armed groups have learnt that making such a declaration does not grant any kind of international legitimacy.

41. As an example, the 1991 *NDFP Declaration of Adherence to International Humanitarian Law*, http://home.casema.nl/ndf/ (accessed 15 July 2009). The 1996 *NDFP Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977* has a more political intention (Protocol I applies to national liberation struggles) but spells out very clearly the categories of persons protected:

> *The NDFP and the forces it herein represents accept the principle of command responsibility for the system of discipline to ensure respect for the rules of international humanitarian law and punish those who break them.*
> *The NDFP regards as legitimate targets of military attack the units, personnel and facilities belonging to the following:*

It may be better to have no unilateral declaration than to have one that serves only public relations purposes and is disconnected of the conflict's real issues.

Another measure that can be taken is to include IHL provisions in agreements with other Parties or organisations. These agreements are much more detailed than unilateral declarations, and often encompass monitoring mechanisms. *Special agreements* are agreements between the Parties to the conflict, foreseen in common article 3, by which the Parties declare themselves bound by the same obligations, either those applicable anyway or obligations more complete than the applicable legal regime. States are usually reluctant to enter into such agreements, as it implies acknowledging that the opposition is both legitimate enough to be a partner and strong enough to warrant a special agreement. An example of such an agreement is the March 2002 "*Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation movement to protect non-combatant civilians and civilian facilities from military attack*"[42].

Bilateral agreements can bind an armed group, the State, and/or third parties; they usually have a limited scope, typically the provision of humanitarian assistance. As such, they are less sensitive politically, but can open the door for IHL issues. The main example of such agreements are the three 1995 and 1996 "*Agreements on ground rules*"[43], defining a framework for humanitarian assistance in South Sudan. These agreements,

1. The Armed Forces of the Philippines
2. The Philippine National Police
3. The paramilitary forces; and
4. The intelligence personnel of the foregoing.
Civil servants of the GRP are not subject to military attack, unless in specific cases they belong to any of the four above- stated categories.
The NDFP will treat any captured personnel of the military, police and paramilitary forces of the GRP as prisoners of war and demands that the GRP likewise treat as prisoners of war any captured personnel of the NPA and other forces represented herein by the NDFP.
The NDFP forthwith disseminates this declaration and the rules of the Geneva Conventions and Protocol I to its forces and asks for the assistance of the ICRC with regards to suitable materials. The NDFP will welcome any offer of services from the ICRC.
The NDFP calls upon High Contracting Parties to the Geneva Conventions and Protocol I to ensure that the GRP and the NDFP respect their obligations (ibid).

42. The first one was signed in July 1995 with the SPLM (John Garang), the second in August 1995 with the SSIM (Riek Machar) and the last in 1996 with the SPLM/United (Lam Akol). Full text of the latter can be found at http://www.vigilsd.org/resolut/agreemsd.htm#Agreement%20between%20the%20Government%20of%20the%20Republic (accessed 15 July 2009).

43. Full text at http://coe-dmha.org/Unicef/HPT_Session8Handout8_1.htm (accessed 15 July 2009).

signed under the leadership of UNICEF, are rightly considered as a best practice.

IHL can also be included in *peace or ceasefire agreements*; this has two advantages in terms of respect for IHL. First, and most obviously, there are IHL provisions that continue to apply even if hostilities have ceased; spelling them out and accepting they bind both parties help to have them fulfilled. An area where such agreements are immediately useful is the fate of people detained in relations to the conflict. Even if a peace agreement enters in force, they may not be freed on the same day and must continue to benefit from IHL protection. The second, and less obvious, advantage is that such agreements publicly confirm that IHL is applicable to both parties, which even a resumption of hostilities cannot change[44].

Unilateral declarations and agreements are the most common political decisions regarding IHL. Other political decisions also have a serious impact on respect for IHL. Publishing one or several documents is, therefore, not the ultimate measure at political level. If the political leadership wants to see IHL applied throughout the activities of an armed group, they must review all of their strategic choices. The way they have decided to wage their war has serious IHL implications, for instance, on the way they treat civilian government employees in their area of control, as well as the minimum age of recruitment, and for the choice and procurement of weapons they use, to name but a few. If the highest leadership orders (or approves) the commanders on the ground to use certain weapons, this has serious consequences: mines, area weapons, or incendiary weapons are all weapons whose use is restricted by IHL. The decision to procure or discard them should be taken and reviewed by the highest leadership, for their military usefulness and for the risk they pose in terms of incidental damage.

In addition to these strategic choices, the leadership of groups that control territory permanently often promulgates *laws* and decrees *administrative measures* in this territory. While the legality of such texts is disputed at best[45], they are an existing practice. An additional political measure that can be taken by armed groups is to ensure that they do not

44. The 1998 *Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law* (CARHRIHL) signed between the Government of the Republic of the Philippines (GRP) and the National Democratic Front of the Philippines (NDFP) was destined to be applicable during the peace negotiations, which eventually stalled; but the agreement is still considered as the reference in this conflict. The full text can be found at http://www.philsol.nl/A03a/CARHRIHL-mar98.htm (accessed 15 July 2009).

45. Any text claiming to replace State legislative decisions is by definition illegal on the territory of the said State.

promulgate any law or measure that would violate IHL. This is true for instance of the setting up of an alternative justice system, including publishing an alternative penal code[46], but also of restrictions of movement (like curfews)[47].

4.3. *Policy decisions-doctrine*

Doctrine encompasses the "*fundamental principles by which armed groups guide their actions in support of their ultimate objectives*"[48]. Such principles can be written or oral, gathered in one authoritative text or dispersed in a number of documents. In all cases, armed groups – as other organisations – do tend to develop their own 'way of doing things'.

Contrary to popular wisdom, armed groups very seldom behave randomly; even the most gruesome violations of IHL can be grounded in rational thinking. This was, for instance, the case of attacks of internally displaced persons (IDP) camps by the Lord's Resistance Army (LRA) in Northern Uganda. While most interactions with the IDP did not entail violence, the LRA did commit massacres at certain times, because it allowed them to "*spoil the name of the government*" and show that the LRA was still an important player, while staging only few attacks[49]. This is but one example of doctrine that does not only condone but also requires violations of IHL.

Armed groups do have doctrine, and this may be quite sophisticated. The Taliban are known to have edited a code of conduct in 2006[50]; they have also written a 150-page manual that has known several editions[51]. Both Jihad and communist armed groups tend to produce significant amounts of written doctrine.

Doctrine provides the by-default solution to commanders when faced with challenges. While not followed blindly, it provides the frame for thinking and decision-making. It is, therefore, crucial that doctrine be in

46. Any sentence pronounced must under IHL respect fundamental judicial guarantees (AP II,6).

47. These are dealt with mostly in customary international law with provisions deriving from Geneva Convention IV and The Hague Conventions. Such measures can also come under IHL provisions for non-international armed conflicts, such as prohibition of collective punishments (AP II,4) or relief actions (AP II,18).

48. Adapted from an US definition; http://www.dtic.mil/doctrine/jel/doddict/data/d/3840.html (accessed 16 July 2009).

49. Olsen 2007, p. 5.

50. *Layeha for the Mujahideen*, http://www.signandsight.com/features/1071.html (accessed 16 July 2009).

51. *Nizami Darsoona - Da Mujahideeno Da Aghdad La para'* (Military Teachings for the Preparation of Mujahidin), sadly not available publicly; for a summary see http://www.ctc.usma.edu/sentinel/CTCSentinel-Vol1Iss10.pdf, pp. 5-7 (accessed 16 July 2009).

keeping with IHL. As an example, the Maoist guerrilla warfare doctrine emphasizes the need to protect and nurture civilians; this has been translated, for instance, in the PLA *Three Rules and Eight Remarks*[52], which insist heavily on the interdiction of plunder, under all its forms.

For doctrine to be in keeping with IHL, the armed group requires more than a mere repetition of common article 3 in a single document.

> *The relevant law must be translated into concrete measures, means and mechanisms conducive to compliance […]. Law is actually a set of general rules, sometimes too general to serve as a guide for practical behaviour in combat or law enforcement. It is, therefore, necessary to interpret it, analyse its operational implications and identify consequences at all levels*[53].

Armed groups should not strive to merely create an IHL-specific document, but continuously ensure that their doctrine as a whole is compliant with IHL, and "*issue manuals, orders and instructions setting out [combatants'] obligations*"[54]. A mere reference to the law in an appendix has only a limited impact, especially when the reference is perceived as a way to please "foreigners". On the contrary, when duties pertaining to IHL are mixed with normal duties routinely enforced by his commander, a fighter will understand that all are important for his 'normal' activities[55]. Taking the example of sexual violence, a command "*not to take liberties with women*" is likely to be obeyed when it follows "*Obey orders in all your actions*", as in *Three Rules and Eight Remarks*, much more than when it is part of a document only stating IHL obligations.

Most external actors focus on training about IHL[56], but this is a mistake: one trains according to one's doctrine. If doctrine is neglected, IHL will come too far down the stream, as an afterthought. In case of doubt during combat, commanders and fighters will revert to the principles that should guide their action.

Measures that armed groups can take in terms of doctrine include the reviewing of their principles, and documents where these are spelled out. Such documents can be general *directives*, specific directives[57], *codes of*

52. http://english.peopledaily.com.cn/dengxp/vol2/note/B0060.html (accessed 16 July 2009).

53. ICRC 2007, p. 17.

54. United Nations Security Council 2009, p. 14.

55. Or be unaware of the IHL component altogether, while following instructions that reflect IHL. What is important is not the knowledge about IHL, but the respect of its provisions.

56. Be it in their recommendations or in their offer to armed groups.

57. For instance on the use of certain weapons.

conduct[58] and *manuals*[59]*, as well as* the *oath* that all new fighters must take[60]. IHL issues should also be integrated into *standard planning*[61], as incorporation of IHL requirements before the operation even begins can prevent many problems from arising.

This is not an exhaustive list and depends upon the armed group's organisation; for some, adopting – and enforcing – a code of conduct is the most they can do. Others routinely produce manuals and are able to include IHL in more documents. In all cases, IHL should be integrated into these doctrinal documents and not be a stand-alone subject.

A specific word must be said about *codes of conduct*; these documents have long been identified as a central tool for armed groups to better respect IHL. There has, however, been some confusion as to what they are. We can define them as the set of rules an organisation expects its members to respect under all circumstances. They outline the responsibilities of or proper practices for an individual or organisation, and typical codes of conduct are, therefore, relatively short. In practice for armed groups, current or past, publicly available codes of conduct range from 10 to 30 articles, usually quite short[62]. Not everything can be said in 30 articles, be it concerning IHL or the group's way of operating.

Many external actors would seek armed groups' adoption of a standard set of IHL rules, and those proposed usually have already a size similar to that of a normal code of conduct, leaving no room for 'normal military' obligations. When adopted, which is extremely rare, these standard documents may be named code of conduct, but do not function as such and are quickly sidelined because ownership of any document copied from the outside is limited at best and cannot compare with that of a self-devised code of conduct. We must not forget that armed groups

58. Such as the two NRA codes of conduct mentioned by Museveni 1997, pp. 146-147.

59. Such as those mentioned by Museveni 1997, p. 148.

60. An interesting example is the oath taken by new MNJ recruits in Niger; although there is no standard wording available publicly, we know that the oath comprises few elements (some say four), including the respect for the civilian population and the promise not to betray the movement: the new fighter, therefore, gets to understand that respecting civilians is viewed at the same level by his leaders as being trustworthy. One can find echoes of this oath at http://www.agadez-niger.com/forum/viewtopic.php?t=2150, which is a pronouncement by a MNJ fighter (accessed 16 July 2009).

61. Pasang 2008 gives a number of examples of how the treatment of prisoners is part of the pre-operation planning and coaching, i.e. giving of operational orders.

62. Some add preambles and conclusions; detailed figures are CNL (Congo Kinshasa) 8, Sendero Luminoso for members (Peru) 8, ALN Algeria 10, Sendero Luminoso for commanders (Peru) 11, PLA China 11, Viet Cong (Vietnam) 12, (PCC Brazil 16), ELN 1995 (Colombia) 17, UNE (Spain) 19, SPLA (Sudan) 29, Taliban 2006 (Afhanistan) 30. The *Book of Rules* edited by the Taliban in 2009 counts 67 rules.

organise themselves, their doctrine and their procedures the way they please; these organisational choices have consequences for the way they devise a relevant code of conduct. There is, therefore, no 'one-size-fits-all' code of conduct[63].

There are obvious bottom lines, but these do not reside in a standard content. The bottom line is that the code must not order or condone violations of IHL. When an external actor discusses the issue of doctrine with an armed group, and even more so about such a code, it must draw the group's attention to the practical consequences in IHL terms of military decisions, and not strive to be legally exhaustive. It is not possible to fit all IHL into 30 articles. By thoroughly discussing such basic principles and their implications, an armed group may discern which rules should be known by each fighter[64], as well as those that should be known by commanders, and how to integrate or translate them into their doctrine.

4.4. *Policy decisions-education and training*

> *Education focuses on providing personnel with theoretical knowledge on what to do. Teaching the content of applicable law during education is one straightforward step. […] The training of arms carriers focuses on providing personnel with practical experience of how to perform their functions while complying with the law. It enables […] to acquire skills and experience*[65].

While not all armed groups have formal education systems, all of them have some sort of training. Even militias in Brazzaville during the Congolese war of 1997 – who were composed to a large extent of inhabitants of the city who had received weapons – received a basic training in how to handle weapons. The same was true of armed groups in Liberia or Sierra Leone. For those groups with limited capacity, imitation of other fighters[66] and informal transmission of information may build the majority of the training; but training still happens.

At the other end of the spectrum, the Hezbollah in Lebanon has an elaborate teaching and training system. During the 2006 conflict, it was

63. Codes with great ownership can have a very long life, and become the code of conduct of State armed forces when the armed group has taken power. This has happened in the Chinese PLA and the Ugandan UPDF (see Ngoga in Clapham 1998, p. 102).

64. The ICRC suggests four different principles to serve as a minimum basis for discussion: *1) Fight only those who participate directly to the conflict. 2) Use no more force than necessary to defeat the enemy. 3) Cause no more damage than necessary. 4) Treat all those in your power well.*

65. ICRC 2007, p. 26 & p. 29.

66. On the job training.

striking to read the obituaries of fighters on the group's websites: most of them had followed a number of different training courses, including very specialised ones. Some groups have permanent schools providing education for officers and/or NCOs. The SPLM in Southern Sudan opened its *Institute of Strategic Studies* in 2000, during the war; following the Comprehensive Peace Agreement, this school was renamed *Dr. John Garang Memorial Military Academy* in 2006. During the war, it provided officers with both training and education; in Eastern DRC, the FDLR also run a military school near Karongi. Many other groups have dedicated programs for new recruits, such as the Colombian ELN's three-months long 'combatant school'.

There is no standard training/education system followed by armed groups and one should not assume that the lowest end of the spectrum is the norm[67]. Whatever system they use, armed groups know – or quickly realise – that they need to define, explain and rehearse standard behaviour for their fighters to be able to act in a certain way during combat[68].

Measures armed groups can take in this field are limited. The first is to include IHL in the *curricula* of formal education, putting a special emphasis in the commanders' education on explaining the reasons why the group wants/needs to respect IHL. As commanders should both give IHL-compliant orders and sanction violations, the group must make sure they understand why political and policy decisions have been taken and must be enforced[69].

The key area in terms of education to rank-and-file fighters is the *dissemination* of decisions related to IHL made by the leadership and of basic IHL principles. This information process is by no means sufficient to increase respect, but ignorance of both the law and the group's policies leads fighters to determine for themselves what is good and what is not.

67. On the contrary, evidence points to the fact that successful groups, like the Viet Cong or the FMLN, spent more time training than conducting operations.

68. *Experience, as well as research, have indeed demonstrated that the mere teaching of legal norms will not result, in itself, in a change of attitude or behaviour. A fact that has been recognised by armed forces for centuries. No commander would want or dare to go to battle before his troops have gone through the appropriate training i.e. before they have acquired, through drills, the necessary skills in order to perform the expected behaviour in stress and danger. In this respect, modern military methodology manuals acknowledge that practical exercises remain the most effective training method. With lectures only, 80% of the information is quickly forgotten unless illustrated by means of audiovisual material, in which case 50% of the information is retained. If questions are asked to check that the message has been understood and the answers given are right, 70% of what has been taught will be retained on average. In comparison, practical exercises yield an efficiency rate of nearly 90%. (*Sénéchaud, forthcoming*).*

69. For a number of groups, this part of IHL education is done during political training (see Weinstein 2007).

This can be avoided at a relatively low cost by making sure commanders at each level inform their subordinates[70]. Some groups go further with a formal system of 'political education', which can be the preserve of commanders, but also of dedicated specialists, such as the NRA's political officers, which were "*expected to guide the army in accordance with the political line of the movement, to educate the fighters and supporters in the reason of the war, and to keep them in touch with developments*"[71].

Training implies the acquisition of practical skills, which do only come through repetition of standard behaviour in near-real conditions, i.e. during *exercises*. There is no such thing as an IHL exercise; behaviour compliant with IHL must be part of tactical behaviour exercised. Some exercises aim at rehearsing very basic behaviour – like how to search a prisoner. They should always be completed by exercises putting such behaviours in a wider context; for instance, including the surrender of enemy personnel in the wider tactical scenario of the attack of a enemy-held position. The best way to include IHL in training is to integrate IHL problematics into already existing exercises[72].

Training and education are important areas for the respect of IHL by armed groups. However, contrary to common belief, they are not the central element in improving respect for IHL. Should an armed group want to start somewhere, doctrine is generally more promising, as it shapes the training given. Because training is not as central as doctrine, armed groups who wish to appear good and change nothing can be very eager to accept external involvement in teaching, which is likely to be publicised by the giver while unlikely to address the core problems.

70. A number of armed groups use the services of external actors like the ICRC to do so, and the institution is more than willing to refer to a group's policy in formal dissemination sessions or in bilateral contacts, provided it is useful for the protection of victims of armed conflict.

71. Pascal Ngoga in Clapham 1998, p. 101. The inclusion of IHL in what is termed political education can be a positive sign, but can also be a sign of disconnection between the operational line and IHL rules. The status in the group of the person giving the education matters much more in terms of IHL respect than the mere content of the education. In groups where the political line (the 'party') effectively directs the military line (the 'army'), a political figure carries weight; where this is not the case, such education must be made by the unit commander to be effective. See also Museveni 1997, p. 90, for the link between political education and discipline.

72. ICRC specialist delegates have done this with a number of armed forces and a few armed groups in the world. They have requested the armed group's trainers to provide the tactical comment and have themselves only highlighted IHL issues arising from the trainees behaviour. To put this bluntly, the ICRC does not care about the tactical soundness of training given; the armed group must make their choices, and pay for them. It only cares about the inclusion of IHL concerns into the training given. While participation to such exercises happens more often with armed forces for practical reasons, the ICRC has had some interesting experience with armed groups as well, notably with the MILF in the Philippines. They help the fighters to see that IHL is not disconnected from their daily business.

4.5. *Policy decisions-sanctions*

In theory, the respect of IHL is a simple matter of discipline, or of command and control. In practice, control is never absolute and, even in the face of definite orders, people may choose not to follow them. When this happens, control has to be regained, and sanctions are the prime means of doing so. This is true in any organisation: policy must be enforced consistently.

For policy to be enforced, an organisation requires a monitoring system, to make sure it knows what its agents are doing. Without a good monitoring system, the organisation can only distribute directives and hope its members will implement them, whether they are liked or disliked. This is clearly a recipe for disaster: without knowledge about behaviour of its agents, no organisation can function.

The same mechanisms also apply to armed groups, with a challenge and a difference. The challenge is that monitoring is a complex task for armed groups, which often are functioning covertly; the difference is that sanctions by armed groups pose a number of complex legal questions. We shall not enter the debate concerning the legality of these sanctions, and of the safeguards that must apply so that these sanctions do not in themselves constitute IHL violations. This discussion has been made with talent by others[73].

When considering measures armed groups can take to foster respect for IHL, sanctions taken by them[74] are an essential element. Making a unilateral declaration, publishing a code of conduct and training accordingly are all useful measures[75]. They will never manage to prevent all violations, because the individual's margin of manoeuvre – and mistake – is only limited and not negated by the institution. Sanctions are the element that close the integration circle: not only does the institution say what is accepted in words, but it also enforces it. Experience shows that the more visible they are and the more predictable their application, the more efficient they will be.

In academic debate on armed groups, sanctions are mostly understood as punishment after negative behaviour. They do, however, also take the form of rewards, which help enforce correct behaviour, even if it is diffi-

73. Some recent examples include Somer 2007, La Rosa-Wuerzner 2008, Sivakumaran 2009.

74. The effect of international sanctions is worth a thorough investigation, to see how much it does influence behaviour by fighters. But these are not measures that armed groups can take.

75. And part of a wider catalogue as was outlined above.

cult to reward someone for something that did not happen. We will, therefore, mention the rewards only in passing.

Whether legal or not, armed groups do apply sanctions to their members. Sanctions currently applied around the world can be classified in five areas: symbolic, 'financial', movement and restriction of movement, corporal, and death penalty. Figure 1 provides a list of sanctions most often used. While not all comply with IHL – both in reward and punishment – and some are outright violations, the list shows that armed groups have a variety of sanctions at their disposal. Among measures they can take to improve respect for IHL, the review of their sanctions is certainly a priority.

Fig. 1 - Some actual rewards and punishments used by armed groups

	Punishment	*Reward*
Symbolic	Private reprimand Warning Public reprimand Dismissal Demotion Self-criticism[76] Loss of seniority Public humiliation	Integration into the group (for recruits) Praise Stripes / Medals Special duty (honour guard) Honorary discharge Promotion to higher rank or status 'Martyr' status
'Financial'	Fines Forced restitution to victim Compensation to victim Suspension of pay	Monetary reward Reward in kind Salary increase Right to plunder Share of plunder
Movement	Imprisonment House arrest Forced labour for the community Prohibition of leave	Short leave Extended leave
Corporal	Extra work / drill Whipping Beating Mutilation Torture	Better assignment
Death penalty	Execution on the spot Execution after trial	–

[Punitive] sanctions can be enforced through penal or disciplinary measures. While the former is doubtless necessary, it must be backed by effective disciplinary sanctions at all levels of the chain of command. These administrative measures, actually under the responsibility of the direct superior, offer two key advantages: they can be enforced rapidly and they are highly visible to the offender's peers. Their dissuasive effect is, therefore, immediate, preventing unacceptable behaviour becoming tolerated or even accepted[77].

76. This can be oral or in writing, in front of the group or in private with the commander.
77. ICRC 2007, p. 35.

Former leaders and commanders of armed groups often insist on the importance of punitive sanctions to enforce decisions made by the leadership. Brigadier General Malual Ayom Dor of the SPLA, interviewed by the ICRC in 2006, stressed the link between clear and written orders and tough punishment when these are disobeyed, particularly when it comes to the protection of prisoners, wounded and women. For him, raping, desertion and robbery "*happen when the commander is weak*". This is not an isolated opinion; in 2008, Ugandan President Museveni, speaking on his experience as former leader of the NRA, stated that:

> *in case one of your soldiers commits a mistake, especially killing people, he must be punished where the mistake was committed, in front of the people. […] Discipline is very crucial for the revolutionary cause to succeed*[78].

In parallel with punitive sanctions, other measures armed groups can take include the adoption of a *disciplinary code*[79], the adoption of a *penal code*[80], the creation of *courts*[81], *cooperation* with national or international justice[82]. All these must be compliant with IHL, both in the offences they list and the punishment they allow.

Unexpected as it may be, one administrative function may carry great weight in terms of respect of IHL: the human resources system. The armed group's leadership passes very compelling messages when it rewards people by promotion. If a promotion rewards a performance based on IHL violations[83], other fighters will get the message: 'for my career, the results are more important than the methods'. This will encourage further violations, and even more serious ones. *Procedures for promotion* (or demotion)

78. Museveni 2008, p. 9. Weinstein 2007 points out that armed groups with limited resources at the start of the insurgency are more likely to want to win the population over, and to attract idealists that can be taught to do so; on the contrary, those which have access to vast resources attract opportunists who are less willing to obey the group's line when it crosses their short-term interests. This argument explains a number of mechanisms, but fails to explain the behaviour of all armed groups; the leadership's actions and motivations count far more than a mechanical application of Weinstein's thesis would explain.

79. As an example of a disciplinary code adopted by an armed group, see the ANC's *Umkhonto we Sizwe Military Code*, http://www.anc.org.za/ancdocs/history/conf/kabcode.htm, (accessed 16 July 2009).

80. This can be the national one.

81. Military, traditional or civilian. Sivakumaran 2009 gives the examples of FMLN (El Salvador), CPN-M (Nepal) and LTTE (Sri Lanka). See also Somer 2007 and La Rosa & Wuerzner 2008.

82. No example is known during conflict, but the South African Truth and Reconciliation Commission praised the ANC's cooperation.

83. An extreme example being to promote an intelligence officer who has managed to extract useful information by the means of systematic torture.

must be consistent with the past actions of the fighter. If he has been disciplined for bad behaviour, it is essential that no promotion follows directly, unless one wants to send the message that IHL respect is secondary. It is difficult to reward IHL compliance with promotion, but the very least an armed group should do is to ensure that promotion does not reward war crimes.

4.6. *The role of external actors*

The variety of measures outlined above provides armed groups with a wide range of courses of action; there is not only one way to deal with the issue, and they can choose their priorities according to their needs and immediate possibilities. Making a political commitment through a unilateral declaration, editing a code of conduct, disseminating the basic norms of IHL, reviewing orders, and reviewing sanctions mechanisms are the most helpful first steps. But they are only a few among a much larger palette. This variety provides openings to a number of different inputs/support by external actors.

As was illustrated by the recent debate in the UN Security Council[84], the issue of engaging into a dialogue with armed groups is still a hotly debated one. While some countries refuse any dialogue with any armed group, a number of others have offered their services, most often as third party mediators or facilitators in talks. The most recent is provided by Qatar hosting talks between the government of Sudan and the JEM.

Among humanitarian organisations, the debate is much less prevalent, because working in an environment where armed groups are active[85] requires some sort of assurance of one's security. It has been an established practice for a number of agencies to discuss such guarantees with armed groups directly[86], a practice that has been codified in OCHA's 2006 Manual *Humanitarian Negotiations with Armed Groups*. Negotiating access is the most basic form of interaction, and will continue to be in the foreseeable future.

Beyond negotiating access, consistent engagement into a dialogue with an armed group, especially with its highest leadership, is a prerequisite for those striving to protect victims of armed conflict. Such a dialogue often

84. S/PV.6151 and S/PV.6151 (Resumption 1), 26 June 2009.

85. The presence of armed groups is NOT a new phenomenon; 63% of the "Red Cross" interventions during the 19th century were in contexts where armed groups (and non-recognised governments) were active (Moynier 1899).

86. The author was personally involved in one of such discussions in 2008.

yields more results than is usually thought. But what should external actors offer armed groups, especially those wanting to take measures for better compliance?

The defining element is the presence – or the absence – of genuine commitment on the side of the armed group to take these measures. This commitment implies much more than a general pronouncement, but a real willingness to improve the situation on the ground. Whatever its motives[87], if the armed group is serious in implementing all or part of IHL dispositions, consequences will follow. Persuasion is one the most valuable contribution an external actor can make; it requires engaging into a real dialogue to understand the reasons lying at the root of violations; it also requires very careful listening, to avoid succumbing to some of the prejudice outlined in the introduction. Finally, it requires realism to discern whether violations are mishaps, the result of a policy (or lack thereof), or worse the expression of an armed group's aim. Not all armed groups can be persuaded with arguments to improve their respect for IHL. In limited cases, pressure applied by the Security Council or by States supporting the group has also yielded results.

A number of organisations offer support when it comes to expressing political commitment. For instance, Geneva Call offers the *Deed of Commitment* when it comes to anti-personnel mines; the ICRC can publish unilateral declarations in the *International Review of the Red Cross*; the Centre for Humanitarian Dialogue has published engagements on IHL issues by several factions in Darfur after a workshop[88].

The organisations working in protection offer interesting possibilities for armed groups to monitor the contents and effects of their orders. This possibility is not used by armed groups as much as it could be. The presence of an impartial actor doing this monitoring is too often seen as a threat. While this may be understandable when the organisation publishes its findings, this is not the case when the representations are done confidentially. Such representations, when they are done well, provide the leadership with an insight into its fighters' behaviour that their monitoring system cannot always rival.

Only few organisations can offer support when it comes to doctrine. The reason for which so few external actors engage in this field is their

87. Measures taken by some groups on the recruitment of child soldiers have more to do with the wish not to appear among the 'bad guys' than with genuine concern for the children. If they translate into the end of recruitment and the release of the children, the goal is, however, still attained.

88. The statement can be read at http://www.hdcentre.org/files/110708.pdf (accessed 16 July 2009).

perceived (and often real) lack of expertise in military terms, as well as the risk to be viewed as building an armed group's military capacity. The ICRC has some experience in discussing codes of conduct or preparing those who will author them by organising courses for them[89]. This is certainly possible because it does similar work with many armed forces around the world.

Education – called training – is the area where the most diverse offer is available to armed groups. Scores of organisations are ready to organise courses on issues like the rights of the child, human rights or IHL. In reality, these courses do pertain mostly to basic dissemination[90] and very seldom go beyond the stage of a welcome addition, parallel to and without influence on the way the armed group conducts its own education and training. A few external actors often go above and beyond basic lectures[91], but extremely few actually engage in real field training[92]. It would appear that the reason for which 'training' (i.e. lectures) features so often among the priorities of external actors is that it is easier to offer some contribution in this area.

Sanctions is the most difficult area for external actors to support armed groups. Most sanctions taken by armed groups are illegal under national legislation, and States object very forcefully to any perceived encouragement by any external actor of a parallel justice system. Some accept tacitly that an organisation like the ICRC may comment on a group's military justice code[93], but this seems to be the maximum. Unless the conflict is at a ceasefire stage, armed groups should not expect too much support in this area[94].

89. Both were done at the same time for an armed group in Asia in 2008.

90. An interesting discussion on the limits of such lectures can be found in Human Rights Watch 2009, pp. 41-43, with the example of soldiers of the DRC Armed Forces (FARDC) and sexual violence. Apart from external limitations like the very poor living conditions and lack of sanctions, several elements stand out: the lack of interest of officers, sending the message that these events are unimportant, the theoretical character of the teaching given (one cannot "train" not to rape), and misunderstandings of what rape actually is. Calling such lectures training (as the report does) is grossly overestimating them.

91. Provision of theoretical IHL content is something an actor like the ICRC can do without too much difficulty, even at high level. In 2008, for instance, ICRC staff has given three courses for legal advisors to the benefit of various factions in Darfur.

92. Apart from medical training (mostly first aid), the author has no knowledge of a humanitarian actor currently offering real training to an armed group.

93. The author was involved in the comment of such a document in 2008.

94. In addition, external actors tend to have contradictory demands on armed groups, on the one hand asking them to take measures to prevent or stop violations, and on the other hand criticizing their sanction system. Armed groups are then damned if they do not and damned if they do… Sivakumaran 2009 has very challenging insights on the legal debates behind this position, mostly on the concept of 'regularly constituted' and on the question of due process guarantees. In his opinion, external actors often fail to monitor armed groups'

5. Conclusion

A former commander of the FROLINAT in Chad recently outlined the measures that this group had taken to ensure that orders were obeyed, including when it comes to the protection of the civilian population[95]. He spent ten years in the movement (1969-1979), starting as a child soldier and was promoted over the years; although he never attained prominence, he was able to discern over time what was central in the respect of directives. In his opinion, a series of measures, starting with a clear decision by the leadership to respect the civilian population and to avoid plunder, were at the root of a good record. He outlined the vetting of recruits, the oath taken[96] after a one-week trial period, the existence of an internal code, the teaching of this code to new recruits and seasoned fighters alike, and the internal sanctions that followed. He added that the family of the victims would often also seek blood revenge, which certainly helped convince the fighters to exercise caution.

This is but one example of the complex mechanics that we have tried to outline. There is *no single* measure that an armed group could take to further respect of IHL by its fighters. There are *a number* of possible measures that can be applied differently from group to group. Increasing respect of IHL is not at the level of rocket science, but it requires consistent work of the armed group as an organisation.

In this process, armed groups can draw from the experience of organisations such as the ICRC regarding IHL, Geneva Call regarding mines, and the Special Representative on Children and Armed Conflict regarding protection of children[97].

They can, however, not hope to 'sub-contract' their own respect of IHL. The *onus* of respect is on their shoulders, and no external actor, be it a State, an international organisation, or a NGO, can respect IHL in their stead. This is why the measures outlined in this paper are so important *for them*.

courts and even fail to make constructive comments to improve such existing courts because they fear to grant them "legitimacy". Yet, "*a court of the armed group may be the only forum in which violations of international humanitarian law will actually be prosecuted [… They] may also, on occasion, compare favourably with state courts, which do not always hold up well in time of conflict* (p. 22)".

95. Interview by the author, Eastern Chad, August 2009. The interviewee wished to remain anonymous.

96. In his memories, this oath had three points: 1) to respect the population 2) to work against the government 3) not to betray the rebellion. The oath was taken on the Quran.

97. S/2009/277, § 41 and 43.

Involving organized armed groups in the development of the law?

*Marco Sassoli**

1. Introduction

This roundtable shows the courage and imagination of the organizers and of the many government and military officials who were in attendance. For three days, we discussed how the outsiders of the international system – the pariahs and the enemies – could be induced to respect the rules of this system where it is most challenged: in armed conflicts with those outsiders. My task is to push this provocation one step further, by exploring whether, and how, the outsiders should be involved in creating new rules of the system, precisely for those situations where it is most challenged.

2. Why should non-state armed groups be involved in the development of International Humanitarian Law?

The main reason for involving armed groups in the development of International Humanitarian Law (IHL) is that this would be the best way to ensure a realistic compliance with it. Indeed, if IHL is unrealistic for a party, that party will not respect it and hence its rules will not protect anyone. An additional reason may be that it is psychologically easier for individuals to accept and respect rules that they, their leaders, or people confronted with similar problems, were involved in developing. Indeed, in the 1970s several guerrilla movements declared that they would not be bound by new rules of IHL in whose development they had not participated. Today, in my experience, armed groups are more concerned about

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the law being realistic and applying to them equally, rather than them contributing to its development.

It is, therefore, not so much due to the will of the armed groups themselves, but rather because of their knowledge of the situation to be regulated, that we should involve them in the development of IHL. Today, many people suggest that IHL is no longer adequate for modern conflicts and that it should be revised. One of the inadequacies mentioned is precisely in reference to situations of armed conflicts with armed groups, in particular when these are trans-national. In the present international environment, I am rather sceptical about the chances of obtaining consensus on new rules that genuinely improve the protection of war victims. Let us assume, however, that we could revise the law applicable to the fighting between States and armed groups. In order to revise a certain area of IHL we would have to discuss it with the implicated actors, which in the area of non-international armed conflicts include the armed groups. No one would suggest revising the law of naval warfare without speaking with navies. IHL has to be applied by, and with the parties, and it must be based on an understanding of the problems, the dilemmas and the aspirations of the parties to armed conflicts. This is the essence of IHL, and what differentiates it from criminal law. The latter does not have to accommodate the aspirations of the criminals, allow them to reach their aims, or be realistic for them. In criminal law there is a vertical, hierarchical, enforcement, while the parties still basically enforce IHL horizontally.

All law must take into account, as closely as possible, the social reality it seeks to govern. Non-international armed conflicts are, by definition, fought at least as much by armed groups as by governmental armed forces. If only the needs, difficulties and aspirations of the latter were taken into account by the law, it would be less realistic and effective. Therefore, we must, in my view, check whether the existing, claimed and newly suggested rules of IHL, or any interpretation of these rules, would enable an armed group, provided it has the necessary will, to comply with them without necessarily losing the conflict. If this is not the case for a certain rule, it will not be complied with, which will undermine the credibility and the protecting effect of other rules.

The current tendency of international criminal tribunals, the ICRC, and scholars to bring IHL of non-international armed conflicts closer to that of international armed conflicts, mainly via alleged customary rules, may also have a negative side effect. The ICTY writes in a much-applauded judgment "*that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings*

are concerned"[1]. The ICTY forgets, however, that IHL of non-international armed conflicts, unlike IHL of international armed conflicts, also binds armed groups and for them the application of many of the norms of international armed conflicts might be unrealistic.

Even the ICRC may have forgotten armed groups when it claimed in its Customary Law Study that 136 (and arguably even 141) out of the 161 rules of customary humanitarian law, many paralleling the rules of Protocol I applicable as a treaty only to international armed conflicts, equally apply to non-international armed conflicts[2]. Did the ICRC remember that such applicability necessarily implies that they are also binding upon armed groups? To take but one example, the ICRC considers (mainly based upon the practice of Human Rights bodies) that there is a customary IHL prohibition of arbitrary detention. In interpreting this prohibition, the Study states that the basis for internment must be previously established by law and reiterates the "*obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention*"[3]. Did the ICRC realize that this either requires armed groups to legislate and institute *habeas corpus* proceedings or to never detain anyone, not even government soldiers? Is this realistic?

As demonstrated by the last-mentioned example, similar concerns may be expressed about the effect of the increasing integration of Human Rights standards into IHL. Such development is necessary for States, but, in my view, it should not be assumed that the same interplay applies to armed groups. To begin with, the very applicability of International Human Rights Law to armed groups is controversial, and even if it did apply, the realism of the resulting obligations of armed groups must be carefully checked. As mentioned in the example regarding the prohibition of arbitrary detention and its interpretation by the ICRC Customary Law Study, the requirements (inherent in a procedure to challenge the lawfulness of a detention) that there be a legal basis and specific procedures established by law for internment, raise concern. International Human Rights Law requires a specific legal basis for any deprivation of liberty. However, neither Human Rights nor IHL applicable to non-international armed conflicts provide a specific legal basis for internment. While a State can provide for such a basis in its domestic law, how is the non-state actor to do this? Parties to armed conflicts intern persons, hindering them from

1. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic*, ICTY, Appeals Chamber, 2 October 1995, para. 97.

2. J.-M. Henckearts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law* (2005).

3. *Ibid*. at pp. 348-351.

continuing to bear arms, so as to gain the military advantage. If the non-state actor cannot legally intern members of government forces, it is left with no option but to release the captured enemy fighters or to kill them. The former is unrealistic, the latter a war crime. These may be arguments for not applying to armed groups the same reasoning for determining when IHL or Human Rights constitute the *lex specialis*.

A further example is based upon another judgment of the ICTY, which concludes that command responsibility must necessarily apply in non-international as in international armed conflicts[4]. Although it may be astonishing to claim that this is a rule of customary law, as far as State agents are concerned this appears to be a result of logical legal thinking. Did the judges realize, however, that their pronouncement implies that command responsibility also applies to armed groups who may have far less factual control over their members than commanders of governmental armed forces and, more importantly, may not have the means to punish members who have committed violations? Rather, was the intent of the judges to abandon the principle of the equality of belligerents regarding the law on command responsibilty? This general principle of IHL, resulting from the fundamental distinction between *jus ad bellum* and *jus in bello*, states that both sides in every armed conflict have the same rights and obligations independently of the legitimacy of their cause. If not for this principle, one could never expect IHL to be respected. However, although the equality of belligerents also applies to non-international armed conflicts, IHL can obviously not require domestic law to treat both sides equally in such conflicts.

3. How could non-state armed groups participate in the development of International Humanitarian Law?

In my view, customary IHL of non-international armed conflicts must now be derived from the practice and *opinio iuris* of both state and non-state armed actors in such conflicts. The ICRC Customary Law Study considers that the legal significance of such practice remains unclear[5] (and this may be one of the reasons why the rules it articulates for non-international armed conflicts are, in my view, not always realistic for armed groups). One of its authors writes that "*[u]nder current international law,*

4. See Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Prosecutor v. Hadzihasanovic et al.*, ICTY, Appeals Chamber, 16 July 2003.

5. Henckaerts and Doswald-Beck, *supra* note 2, at xxxvi.

only State practice can create customary international law", but he advocates taking into account the practice of armed groups at least *de lege ferenda*[6]. In my view, customary law is based on the behaviour of the subjects of a rule, in the form of acts and omissions or of statements, mutual accusations and justifications of their own behaviour. Thus, non-state actors should logically be subject to customary law rules that they have contributed to creating.

Involving armed groups in the development of treaty rules is more difficult and it would be almost impossible to reach agreement over which groups should be invited to participate in the respective diplomatic conferences drafting those treaties. At a minimum, the groups should exist for a minimal time before being able to make useful contributions. Even then, their participation will make the treaty-making process even more cumbersome and politicized than it already is. In addition, armed groups involved in ongoing conflicts are by definition illegal under the law of the State where they fight, and often also under the law of third States. This is even more so the case due to the recent practice of States and international organizations of labelling many groups as "terrorist", subject to travel bans, and criminalizing any contact with them under domestic law. It may, therefore, be practically difficult, and politically controversial, to involve their representatives in any formal (preferably separate) preparatory meetings or, even more so, in diplomatic conferences for the adoption of new instruments. It should be noted that in the past, from 1974-1977, eleven national liberation movements participated as observers in the deliberations of the *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* convened by Switzerland, which adopted the 1977 Protocols[7]. However, this participation led to very arduous and politically heated discussions at the conference. Furthermore, from the viewpoint of international law, those national liberation movements were all regionally recognized, well-established, and broadly supported armed groups. It is, therefore, doubtful that such an experience could be repeated today.

A solution may be to invite only those groups who participated in armed conflicts that have ended. However, this will in turn increase the time gap between the needs of practice and the response of the law. Moreover,

6. Thus Heckaerts, 'Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law', in *Proceedings of the Bruges Colloquium, Relevance of International Humanitarian Law to Non-State Actors, 25th-26th October 2002*, 27 *Collegium* 123 (Spring 2003), at p. 128.

7. Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at xxxiii.

participants of past conflicts that may still be reached due to practical reasons, consist of groups that have succeeded in establishing or participating in the development of the new government of a State. As experience has shown, after gaining power, armed groups quickly adopt the perspective of governments. As a result, they become equally unforgiving of other non-state armed groups that would dare to fight against them and do not acknowledge them.

In my opinion, the groups' views could and should nevertheless be collected as part of the factual research preceding any codification or adoption of new interpretations. This is certainly an easier task for an independent organization, such as the ICRC, when it prepares new developments of IHL, or for NGOs, than it is for bodies of intergovernmental organizations such as the UN High Commissioner for Human Rights.

By analogy to other fields of international reality dominated by non-state actors, one could imagine these actors developing among themselves a new trans-national law of armed groups, just as sports clubs and their organizations have developed international sports law, internet users and providers have developed the cyber law, and merchants developed the *lex mercatoria*. The relationship between such new *lex armatorum* and IHL adopted by States would have to be clarified, but similar clarification was also necessary to establish the relationship between *lex mercatoria* and the instruments of international trade law. The greater difficulty lies in that armed groups, unlike sports clubs, merchants and Internet users, are not repeat players (i.e. they do not fight different actors in multiple situations) and are illegal under their domestic legislation. Furthermore, the aforementioned non-state actors mainly interact with each other, and the trans-national law they created governs such interactions. However, armed groups do not fight worldwide against each other, but rather against governments and other specific armed groups in their geographic vicinity, whom it would be difficult to subject to the new *lex armatorum*.

It is nevertheless interesting to take into account the experience of Geneva Call, an NGO engaging non-state armed groups to respect humanitarian norms, initially with respect to the prohibition of using antipersonnel landmines. Geneva Call has organized meetings for armed groups from very diverse cultural, political and geographical backgrounds. These meetings demonstrate that although armed groups differ, they may nevertheless find a common agenda and have common aspirations[8]. The Second

8. See *18-19 June 2009 - Geneva - Switzerland. Second Meeting of Signatories to Geneva Call's "Deed of Commitment for Adherence to a Total Ban on Anti-Personnel (AP) Mines and for Cooperation in Mine Action*", Geneva Call, http://www.genevacall.org/news/events/events.htm (last accessed 3 October 2009).

Meeting of Signatories to Geneva Call's "Deed of Commitment" in 2009 adopted two Declarations, one of them addressed to the Cartagena Summit on a Mine-Free World that will be held from 30th November to 4th December 2009[9].

Another option is to adopt, in existing or in new international *fora,* new soft law standards in the fields of IHL to be respected by armed groups, similar to those adopted or suggested in the UN and the Organization for Economic Co-operation and Development (OECD) for trans-national corporations. When such rules for armed groups are elaborated, the views of those groups should, however, be fully taken into account. In practice, this is difficult even for soft law. It is hardly surprising that the UN did not involve armed groups in the preparations of the *Minimum Humanitarian Standards.* It is more remarkable that, as far as I know, the ICRC did not consult non-state armed groups in the process leading to the adoption of the ICRC Interpretative Guidance on the notion of direct participation in hostilities[10], a concept which is central for the protection, rights and obligations of these groups. Admittedly, the relationship between the new soft law and hard law obligations of armed groups in the law of non-international armed conflicts, customary or conventional, has to be clarified. In addition, as the rules would frequently apply to conflicts between armed groups and States, this would lead to a situation in which both sides are not bound by the same rules, which is contrary to the principle of the equality of belligerents before IHL.

In view of the aforementioned difficulties, it may be preferable to negotiate with individual armed groups specific codes of conduct that they could adopt, which interpret and adapt existing IHL rules to their specific situation. This would help achieve the greatest possible sense of ownership by a given armed group, and to obtain rules tailored as closely as possible to the concrete situation the group is involved in and the humanitarian problems it raises. For example, the prohibition of trials without judicial guarantees may represent for a group with stable territorial control something very different than for a group without such control. For the former, the principle that courts must be established by law may raise problems, while for the latter, the prohibition may mean that it is barred from sentencing anyone. Such codes of conduct should obviously contain

9. See Declaration by Signatories, http://www.genevacall.org/news/events/f-events/2001-2010/2009-19jun-finalsign.pdf and Declaration to the Summit, http://www.genevacall.org/news/events/f-events/2001-2010/2009-19jun-finalpart.pdf (last accessed 3 October 2009).

10. 'Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law', 90 *International Review of the Red Cross* (2008), at pp. 991-1047.

provisions about their dissemination and enforcement within the armed group and designate, if possible, an outside monitoring mechanism. Here again, a certain analogy can be made with codes of conduct and social labelling mechanisms adopted by or for trans-national enterprises. These will only be efficient if they translate, reformulate and reconceptualise the general Human Rights norms into something meaningful for the given enterprise and its field of activities. The mere discussion and drafting of such codes within an armed group would certainly have a considerable impact in terms of leading groups to reflect upon and hopefully alter their behaviour. Armed groups might also relish the opportunity to manifest their acceptance of IHL in order to sway local and/or international public opinion.

Once several codes have been developed with different armed groups, they would then offer a sound basis for future developments of IHL. At the very least, they would influence the development of customary international law. Another positive effect of the drafting of such codes, or of collecting the declarations of acceptance of armed groups, is that States may realize the refusal of these to accept certain provisions of IHL. As a result, States may be inclined to react to this refusal by adopting new rules, which reflect the reality of the practice of armed groups during a conflict.

4. What substantive changes in International Humanitarian Law could result from the involvement of non-state armed groups?

As serious involvement has not yet taken place, I cannot possibly know how the rules would change if they were to take the perspective of non-state armed groups into account. One may, however, make some provocative speculations.

The current assumption that all of customary IHL of non-international armed conflicts applies as soon as the minimum threshold of organization and intensity, necessary for a situation to become an armed conflict, is met, may be wrong[11]. It may be that the highly criticized fact that Protocol II has a significantly higher minimum threshold of applicability than Article 3 common to the Geneva Conventions is realistic. It may even be that we need a sliding scale of increasing obligations for armed groups, which will be determined according to their degree of organization and the intensity of the violence that is taking place. This would certainly signify

11. See for a detailed analysis, based upon a vast review of the jurisprudence of the ICTY and of national courts, Judgment, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Trial Chamber, 10 July 2008, para s. 177-206.

difficulties and controversies in determining the level of application in a given situation. In addition, if the IHL principle of equality of the belligerents is maintained, the obligations of governmental forces fighting a poorly organized armed group in a low-intensity armed conflict would be equally limited. The result would, however, be less shocking than it appears, as International Human Rights Law would also bind the government.

An even more revolutionary result, which would resolve the aforementioned problem, would be to abandon the equality of belligerents and introduce differentiated rules for governments and non-state armed groups. This already largely corresponds to the rules that are in reality respected in most contemporary armed conflicts. However, abandoning the normative claim is a decision that should not be easily taken, and we should first consult practitioners from both the governmental and non-governmental personnel fighting in armed conflicts, to make sure that this would not further decrease the willingness of the actors to respect the rules. If the dogma of the equality of belligerents were to be abandoned, it will be necessary to revisit, at the very least, the equal applicability of all the rules of IHL that are influenced by Human Rights. As a minimum, Human Rights-like obligations should be translated into the reality of armed groups and adapted to those that they are actually able to respect.

To conclude, I agree with the UN Secretary-General who writes in a recent Report: "*[W]hile engagement with non-state armed groups will not always result in improved protection, the absence of systematic engagement will almost certainly mean more, not fewer, civilian casualties in current conflicts*"[12]. Therefore, I suggest the consideration to develop the law for the real world in which armed conflicts are fought as much by armed groups as by governments. Such a development must take into account the perspective, problems and needs of the armed groups who would apply the newly developed rules. This is the new frontier of IHL and if the law does not develop on it, it will become slowly, but increasingly, irrelevant.

12. *Report of the Secretary-General on the protection of civilians in armed conflict*, S/2009/277, 29 May 2009, para. 40.

VII. Celebration of the 60th anniversary of the 1949 Geneva Conventions and of the 150th anniversary of the birth of the idea of the Red Cross: the Battle of Solferino

Guerra e pace dopo Solferino

*Silvio Fagiolo**

Ringrazio per l'occasione di contribuire ad un incontro che vuole ricordare e riflettere sull'idea di cui Henry Dunant si fece portatore centocinquanta anni fa, dinanzi all'insostenibile spettacolo offerto dal campo di battaglia di Solferino. Era andato in Lombardia per ottenere da Napoleone III una concessione di terre in Algeria. Vide invece migliaia di soldati impegnati nella più cruenta battaglia campale del Risorgimento italiano. Tra i lampi e la pioggia, vestito di lino bianco, vagò stordito tra morti e feriti. Dunant evoca il personaggio centrale del capolavoro letterario dell'Ottocento *Guerra e pace*, scritto proprio nel decennio successivo a Solferino. In *Guerra e pace* il principe Pierre Bezuchov percorre le colline di Borodino, terreno di scontro tra l'esercito russo e quello di Napoleone lanciato alla conquista di Mosca. Anche lui vestito di bianco e sgomento dinanzi a tanto sangue ed a tanta sofferenza. Personaggio centrale di quel capolavoro letterario intriso di storia, il più vicino alla sensibilità ed alle aspirazioni dell'autore, con il principe Bezuchov Henry Dunant avrebbe potuto identificarsi non meno di Leone Tolstoj. A Solferino, in mezzo ai feriti cui veniva impedito l'accesso ad un riparo, Dunant protestò vivamente e nel suo stentato italiano gridò "tutti fratelli". Tutti fratelli ripetevano le donne di Solferino che, come lui, non facevano alcuna distinzione di nazionalità e si sforzavano di prestare assistenza agli italiani come ai loro alleati ed ai loro nemici.

A Solferino Dunant constatò come la stessa guerra che spinge gli uni contro gli altri unisce le vittime nella sofferenza. Sono dunque la debolezza e la pena a creare una fraternità orizzontale. Dunant scrisse, raccontò, sollecitò i potenti della terra e mosse l'Europa. Lanciò l'idea di un comitato di volontari che soccorresse mutilati e feriti, che "*disputasse alla guerra tutte le vittime che la guerra ha colpito ma che la morte non ha ancora*

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falciato". Cercò anche un simbolo che subito richiamasse la pace. Diverrà più tardi la Croce Rossa. Dissipò il suo patrimonio in questa impresa generosa, in quella Ginevra di Calvino nella quale la ricchezza era anche il segno della grazia divina. Visse di stenti, finì in un ospizio. Nel 1901 ottenne il premio Nobel. Le sue ultime immagini lo mostrano vestito di un povero soprabito troppo largo, gli occhi socchiusi, la barba tutta bianca. Morì il 30 ottobre 1910 e pretese, inutile raccomandazione, che nessuno accompagnasse la sua bara. Ma il desiderio di Dunant era divenuto realtà già nel 1964 con la firma della prima Convenzione di Ginevra per il miglioramento della sorte dei combattenti. Il movimento internazionale nato in quella occasione si basa ancora oggi sul principio di una doppia neutralità: alla protezione senza discriminazione delle vittime, da parte di una istanza che non prende parte alle ostilità, si aggiunge la necessità, per questa istanza, di rinunciare a qualsiasi presa di posizione pubblica. Indifferente alla provenienza dei corpi sofferenti come all'uniforme che li riveste ed alla bandiera che li distingue, il nuovo movimento con intenti umanitari volle da allora rimanere anche estraneo alle controversie politiche, filosofiche, razziali e religiose che provocano i conflitti. Il rifiuto di scegliere tra gli infelici si accompagna al rifiuto di scegliere fra gli attori e di giudicare la condotta dei governi. Questa logica ha comportato e comporta dilemmi laceranti. Il Comitato internazionale della Croce Rossa, avvertito nel 1942 della sorte degli ebrei e della esistenza di campi di sterminio, scelse il silenzio per non compromettere le proprie azioni a favore dei prigionieri di guerra.

Con la prima guerra mondiale la violenza dilagò incontrollata, conquistò nuovi spazi, al mare ed alla terra si aggiunse il cielo. Ma anche quell'enorme massacro non ruppe il legame di umanità tra i combattenti. Ricordo un piccolo episodio che nulla toglie all'orrore di quel conflitto. Lo racconta un testimone italiano, lo scrittore ed antifascista Emilio Lussu, a proposito di una notte chiara del settembre 1916 sull'altipiano di Asiago. Si era avventurato fuori delle trincee per rilevare la posizione di un invisibile cannone che da giorni teneva sotto tiro le linee italiane. Aveva raggiunto un posto dal quale poteva vedere le trincee nemiche. "*Ora*", scrive, "*erano lì gli austriaci, vicini, quasi a contatto, tranquilli, come i passanti su un marciapiede di una città. Quelle trincee, che pure avevamo attaccato tante volte inutilmente, avevano poi finito per apparirci inanimate, come cose lugubri, inabitate da viventi, rifugio di fantasmi misteriosi e terribili. Ora si mostravano a noi nella loro vita. Uomini e soldati come noi, fatti come noi, in uniforme come noi, che ora si muovevano, parlavano e prendevano il caffè, proprio come stavano facendo, in quella stessa ora, i nostri stessi compagni*". Lussu non scopre nulla che non sapesse già. Non aveva mi creduto, pur partecipando alla guerra, di combattere contro i membri di

un'altra specie. Ma questo primo piano risuscita tra lui ed il nemico quel sentimento di comunanza che la guerra aveva occultato.

Quella guerra avrebbe dovuto essere l'ultima nella visione ottimistica del capo della nazione che si era affacciata per la prima volta da protagonista sulla scena europea. Scendendo dal podio dal quale aveva annunciato in Congresso la partecipazione degli Stati Uniti al primo conflitto mondiale Woodrow Wilson aveva confidato ad uno dei suoi collaboratori: "*Ho portato un messaggio di morte e mi hanno applaudito*". Presagio forse del naufragio del suo tentativo di cancellare la guerra dalla consuetudine degli Stati. Proprio per questo l'impegno umanitario veniva ad assumere il carattere di una azione riparatrice, per non esporre gli uomini ad una illimitata violenza. Una eredità che anche il secolo trascorso lascia a quello appena iniziato.

Da sempre l'uomo si interroga sulle cause della guerra e quindi della sua legittimità. A scatenare la guerra concorrono le scarsità materiali o simboliche, le dinamiche economiche e sociali, le contraddizioni interne o internazionali, le logiche di potenza e di sicurezza, il trionfo di una fede o di una ideologia, totalitaria o democratica. Dopo la prima guerra mondiale, ad Albert Einstein era stato richiesto dalla Società delle Nazioni di riflettere sul modo di liberare l'uomo da la più cruenta delle sue fatalità. Chi avrebbe potuto avviare una indagine di questo tipo meglio di Einstein, l'uomo che rappresentava come nessun altro la fiducia nell'ordine cosmico, il tenace rifiuto del caos? Einstein si era rivolto a Sigmund Freud, altro genio che citare accanto al primo fra i padri della modernità è divenuto un luogo comune. La mia osservazione, aveva risposto Freud riassumendo i punti essenziali del suo saggio sul "Dialogo delle civiltà", mi dice che l'uomo ha due pulsioni fondamentali, che tendono a conservare ed unire oppure a distruggere ed uccidere. Non c'è alcuna possibilità di sopprimere le tendenze aggressive: né degli uomini né dei popoli. Ma Freud aggiungeva che la civiltà modifica la psiche, costringe ad interiorizzare l'aggressività, poiché la guerra contraddice nel modo più stridente l'atteggiamento che ci è imposto dal vivere civile. Si può sempre cercare di contenerla.

La violenza è stata in realtà la vertiginosa inumana originalità del XX secolo. Abbiamo sperimentato la massima di Karl Barth secondo il quale "*quando il cielo si svuota di Dio, la terra si popola di idoli*". Nel XIX secolo la storia aveva preso il posto di Dio nell'onnipotenza sui destini dell'umanità ma è solo nel XX secolo che appaiono le follie politiche nate da questa sostituzione. Di qui pretese in apparenza universali al servizio delle volontà egoistiche e particolari dei singoli Stati, delle loro politiche di utilità e di potenza. Nella contrapposizione ideologica della guerra fredda pace e guerra si erano confuse in un grigio crepuscolo, secondo la famosa definizione di Raymond Aron "*pace impossibile, guerra improbabile*".

Alla fine del secolo breve, estenuato dalle battaglie senza tregua scatenate da idee con pretese universali, che fossero basate sulla razza o sulla classe, ci si apprestava a celebrare, con la caduta del muro di Berlino, se non la fine della storia, almeno il trionfo della democrazia e l'abbandono della guerra come strumento di soluzione delle controversie internazionali. Ed ecco che la scena viene invece bruscamente invasa dai vecchi fantasmi della storia europea, l'odio etnico, lo sciovinismo nazionalista, i regionalismi sfrenati, l'antisemitismo. Finita la guerra fredda, tutto si svolge come se il grande confronto dei sistemi avesse ceduto il posto alle guerre di campanile, alle divergenze frontaliere, agli alterchi territoriali. Ciò che Hannah Arendt aveva detto per gli esuli del suo tempo diviene il destino di milioni di persone, mobilita al limite delle proprie forze un'altra grande organizzazione umanitaria, non meno meritoria della Croce Rossa, l'Alto Commissariato per i Rifugiati. "*Abbiamo perduto il nostro focolare, cioè la familiarità della nostra vita quotidiana. Abbiamo perduto la nostra professione, cioè la certezza di essere di qualche utilità su questo mondo. Abbiamo perduto la nostra lingua materna, cioè le nostre reazioni naturali, la semplicità dei gesti e l'espressione spontanea dei nostri sentimenti*". Così Hannah Arendt aveva definito una condizione che riteneva la più distintiva dell'uomo del suo secolo e che ancor più lo sarà di quello successivo. Se la terra natale può divenire un incubo per l'esule, come era appunto la Germania per Hannah Arendt, il che lo rende estraneo alla propria nostalgia, il secondo esilio non annulla in alcun modo il primo.

Certo il realismo riconduce la politica all'interno dei suoi limiti e delle sue responsabilità, al suo tragico destino di ospitare in sé guerra e dominio. Ma sarebbe reazionario un realismo che sostenesse solo gli aspetti più duri della politica, e dileggiasse come idealistico ogni altro approccio, in primo luogo quello fondato sul diritto. A sua volta internazionalismo non significa democrazia a mano armata. Significa invece creare una serie di norme e regole alle quali la maggioranza degli Stati si attenga, con l'appoggio delle organizzazioni multilaterali. Gli europei hanno perduto potere ed influenza nel resto del mondo. Hanno acquistato benessere e libertà individuali senza precedenti, grazie anche agli Stati Uniti che li hanno affrancati dalle ideologie liberticide, che li hanno confinati in una comoda periferia. Ma possono recuperare una *leadership* proprio nel campo del controllo della violenza.

Da ultimo sono venuti meno talvolta, ad es. nella lotta al terrorismo, quei canoni che pure avevano regolato ogni guerra. Il perseguimento di certi obiettivi ha fatto smarrire il senso della misura e dell'onore. È riemersa la tentazione della guerra come scontro di civiltà, che già aveva opposto l'Europa all'Asia, l'impero ai barbari, la *res publica* cristiana agli infedeli, la civiltà del vecchio mondo ai selvaggi del nuovo. C'è sempre la tentazio-

ne di non riconoscere all'avversario pari dignità, di considerarlo di rango inferiore. La vera alternativa politica sta tutta qui: se il potere sia guidato dal diritto e vi si conformi, o se miri semplicemente a sottomettere, reprimere, dominare. Non c'è eccezionalismo che possa esimere dal rispetto dei precetti universali relativi alla guerra.

L' interdipendenza ha ormai reso permeabili i confini della sovranità nazionale e ne invalida sempre più i poteri. Impone un consorzio di sovranità fondato sul diritto e sulle istituzioni. Nel secolo nuovo le organizzazioni umanitarie entrano illegalmente nei territori stranieri ed al ritorno dalla loro missione testimoniano. Questa doppia infrazione ispira le organizzazioni che nascono sulla scia delle Solferino contemporanee. Esse si appoggiano a nuove forze, i media e l'opinione pubblica. Questa emergente generazione umanitaria proclama il diritto e il dovere di soccorrere tutte le vittime, in qualsiasi campo la storia le abbia situate e quale che sia il segno ideologico della loro oppressione. Occorre rispondere all'appello silenzioso del dolore. L'onnipresenza della immagine e l'emergere correlativo di una opinione pubblica internazionale hanno indotto le Nazioni Unite a iscrivere nei codici internazionali il diritto di assistenza umanitaria, del libero accesso alle vittime, una ingerenza della sensibilità comune nello spazio fino a ieri aristocratico e separato della diplomazia, custode della sovranità. Si può sperare di organizzare una nuova civiltà attorno alla democrazia politica, alla predominanza della società civile, alla libertà economica, ai diritti dell'uomo. Per questo è così pregnante, come sbocco della storia europea, l'incipit della Carta dei diritti annessa al trattato di Lisbona, speriamo di prossima ratifica, che attribuisce valore assoluto alla dignità dell'individuo. Il che significa riconoscere ad ogni persona, in virtù della sua umanità, un valore intrinseco ed assoluto, per il quale ogni singolo viene percepito nella sua particolarità e come specchio del genere umano in generale.

L'abolizione della guerra come diritto sovrano dello Stato, la sua classificazione come crimine, la sua sopravvivenza come guerra giusta che ripara un torto (penso alla guerra del Kosovo come tutela di una minoranza oppure alla prima guerra del golfo come ripristino di una sovranità violata) presuppone dunque una forte crescita istituzionale della comunità internazionale, la dismissione progressiva del suo carattere anarchico. Le guerre di religione erano nate dalla affermazione unilaterale della verità, il nemico era pertanto anche un eretico. Intorno al concetto di sovranità, a partire dalla pace di Westfalia, era stato poi costruito il monopolio della violenza dello Stato. La guerra non sarebbe stata condotta per fare trionfare un verità ma per soddisfare un diritto ed un interesse dei governi. Anche questa fase della storia non ha risparmiato lutti e tragedie. A partire dalla fine della guerra fredda sono emerse sia l'inadeguatezza degli Stati a gestire la guerra e garantire la pace (i più devastanti attori della guerra sono oggi en-

tità non statali), sia l'incapacità della superpotenza vittoriosa, gli Stati Uniti, di instaurare un ordine mondiale. La pace attraverso l'impero non è meno precaria che la pace attraverso gli equilibri di potenza.

I governi continuano a sacrificare i loro cittadini dietro lo schermo protettore della sovranità. Indipendenza degli Stati e tutela dei diritti costituiscono uno dei dilemmi della comunità internazionale, non meno della dicotomia ambiente e sviluppo. Certo la sovranità è una categoria insostituibile. Come aveva detto Churchill della democrazia, essa garantisce la peggior forma di governo del mondo salvo tutte le altre. Ma al concetto di sovranità va sostituendosi gradualmente quello di protezione e responsabilità per le persone che si muovono entro lo spazio presidiato dal primato dello Stato. Di qui il quesito fra i più impegnativi del nostro tempo, concernente il diritto di intervento militare oltre le proprie frontiere per prevenire o interrompere pulizie etniche, genocidi, crimini contro l'umanità. Una nuova logica si fa luce, l'uso della forza per fini umanitari. Quest'ultimo necessita di un quadro giuridico convenuto, per non sostituire la autodifesa con la guerra preventiva, la dissuasione con la coercizione, il multilateralismo con l'unilateralismo, la sovranità condivisa con l'equilibrio delle potenze, la parità degli Stati con l'egemonia di uno solo. Sarebbero fuori posto la retorica della crociata come quella della frontiera dell'Ovest selvaggio. La sovranità deve significare protezione dei propri cittadini all'interno e responsabilità verso la comunità internazionale all'esterno. Intorno a questi concetti si interrogano la riflessione e la prassi. Il ricorso alle armi sarà allora limitato, trasparente nei suoi fini, proporzionato, strumento di ultima istanza. La sua legittimità discenderà, salvo che nel caso di autodifesa, dalle decisioni di un organismo multilaterale, le Nazioni Unite, ma anche di un organismo regionale, se le prime non sono in grado di agire. Oggi l'unica forma di sopravvivenza della guerra è che essa valga come sanzione contro gli Stati che vi ricorrono per primi oppure che essa venga presentata come un atto di polizia internazionale, ispirata da istituzioni che abbiano legittimità per quanto possibile universale. Non è irrealistico immaginare che anche la guerra, sulla scia di quanto aveva anticipato Emmanuel Kant, sia un crimine imputabile e sanzionabile, non tanto con riferimento alla sovranità dello Stato quanto delle persone fisiche che la dichiarano. Le istituzioni potrebbero allora divenire il principale riferimento normativo per ripensare il rapporto tra guerra e politica. Non sarebbe questo anche il trionfo di Henry Dunant?

The 60th anniversary of the Geneva Conventions and the 150th anniversary of the idea of the Red Cross and Red Crescent Movement

*Jacques Forster**

It is with great pleasure that I take the floor today to mark – together with you – the 60th anniversary of the Geneva Conventions and the 150th anniversary of the idea of the Red Cross and Red Crescent Movement that emerged from the Battle of Solferino in 1859.

Tolstoy wrote that the sole meaning of life is to serve humanity. What better way to describe the conviction that drove Henry Dunant to restore some semblance of humanity to the battlefield in Solferino? The humanitarian imperative was his inspiration. Henry Dunant had not come to Solferino to invent modern humanitarianism. The circumstances gave him his purpose! Confronted by the suffering he witnessed on the battlefield, Dunant threw himself into the task – feeling compelled to act to make sure that it would never happen again.

Profoundly shaken by the events in Solferino, Dunant laid down his painful memories in a book: *A Memory of Solferino*, first published in Geneva in 1862. Only one year later, in 1863, he called for the creation of national relief societies to assist the wounded in the field. This solemn call led to the creation, throughout the world, of national Red Cross and Red Crescent societies.

Yet, Dunant also wanted to raise awareness among the leaders of his time. In the final pages of *A Memory of Solferino*, he boldly paved the way for a new body of law: international humanitarian law. Dunant's idea soon gained considerable momentum within the international community and over time led to the adoption of a steadily growing number of humanitarian treaties. The four Geneva Conventions of 1949 constitute a milestone in this evolution of humanitarian law. Adopted in the immediate aftermath of the Second World War in 1949, they aimed to abolish the

* Former Vice-President, ICRC; Council Member, IIHL.

concept of "total war" as witnessed during the Second World War by establishing a legal framework to place limits on how war is waged. Henceforth, they have successfully manifested the idea of "limited warfare" throughout the world. Today, they constitute the bedrock of international humanitarian law, and are among the most important treaties governing the protection of victims of armed conflict. These victims include the wounded and sick, the shipwrecked, prisoners of war, civilian internees, civilians living under occupation, women, children and displaced people. The Conventions have been universally ratified by all States – meaning that they apply to any armed conflict, whether international or non-international, anywhere in the world.

The Geneva Conventions have been successful. They have saved numerous lives, given comfort to thousands of prisoners of war, helped reunite millions of families and contributed to the restoration of peace. They have also served the ICRC well in seeking access to prisoners, in tending to the wounded and sick, the displaced, in addressing the needs of civilians under occupation and in offering its services to the parties in non-international armed conflicts. Yet, the real value of the Conventions lies not only in the good they help to achieve, but maybe even more so – quoting Nelson Mandela – in the yet greater evil they have helped to prevent. For example, we know from experience that the distinctive emblems of the Red Cross and Red Crescent have protected countless hospitals, medical units and personnel as well as innumerable wounded and sick. Unfortunately, we still witness far too many examples of flagrant violations of both the distinctive emblems and the medical mission. However, and this is the point I would like to make, without the rules contained in the Conventions the situation would be far worse. Worse for the victims and far more difficult for those who try to assist and protect them.

Yet, the question still arises frequently: Are the Conventions still relevant today in the wars and conflicts of our time?

The continuing relevance of IHL is supported by the findings of an opinion poll that asked a series of questions about what people in countries affected by war consider acceptable behavior during hostilities and on the effectiveness of the Geneva Conventions. The research, entitled *Our world. Views from the field.* was carried out in Afghanistan, Colombia, the Democratic Republic of the Congo, Georgia, Haiti, Lebanon, Liberia and the Philippines. This survey I am referring to was specifically commissioned by the ICRC to mark the 60th anniversary of the Geneva Conventions.

Most of the roughly 4,000 people surveyed across the eight countries – 75% – say there should be limits to what combatants are allowed to do in the course of fighting. But when asked if they had ever heard of the Geneva Conventions, slightly less than half said they knew such rules

existed. Among them, around 56% believe the Conventions limit the suffering of civilians in wartime.

The findings reveal broad support for the core ideas behind the Geneva Conventions, and IHL as a whole, by people to whom their protection matter the most, i.e. by people who have actually lived in conflict- and violence-affected countries.

However, the survey has also revealed – I suppose this is less surprising – that the perceived impact of the rules on the ground is far weaker than the support for them. This appears as a strong indicator that people in war-affected countries want to see better respect for and implementation of the law. At least in this regard the good news is that today violations no longer pass in silence. Indeed, thanks to important developments in the field of international criminal justice, impunity for serious violations of international humanitarian law can no longer be taken for granted.

Of course, for the most part, the Geneva Conventions only regulate international armed conflicts, including situations of military occupation. While it is true such conflicts and occupations are – fortunately – not as frequent as in the past, we can only observe that they have not completely disappeared either. Recent examples of conflicts where the Conventions were fully applicable are the conflicts in Afghanistan (2001-2002), the Iraq war (2003-2004), and the conflict between Russia and Georgia (2008). Hence, to the extent that international conflicts and occupations continue to exist and will occur in the future, the Conventions remain as valid and relevant as ever. It is, therefore, very important to preserve this precious humanitarian *acquis* obtained through the universal acceptance of the Conventions. Whatever developments may occur in the future, they should build upon these existing rules.

This statement also holds true with regard to non-international armed conflicts, the most widely prevalent type of armed conflict today. To be sure, these conflicts vary greatly, resembling traditional anti-regime conflicts as well as unstructured conflicts, involving a large variety of actors and without clearly delineable territorial confines. The situations that come to mind include, for example, the Darfur region in Sudan, Colombia, Eastern DRC or today's Afghanistan, Iraq, and Somalia. The Geneva Conventions cover all of these situations. Although this is just one provision, it contains the essential rules of the Geneva Conventions in a nutshell. Common Article 3 is thus not just an article like any other but indeed a mini-Convention within the Conventions. The International Court of Justice has called common Article 3 a reflection of "elementary considerations of humanity". In the light of the prevalence of non-international armed conflicts, it remains a provision of utmost importance. As a result, with respect to non-international armed conflicts, the Geneva Conventions

remain extremely relevant today. Because of their universal acceptance, common Article 3 is applicable in any armed conflict not of an international character anywhere in the world.

In order to fully appreciate the relevance of the Geneva Conventions today, they have to be looked at in the proper perspective. They must not be viewed in isolation. Since their conclusion in 1949, they have been supplemented and developed by three Additional Protocols. The first two were adopted in 1977, more than 30 years ago, and the third more recently in 2005 introducing a new protective emblem, the Red Crystal. What is more, at the request of the international community, the ICRC has identified a wide range of customary humanitarian law rules applicable both in international and non-international armed conflicts.

While the 1949 Geneva Conventions have been universally ratified, the Additional Protocols have not. At present, 168 States are party to Additional Protocol I and 164 States to Additional Protocol II. Although this places the 1977 Additional Protocols among the most widely accepted legal instruments in the world, we cannot be satisfied with this situation and must continue to strive for a universal ratification also of the Additional Protocols. The rules on the conduct of hostilities and the fundamental guarantees enshrined in the 1977 Additional Protocols are an absolute necessity. Their recognition and application is needed, now more than ever.

I submit, therefore, that the Geneva Conventions have served well over the past 60 years and that they remain highly relevant in the conflicts of our time. At the same time, there can be no doubt that despite all achievements of the past there is still a long way to go. In fact, there always will be. Armed conflict is a mutable menace, ever-changing its face. The evolution of warfare will continue indefinitely in the pursuance of our humanitarian mission we must do our best to keep the regulatory framework up to date so as to alleviate suffering in war as much as possible.

At the start of the twenty-first century, what should we take from Henry Dunant's actions and his words? I believe it should be the determination to act, the power of the truth, and the fundamental relevance of humanitarian action. Dunant has shown that the conviction and the actions of one person can make a difference – a big difference. One man's initiative 150 years ago led to the creation of an international movement comprising millions of volunteers, to one of the most instantly recognizable emblems on the planet, and to that rare thing – a universally ratified international treaty regime. And that isn't all – Henry Dunant's initiative has saved countless lives, alleviated terrible suffering and protected the dignity of vast numbers of vulnerable people. At the beginning of the 21st century, Dunant must remain a powerful source of inspiration for those seeking to protect the lives and dignity of people affected by armed violence.

Concluding remarks

*Fausto Pocar**

It is extremely difficult, as well as a great responsibility, to propose a few conclusive remarks on this Sanremo Round Table. Once again, this annual gathering of eminent and qualified experts highly competent in the field of International Humanitarian Law (IHL) and its multifaceted features has proven to be a success. The number and variety of presentations, statements and interventions hardly allows for a full summary of the topics and issues which have been discussed throughout the sessions, or the challenging implications thereof in the development of IHL in contemporary armed conflicts.

The subject of non-State actors and IHL involves crucial issues from both the legal and the operational perspective. Of course, the existence and activity of non-State actors, in particular, organized armed groups also raises issues of a different nature and is a politically hot topic. However, political considerations were largely left out of our debate, which focused on the issue of non-State actors strictly through the lens of our specific respective expertise. Our aim was to identify the most appropriate legal framework and most suitable operational approaches, so as to contribute to the achievement of the ultimate goals underlying IHL in situations where organized armed groups come into play – these goals consisting, first of all, of the protection of victims in armed conflicts.

During the Round Table, distinguished speakers coming from extraordinarily different backgrounds – academics, experts in International Humanitarian Law, International Criminal Law, Human Rights Law, and operators in the field, including representatives of armed forces and NGOs, committed to common goals through different, equally valuable projects and approaches – have engaged in a learned and interesting debate, with a view to achieving a truly mutual exchange between the theoretical exper-

* Judge, International Criminal Tribunal for the former Yugoslavia, The Hague; Vice-President, IIHL.

tise of international lawyers and the practical experience reported by operators in the field. The delicate issue before us is that what we are facing is not just a matter of translating into practice answers already available in theory. The question here consists, to a large extent, of identifying with the necessary degree of accuracy the factual scenarios which need to be conceptualized in theory, and resisting the temptation of elaborating elegant and sophisticated legal constructions that have no chance of being applied in practice. From this point of view, the representatives of organizations operating in the field have made an invaluable contribution, both as sources of information and as attentive guardians against the risk of entering the corridors of an ivory tower of theoretical discussions. A mix of expertise was instrumental to improving the knowledge of legal and factual approaches and to thinking of the possible developments in this delicate matter. In the context of different expert approaches, the unique contribution made by the International Committee of the Red Cross (ICRC) has to be emphasized, as this organization provided both legal expertise and, at the same time, an operational expertise in the field, thus offering an especially useful channel of communication between the theory and the practice of IHL.

Let me recall that some of the key issues emerged very clearly from the beginning in the opening addresses, including, in particular, the keynote presentation of Jakob Kellenberger, who listed a number of factors which, although to a large extent factual statements or undisputed legal considerations, showed the difficulties in dealing with the subject of the relationship between organized armed groups and IHL. Among these difficulties, first of all, is the fact that armed conflicts have evolved over the past sixty years since the conclusion of the Geneva Conventions and also since the adoption of the Additional Protocols of 1977. There is today a prevalence of non-international armed conflicts. The proliferation of non-state actors, notably organized armed groups, has resulted in a variety of factual situations that are not homogeneous and resistant to uniform definition or conceptualization under the traditional well-established legal categories that were applicable in the past. And often, the boundary between an armed conflict, be it national or international, and other forms of violence, such as organized crime and terrorist activity, is not easy to identify.

These considerations make it difficult to define exactly the scope of our discussions and the criteria to be followed to address this new situation, notwithstanding the fact that in some respects, as pointed out and underscored by Michel Veuthey, the conceptual problem of armed groups is not new in and of itself. We were reminded to look at the history and at examples in the past. But there are clear elements of novelty from both the quantitative and qualitative points of view in recent years. It is always difficult in history to identify a date as the moment as of which changes have occurred, but a

reference to 9/11 appears obvious and unavoidable, even if it may not be the only reference in order to explain any development in this field.

In such a difficult context, it is clearly impossible to recall in detail all the questions that have been raised and discussed during the Round Table, and to mention all the thoughtful presentations and interventions that have characterized the debate.

Two issues may, however, be regarded as central and critical. First, the need has been emphasized for a clarification of the applicable law and for its adaptation to the new circumstances. In this context, it has been pointed out that the continued application of traditional legal categories, to the extent that they are still relevant, and the search for a new legal framework, should not lead, as is sometimes the case, to overlap or to criteria which would not be well fitting. Second, the need has also been stressed for enforcing existing and already applicable norms to the largest extent possible. In other terms, the temptation should be resisted to find a new legal regime at any cost because the current situation presents new features, and to thereby derogate from existing principles that may still be applicable.

As to the first issue, i.e. the clarification of the applicable law, it can be looked at as a technical question, because it inevitably presents some technical aspects. However, as has been pointed out, it is somewhat provocative to say that it is a "technicality." There is indeed an inherent truth in saying that "somehow" IHL also applies to organized armed groups. The problem consists, however, in identifying those circumstances in which it applies, to what extent and with which limitations or restrictions.

One can certainly agree with Marco Pedrazzi that traditional international law, as it stands, centered on the State paradigm, does not contain a definition of organized armed groups, except for the insurgents that have come to be recognized subjects of international law under certain circumstances. But a comprehensive definition of the subjects to whom a legal regime applies appears critical when an assessment has to be made on the scope of such a regime. The adoption of a broad definition rather than a restricted notion will of course result in a broader application of IHL. Furthermore, on one hand, the more groups are regarded as bound by IHL, the more IHL is applicable and effective, but on the other hand, the application of IHL raises the problem of the suspension of or derogation from human rights principles that would otherwise be applicable.

This Round Table, however, was not able to agree on any definition of non-State actors. It has been observed that certain situations may come within the notion of non-State actors, but it appears that a comprehensive definition applicable in international relations is not available at the moment.

The problem of agreeing on a definition depends, in particular, on the level of organization required before an armed group exists as a subject

and is, therefore, bound by international humanitarian law. The situations are so different, so varied that it is difficult to identify the boundary between a non-State actor who ought to be bound by IHL and a non-State actor that would not be bound. In such a context, characterized by real difficulty in agreeing on a definition, I will not try to propose my own. I will only note that the fact of not having an agreed upon definition should not bring us to say that, in such a situation, no assessment can be made as to the law applicable. There was large consensus on this conclusion in our debate, and the point has been made that ultimately, the applicability of IHL to organized armed groups should be based, on a number of grounds, on customary international law.

This approach avoids the problem, as Robin Geiss has outlined with great efficacy, of reverting to sources that would depend on the express consent of the armed groups themselves, a consent which will obviously not be available, although it has also been noticed that some degree of consent, on certain rules at least, can be achieved in practice in given situations or limited to specific human rights. A reference to customary international law further avoids the problems involved in the acceptance of theories according to which armed groups would be bound by the domestic law of the State in the territory in which they operate – the problem being in this case of so-called "ownership", a word that was mentioned several times in the course of the conference. It would be difficult, in other words, to request armed groups to respect certain norms on the ground that they are applicable in the State that the armed groups normally aim to oppose. This contradiction would be set aside by referring to customary international law as the source for the applicability of IHL to organized armed groups, although a problem of ownership may also arise in this case. In fact, customary rules are, by definition, built up on the practice of States, while non-State actors are left aside and do not participate in shaping State practice. Has the moment come to rewrite the chapter on the sources of public international law, reviewing the concept of custom so as to reflect the practice of non-State actors as well? This is a crucial question we were left with.

This might not be the appropriate time nor the place, or perhaps the place but definitely not the time, to fully address the question and give it an exhaustive answer. However, it is apparent to me that the practice upon which international custom is grounded has undergone significant developments in recent years, in particular because it tends to rely on elements other than the practice of States in their international relations, as was traditionally the case. State practice coming into play is frequently the domestic practice of States and sometimes, not even of States but in States, due to the presence and activity of non-State actors. It is enough to look at the developments in international case-law of international courts, in

particular when they adjudicate human rights issues or deal with the application of IHL. But, as I said, it is not the time here to revisit the doctrines of international law as regards defining the practice of States as the source of international custom, but certainly international case-law resulting out of the adjudication of intrastate cases is becoming more and more significant and shows an inclination of the international community to rely on intra-State practice as providing a basis for assessing customary international law. The experience of the international criminal courts and tribunals, whose proliferation in the last fifteen years has been unexpected and prodigious, deserves to be analyzed also in this perspective.

In any event, grounding the applicability of IHL to non-State actors on customary international law raises the issue of identifying the content of the applicable rules. Which are the customary rules that will come into play? Without going into details, it seems appropriate to say that common Article 3 of the Geneva Conventions, which reflects a well-established customary rule, constitutes the natural basic provision in this context, as it is a body of minimum guarantees applicable in all situations of armed conflict be they domestic or international. The applicability of Common Article 3 to international conflicts has been challenged but there is a clear indication that it applies in any situation, as the case-law of international courts, in particular the ICTY, has also largely shown in recent times.

The problem has further emerged of whether any other customary rule of IHL should be regarded as applicable, including e.g., those enshrined in Optional Protocol II. Some doubt has been expressed about this conclusion by Marco Sassoli, who has pointed out that the provisions of the protocol would not necessarily come into play, some of these provisions being based on territory and some being specifically tailored to States. Again, should the application of customary rules be restricted to those rules which do not depend on the capacity of a group to comply with them, a capacity only the States would have in full? This problem has been raised and a solution is probably not at hand. It should be noted that adapting or adjusting IHL or human rights rules may easily lead to their disregard and derogations from IHL and human rights principles should be looked at with caution and should not be accepted lightly.

In this context, the problem of the right to a fair trial was raised and it was pointed out that it should be accepted that an organized armed group would most likely not have the capacity to ensure a fair trial and could not therefore be bound by customary rules thereon. It is not so obvious, however, that derogation should be accepted automatically. A conclusion would also be warranted to hold organized groups accountable for violating the principles of fair trial, based upon the consideration that, if they do not have the capacity to hold regular trials in compliance with principles of customary international law, they should abstain from admin-

istering justice. Derogation should only be upheld when a rule is clearly drafted only for States.

Furthermore, it has been stressed that, in any event, the identification of the applicable law may present difficult problems in specific situations. On the wings of a fascinating case-study, it has been shown that specific situations – such as e.g., transnational violence, terrorism, piracy – originating from the action of organized armed groups, could be addressed in different ways. Claus Kress has put forward the alternative options whether to deal with these matters with a pure inter-State interpretative model or the concurrency of different models. He has shown a preference for the second option, which would overcome two main difficulties that could not possibly be solved by a reference to a pure inter-State model: first, avoiding a reductive qualification of the fighters of the armed groups as "offensive civilians"; and, second, providing a basis for including also the initial attack within the framework of the armed conflict. The emphasis has also been put on piracy, where a reference to IHL may probably be justified only to a limited extent, should ground military operations be carried out in Somalia as envisaged by the more recent Resolutions of the Security Council.

One dimension has been rightly underlined in the debate, i.e., that IHL is only one of the facets of the problem of identifying the applicable law. Besides the recourse to IHL, reliance on Human Rights Law is also a valid approach to ensuring some degree of protection for victims of the activities of organized armed groups. This is an area where it will be helpful to try to better explore the connections between IHL and HR – two branches of international law that developed separately but are, in practice, interconnected as shown not only by the basic rule of IHL reflected in common Article 3 of the Geneva Conventions, but equally by a number of customary and conventional human rights norms which must be applied in all situations, without distinction between armed conflicts and internal disturbances that may not meet the conditions for classification as armed conflicts.

As Andrew Clapham has pointed out, some international treaties, such as the Convention on the Rights of the Child, include norms addressed to armed groups. The United Nations has also contributed to the application of human rights norms by stating that those groups (such as e.g. FARC in Colombia) are bound to respect these norms in the territory over which they exercise their control. A strategy aimed at ensuring compliance with human rights law on the part of organized armed groups requires developing a sense of ownership. Hardly could a law be applied if those called to do so do not regard the prohibited acts as unjust. It would be incorrect to maintain that human rights should be respected by armed groups because of their display of quasi-governmental functions. A sense of ownership must be developed, bearing in mind that fundamental human rights norms, such as

the prohibition on torture, bind anyone who may violate them, irrespective of whether the conduct is attributable to a State, an organized armed group or a mere individual having some official or semi-official capacity. The attention has also been drawn to the Universal Declaration of Human Rights of 1948, which is not drafted in terms of State obligations, although there is a provision dealing with States, but of rights which are inherent in the human being and must be respected by everybody.

This discussion led to a more philosophical debate on the essence of human rights and the source of their protection, whether and to what extent it depends on positive law or on natural law. A reliance on customary law governing the human rights dimension as an expression of natural law may avoid a reference to traditional categories such as the State and other formal structures. Natural law would apply in any case, and the classification of actors as State actors or non-State actors would not play any role as to its binding force. In taking such an approach, would the emergence of a new *jus gentium* be advocated, or rather, a return to an old *jus gentium* based on recent developments which would require changing the positive approach prevailing for many decades in international law? My answer to this question will be limited to designating it as a track for reflection of special significance.

Some of the above considerations lead to the second issue that can be regarded as central in a debate on organized armed groups and IHL, the application of IHL in practice. Can armed groups be induced to comply with IHL? And if yes, how can such compliance be achieved? At least two approaches have emerged, which are not mutually exclusive and which can be schematically organized under the categories of (1) "engagement" of the groups to respect IHL, and (2) of their "accountability".

As to the first approach, it has been pointed out by Elisabeth Decrey Warner, the president of Geneva Call, that in order to enlarge understanding of IHL by armed groups, practical guidance should be given and a method should be endorsed of talking to the groups and securing their commitment to respect IHL. Some results have been achieved in doing so, and although they may appear to be "little fishes" if compared with the dimension of the problem, they show that this approach may ultimately pay, a view that was shared by many, including Cornelio Sommaruga in his passionate intervention. This approach is not entirely new, of course. It corresponds to the traditional approach of the ICRC, which has always engaged in dialogue with people in the field in order to ensure or improve the implementation of IHL. There are NGOs such as the one mentioned that are following the same course, and it has been emphasized that this approach may be particularly useful for the protection of women and children. The role of women in this area must be specially underscored because of their increasingly significant participation in organized armed

groups, although not necessarily at the level of taking decisions, but rather on the operative side. The gender dimension has to be explored more deeply in order to obtain positive results, taking into account that a dialogue with organized armed groups cannot be limited to a dialogue with their leaders, most likely men, but should reach all the participants therein. Should there be a significant contingent of women, their role in disseminating the principles of IHL and bringing about commitment to their application should not be underestimated and may prove relevant in many respects.

Then there is the approach of accountability, which may play an additional significant role, the implications of which have been well identified and analyzed by Liesbeth Zegveld. It is in and of itself an important approach, although one would hesitate to regard it as the only one to be followed. Its role is to combat the climate of impunity that so frequently accompanies grave violations of IHL and Human Rights Law. By holding the perpetrators criminally accountable, be they State agents or non-State actors, a higher degree of compliance with the law can be obtained. The risk for perpetrators of being brought before an international criminal court starts becoming high, even when a crime is not under the jurisdiction provided for by the statute of an existing court, because of a trend toward establishing special courts in recent years entrusted with exercising retroactive jurisdiction over grave breaches of IHL.

No final conclusion can certainly be drawn from the issues that have been discussed throughout the Round Table. It cannot be denied, however, that this conference has left us with the feeling that there are a number of theoretical and practical avenues through which IHL may be applied to non-State actors, in particular organized armed groups and enforced with respect to them, although, at the same time, challenging issues requiring clarification and thought remain. Looking at the future, several significant and stimulating questions remain open, and need to be addressed before deciding which direction should be taken and where efforts should be focused. Is customary IHL sufficient, or should it further develop to encompass the situation of organized armed groups? Are new more focused treaties needed or do the current treaties need to be improved to this effect? Is a further codification or, alternatively, a different interpretation of the current law necessary? Should the focus be put primarily on the activity of the NGOs, or should we rather opt for accountability, or for both? I have tried to address some of these issues, at least in part, but further investigation and analysis in definitely necessary. Possibly a combination of all the avenues discussed, and more to be identified, would be beneficial for the development of IHL and its application to activities of non-State actors. The debate should continue with a view to reaching satisfactory conclusions both on the doctrinal and the practical level.

Messages

Sono lieto di rivolgere un caloroso saluto ai promotori ed ai partecipanti alla Tavola Rotonda organizzata dall'Istituto Internazionale di Diritto Umanitario sul tema "Attori non statali e diritto internazionale umanitario. I gruppi armati organizzati: una sfida per il 21° secolo".

Si tratta di una questione di assoluta attualità, che richiede un approfondimento attento e urgente, tanto più in questa fase storica in cui si assiste al moltiplicarsi di missioni militari internazionali e ad un mutamento di natura dei conflitti.

Pace, rispetto della dignità umana, solidarietà sono valori fondanti della nostra Costituzione e del diritto umanitario e questi stessi valori ci richiamano ad un rinnovato impegno collettivo per garantire una sempre maggiore protezione delle vittime delle guerre.

In questo spirito formulo i migliori auspici per i lavori della Tavola Rotonda, fiducioso nel contributo che le vostre riflessioni potranno offrire per accrescere la consapevolezza sulla portata autenticamente universale dei diritti dell'uomo.

Giorgio Napolitano

PRESIDENTE DELLA REPUBBLICA ITALIANA

Egregio Presidente,

Rispondo alla Sua cortese lettera del 18 febbraio scorso, in merito alla 32° edizione della Tavola Rotonda dell'Istituto di Diritto Umanitario di Sanremo, dedicata quest'anno a *"Non-State Actors and International Humanitarian Law. Organized Armed Groups – a Challenge for the 21st Century"*.

Desidero ringraziarLa della proposta, tanto più gradita alla luce dell'importanza attribuita dall'Italia, e dal Ministero degli Affari Esteri in particolare, alle attività dell'Istituto di Diritto Umanitario da Lei presieduto. Questo invito testimonia altresì lo spirito della collaborazione che caratterizza da sempre, e in particolare dalla Sua elezione, il rapporto tra il Ministero degli Esteri e l'Istituto di Sanremo.

A causa di impegni pregressi, non potrò prendere parte alla Tavola Rotonda, ma il sottosegretario On. Scotti ha già manifestato la sua disponibilità ad intervenire alla cerimonia di apertura dei lavori, la mattina dell'11 settembre. Nell'augurarLe sin d'ora che l'evento abbia pieno successo, colgo l'occasione per inviarLe i miei più cordiali saluti.

Franco Frattini

MINISTRO DEGLI AFFARI ESTERI

La ringrazio per il Suo cortese invito a partecipare alla XXXII edizione della Tavola Rotonda di Sanremo, organizzata dall'Istituto da Lei autorevolmente presieduto, in collaborazione con il Comitato Internazionale della Croce Rossa.

Purtroppo, a causa di pregressi inderogabili impegni, non potrò essere presente all'interessante manifestazione.

Desidero, tuttavia, rivolgere a Lei ed a tutti i convenuti un cordiale saluto augurale, nella consapevolezza che questo evento offre un'importante occasione di discussione e confronto ai massimi livelli su un tema di grande importanza e attualità: "Attori non statali e diritto internazionale umanitario. I gruppi armati organizzati: una sfida per il 21° secolo".

Appena pochi giorni fa, è stato celebrato il 70° anniversario dell'inizio del secondo conflitto mondiale che costò la vita ad oltre 60 milioni di persone – di cui più della metà civili – e fu teatro di terribili crimini contro l'umanità.

Da allora importanti progressi sono stati conseguiti per assicurare la tutela e il riconoscimento della dignità umana, anche in situazioni di conflitto armato.

Tuttavia, ancora oggi molti sono i civili vittime innocenti dei conflitti che insanguinano il nostro pianeta, della barbarie del terrorismo, dei fenomeni di pirateria, di cui sono molto spesso protagonisti proprio quei gruppi organizzati non statali oggetto della tavola rotonda da Voi promossa.

In talune aree geografiche, queste violazioni sono insieme causa ed effetto di una profonda instabilità sociale: il rispetto dei diritti umani è, infatti, un prerequisito imprescindibile per mantenere la pace assicurando lo sviluppo ed il benessere economico di ciascun Paese.

Nell'epoca globalizzata in cui viviamo, caratterizzata dalla forte interdipendenza tra stati, il superamento di queste criticità resta, dunque, una partita aperta, una sfida di civiltà e di progresso da superare nell'interesse di quanti sono direttamente coinvolti nei conflitti e dell'intera comunità internazionale.

Sono certo che queste tre giornate di intenso lavoro potranno dare un importante contributo di riflessione per una migliore comprensione del fenomeno e per l'elaborazione di una efficace strategia di contrasto all'azione dei gruppi armati organizzati.

Mi congratulo quindi con gli organizzatori per avere promosso anche quest'anno un'iniziativa così meritoria ed esprimo loro il mio più vivo apprezzamento: all'IIDU per l'importante contributo fornito allo sviluppo del diritto internazionale umanitario e al CICR per il prezioso sostegno assicurato alle vittime dei conflitti armati, a garanzia del rispetto della dignità umana anche in situazioni di crisi.

Augurando a tutti Voi buon lavoro, invio i miei più cordiali saluti.

Claudio Scajola

MINISTRO DELLO SVILUPPO ECONOMICO

Monsieur l'Ambassadeur,

Permettez-moi de vous remercier de votre lettre du 19 août 2009 et votre aimable invitation à participer à la XXXIIème Table Ronde de l'Institut International de Droit Humanitaire, qui aura lieu à Sanremo du 11 au 13 septembre 2009.

Je souhaiterais vous féliciter de l'excellent travail accompli par votre Institut en vue de résoudre les défis actuels du droit international humanitaire. Le choix du thème pour la Table Ronde de cette année est particulièrement pertinent étant donné le rôle des acteurs non-étatiques dans les enjeux sécuritaires et humanitaires d'aujourd'hui. Malheureusement, d'autres engagements ne me permettront pas de me joindre à vous à cette occasion.

En formulant des vœux pour le succès de cet événement important, je vous prie d'agréer, Monsieur l'Ambassadeur, les assurances de ma considération distinguée.

Sergei A. Ordzhonikidze

LE DIRECTEUR GÉNÉRAL, OFFICE DES NATIONS UNIES À GENÈVE

Monsieur le Président,

J'ai bien reçu votre courrier m'invitant à assister à la XXXIIème Table Ronde sur les problèmes actuels du droit international humanitaire, organisée du 11 au 13 septembre à Sanremo, par l'Institut International de Droit Humanitaire. Je vous en remercie.

A l'instar des éditions précédentes, vous avez réussi à réunir les plus éminents spécialistes de droit humanitaire pour aborder des thèmes du plus grand intérêt pour tous. Je suis particulièrement sensible à l'invitation que vous m'avez envoyée mais, malheureusement mon emploi du temps particulièrement chargé ne me permettra pas de me joindre à vous à cette occasion. J'ai toutefois demandé à Monsieur Fabrice Leggeri, sous directeur du droit international et du droit européen au sein de la direction des affaires juridiques du ministère de la défense, de bien vouloir m'y représenter.

Je souhaite un plein succès à cette XXXIIème Table Ronde et je vous prie d'agréer, Monsieur l'Ambassadeur, l'assurance de ma considération la plus distinguée.

Jean-Louis Georgelin

CHEF D'ÉTAT-MAJOR DES ARMÉES, FRANCE

All'Ambasciatore Maurizio Moreno, Presidente dell'Istituto Internazionale di Diritto Umanitario di Sanremo, alle Autorità civili e militari presenti, agli illustri relatori e ai signori partecipanti alla XXXII Tavola rotonda sul tema:«Attori non statali e diritto internazionale umanitario. I gruppi armati organizzati: una sfida per il 21° secolo», giunga il mio caloroso e cordiale saluto.

Lo scenario internazionale presenta sfide che richiedono fermezza sul piano intellettuale e morale. Il consolidarsi di teatri di guerra «asimmetrici» o di «crisi complesse» sembra mettere in crisi il bagaglio di civiltà giuridica e di umanità frutto di secoli di sacrificio e di evoluzione. La tentazione potrebbe essere quella di un ritorno al passato, al principio per cui «*silent enim leges inter arma*», cioè «tacciono le leggi tra le armi»; al mancato riconoscimento della dignità del nemico, come combattente e come uomo; alla negazione di un nucleo essenziale di regole condivise; in una parola: alla negazione della dignità umana.

Al contrario, proprio nei passaggi storici epocali, l'umanità è chiamata a testimoniare la propria fedeltà alle conquiste del passato, la propria «*fede nei diritti fondamentali dell'uomo, nella dignità e nel valore della persona umana*», come si legge nel Preambolo della Carta delle Nazioni Unite, anch'essa frutto di un passaggio epocale sul piano politico e morale.

Certamente, il coinvolgimento di attori e gruppi armati non statali nei conflitti armati solleva questioni difficili da definire e risolvere. Sfide che sollecitano lucidità e immaginazione nel trovare soluzioni tecniche adeguate. Al tempo stesso, occorre una grande coerenza al principio di umanità, che impone il rispetto di ciascun essere umano, senza il quale, le stesse soluzioni tecniche, perdono di efficacia e di senso.

Vorrei, pertanto, esprimere vivo compiacimento per questa importante iniziativa promossa dall'Istituto Internazionale di Diritto Umanitario di Sanremo, il quale si conferma un punto di riferimento nella riflessione sui problemi attuali del diritto umanitario e su quella che è la sfida di sempre, cioè la tutela della dignità e dei diritti umani, in ogni contesto.

Renato Raffaele Card. Martino

PRESIDENTE DEL PONTIFICIUM CONSILIUM DE IUSTITIA ET PACE

Signor Ambasciatore,

Ho ricevuto il Suo gradito invito a partecipare alla cerimonia di apertura dei lavori della "Tavola Rotonda" che, su iniziativa dell'Istituto Internazionale di Diritto Umanitario, di cui Ella è Presidente, e del Comitato Internazionale della Croce Rossa, si terrà a Sanremo dall'11 al 13 settembre prossimo.

Per un impegno che mi vede in quei giorni a Seregno ad inaugurare, con una conferenza ai docenti e agli alunni, l'inizio dell'anno scolastico di un importante Liceo della città, sono molto dispiaciuto di non poter prender parte all'inizio del Convegno.

Il Diritto Internazionale Umanitario sta particolarmente a cuore anche alla Chiesa. Nel suo primo Messaggio per la Giornata Mondiale della Pace, 1° gennaio 2006, il papa Benedetto XVI così scriveva: «*Il diritto internazionale umanitario è da annoverare tra le espressioni più felici ed efficaci delle esigenze che promanano dalla verità della pace. Proprio per questo il rispetto di tale diritto si impone come un dovere per tutti i popoli. Ne va apprezzato il valore ed occorre garantirne la corretta applicazione, aggiornandolo con norme puntuali, capaci di fronteggiare i mutevoli scenari degli odierni conflitti armati, nonché l'utilizzo di sempre nuovi e più sofisticati armamenti*».

La Tavola Rotonda sui problemi attuali del Diritto internazionale possa aiutare, in maniera sempre più efficace, il raggiungimento di quella Pace che i popoli attendono e desiderano nel rispetto dei loro diritti.

Voglia, signor Ambasciatore, porgere il mio saluto a tutti i partecipanti e, in modo particolare, all'Onorevole Vincenzo Scotti, Sottosegretario per gli Affari Esteri.

Con l'augurio di un proficuo lavoro, distintamente La saluto.

Alberto Maria Careggio

VESCOVO DI VENTIMIGLIA E SANREMO

Au nom de Son Altesse Éminentissime le Prince et Grand Maître de l'Ordre Souverain de Malte, Fra' Matthew Festing, qui regrette vivement de ne pas pouvoir participer à cette XXXII^{ème} Table Ronde, et, en mon nom personnel, je voudrais adresser au Président de l'Institut International de Droit Humanitaire, aux membres de son Conseil et à tous les participants de cette Table Ronde de San Remo nos vœux de plein succès pour vos réflexions sur ce thème d'une si grande actualité: «Les acteurs non-étatiques et le droit international humanitaire. Les Groupes armés organisés: un défi pour le 21° siècle».

L'Ordre Souverain Militaire Hospitalier de Saint-Jean de Jérusalem de Rhodes et de Malte déploie depuis neuf siècles ses activités humanitaires dans le monde sans distinction de race, d'origine ou de religion. Il suit avec un vif intérêt les efforts déployés depuis bientôt quarante ans par l'Institut International de Droit Humanitaire pour la promotion et le respect du droit international humanitaire.

Je serais très heureux que la collaboration de l'Ordre Souverain de Malte avec l'Institut puisse se poursuivre et se développer notamment dans le domaine de la formation en droit international humanitaire. Je prendrai connaissance avec la plus grande attention du résultat de vos travaux.

Jean-Pierre Mazery

GRAND CHANCELIER, ORDRE SOUVERAIN DE MALTE

Acronyms

AJIL	American Journal of International Law
ALN	Algerian Liberation Army
ANC	African National Congress
AP	Anti-personnel
CARHRIHL	Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law
CDDH	Steering Committee of Human Rights (French: *Comité Directeur pour les Droits de l'Homme*)
CEH	Historical Clarification Commission (Spanish: *Comisión para el Esclarecimiento Histórico)*
CICR	Comité International de la Croix-Rouge
CNL	Comité National de Libération (Congo)
CPN-M	Communist Party of Nepal (Maoist)
CTV	Coutume grande vitesse
DPH	Direct Participation in Hostilities
DRC	Democratic Republic of the Congo
ELN	National Liberation Army (Colombia, *Ejército de Liberación Nacional*)
EU	European Union
FARC	Revolutionary Armed Forces of Colombia – People's Army (Spanish: *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo*)
FARDC	Armed Forces of the Democratic Republic of Congo (French: *Forces Armées de la République Démocratique du Congo)*
FDLR	Democratic Forces for the Liberation of Rwanda (French: *Forces Démocratiques de Libération du Rwanda*)
FMLN	Farabundo Martí National Liberation Front (Spanish: *Frente Farabundo Martí para la Liberación Nacional*)
FROLINAT	National Liberation Front of Chad (French: *Front de Libération Nationale du Tchad*)

GC	Geneva Convention(s)
GRP	Government of the Republic of the Philippines
HR	Human Rights
IAC	International Armed Conflict
ICC	International Criminal Court
ICL	International Customary Law
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IDPS	Internally Displaced Persons
IED	Improvised Explosive Device(s)
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IIDU	Istituto Internazionale di Diritto Umanitario
IIHL	International Institute of Humanitarian Law
IMT	International Military Tribunal
ISAF	International Security Assistance Force
JEM	Justice for Equality Movement (Sudan)
LOSC	Laws of the Sea Convention
LRA	Lord's Resistance Army (Northern Uganda)
LTTE	Liberation Tigers of Tamil Eelam (Sri Lanka)
MCA	Military Commissions Act (United States)
MILF	Moro Islamic Liberation Front (Philippines)
MNJ	Moevement Nigérien pour la Justice
MRTA	Túpac Amaru Revolutionary Movement (Spanish: *Movimiento Revolucionario Túpac Amaru)*
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organization
NCO	Non-Commissioned Officer
NDFP	National Democratic Front of the Philippines
NGO	Non-Governmental Organization
NIAC	Non-International Armed Conflict
NPA	New People's Army (Philippines)
NRA	National Resistance Army (Uganda)
OECD	Organization for Economic Co-operation and Development
ONU	Organizzazione delle Nazioni Unite
PLA	People's Liberation Army
PMSCS	Private Military and Security Companies
POW	Prisoners of War
PSIO	Programme for the Study of International Organizations

RENAMO	Mozambican National Resistance (Portuguese: Resistencia National Moçambicana)
RUF	Revolutionary United Front
SC	Security Council
SPLM	Sudan People's Liberation Movement
SSIM	South Sudan Independence Movement
SUA	Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation
TFG	Transitional Federal Government of Somalia
UE	Unione Europea
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
UNICRI	United Nations Interregional Crime and Justice Research Institute
UPDF	Uganda People's Defence Force