Volume 90 Number 870 June 2008

INTERNATIONAL REVIEW of the Red Cross

Armed groups, sanctions and the implementation of international humanitarian law

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Abstract

While it is widely accepted that punishing the perpetrators of violations of international humanitarian law is an important instrument in improving compliance with the law, little research has been done into the obligations on armed groups to impose sanctions and their possibilities for doing so. This article discusses characteristics of armed groups that influence their willingness and ability to comply with international humanitarian law and to punish those of their members who commit violations. It takes a holistic approach to these sanctions, and analyses the different methods of punishing members of armed groups, including disciplinary sanctions, penal sanctions imposed by the state and penal sanctions imposed by the group itself.

Introduction

Each party to a conflict is required to comply with the provisions of international humanitarian law and to ensure that the members of its armed forces and other

* The content of this article reflects the views of the authors and not necessarily those of the organisations to which they are or were associated.

persons or groups acting under its instructions and orders or under its control also comply.[1] In this respect international humanitarian law makes no distinction between the obligations of states and those of the armed groups concerned. Moreover, Article 3 common to the Geneva Conventions, which reflects the minimum rules applicable to all armed conflicts, stipulates specifically that the *parties to the conflict*, without distinction, must comply with certain rules set forth in that Article.[2]

In order to reflect on how sanctions can affect the behaviour of armed groups, we must examine the extent to which the underlying principles of international humanitarian law – which are rooted in international armed conflicts – are suited to them. Those principles call for appropriate action whenever the law is violated, including administrative, disciplinary or punitive measures, in order to put an end to the violation and prevent its repetition. In the case of several of these measures, the initiative and responsibility lie with the armed bodies themselves. Others fall within the purview of entities that are authorized and competent to take such action, such as judicial bodies, although it must be borne in mind that they may be powerless when faced with armed groups which claim control of their own affairs, hence the need to explore to what extent these armed groups are in a position to meet the relevant obligations imposed by international humanitarian law, including the measures to be taken in the event of violations.

In order to apprehend this issue fully we must first identify in the constellation of armed groups those that have the characteristics that are necessary if the implementation and sanctions of international humanitarian law are to have the desired effect of preventing violations from being committed or repeated. We shall confine ourselves to examining the situation of armed groups in the conventional sense of the term and shall not include those that have been described as transnational groups, even though some of the considerations set forth below could apply to them.[3] Once these groups have been identified, we shall discuss how they could spread knowledge of international humanitarian law and

1 Article 1 common to the four Geneva Conventions of 1949. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, Judgment of 27 June 1986, [1986I] ICJ Rep., para. 220; Rule 139 of the ICRC Customary Law Study confirms the applicability of this provision for international and non-international armed conflicts – see Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, ICRC and Cambridge University Press, Geneva and Cambridge, 2005, Vol. I, pp. 495–8.

2 See for example *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, Judgment of 27 June 1986, [1986] ICJ Rep., para. 218. It states that ''Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called ''elementary considerations of humanity'' (*Corfu Channel*, Merits, ICJ Reports 1949, p. 22, paragraph 215 above).''

3 See in particular, on the issue of transnational groups, Marco Sassòli, ''Transnational armed groups and international humanitarian law'', *Program on Humanitarian Policy and Conflict Research*, Occasional Paper Series, Winter 2006, No. 6, Harvard University, available at www.hpcr.org/pdfs/OccasionalPaper6.pdf (last visited 14 July 2008).

train their members in this subject. We shall then turn to the sanctions which could be applied in the event of non-compliance by focusing our attention on the question of criminal punishment.

The essential characteristics of armed groups in relation to implementing international humanitarian law

There are various constraints involved in identifying armed groups that can be influenced by the discourse of compliance with the law. For instance, for international humanitarian law to be applicable, the armed groups must at the very least be operating in a context of non-international armed conflict – that is, in a situation of violence between a state and an armed group or between armed groups. To qualify as an armed group a minimum degree of organization – that is, a certain level of organizational coherence and hierarchy, such as a command structure and the capacity to sustain military operations – is necessary. This element will be discussed below.[4]

The level of organization

An armed group must have a minimum degree of organization to be able to comply with all the rules of international humanitarian law applicable to non-international armed conflicts.

This level of organization is particularly relevant to our purposes, for a group that does not attain it may well be unable to familiarize its members with international humanitarian law and establish mechanisms to ensure compliance. This situation can result in an increase in violence that is difficult to control and leads to a spiral of anarchy and bloodshed – precisely what humanitarian law aims to avoid by seeking a balance between the principle of humanity and the considerations of military necessity.

In practical terms, internal organization presupposes that there is a command structure. Only when such a structure exists can the leaders train the members of the group, give clear orders and instructions, be informed of the actions of subordinates and react promptly to them. A chain of command and a reporting system are thus necessary if the leadership is to be informed about violations, trace the role played by individuals in committing a crime and take appropriate measures. The reporting procedures require reliability and predictability and can only exist in structures with a certain level of internal organization.[5]

4 See Dietrich Schindler, "The different types of armed conflicts according to the Geneva Conventions and Protocols", *Recueil des Cours de l'Académie de droit international de Liège*, Vol. 163 II, 1979, p. 147. For a detailed analysis of these criteria, see International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Fatmir Limaj*, Case no. IT-03-66-T, Judgement, 30 November 2005, para. 94–134.

5 On the different organizational structures of armed groups see Pablo Policzer, "Human rights and armed groups: toward a new policy architecture", *Armed Groups Project*, Working Paper No. 1, July 2002, available at www.armedgroups.org/sites/armedgroups.org/files/_1_Policzer.pdf (last visited 14 July 2008).

Furthermore, there must be a body or an authority, such as a command superior, with responsibility for imposing rules and punishing violations. Under any system of self-regulation, offences committed by members of armed groups would be liable to go unpunished. Besides, it is this minimum degree of organization within the hierarchy of an armed group which makes it possible to hold superiors responsible for their omissions, owing to their effective control over their subordinates and their ability to command respect, to put an end to violations and to punish them. Seen from this angle, one understands how important it is for commanders and other superiors to take timely action to ensure that their subordinates are aware of their obligations with regard to international humanitarian law and to take the most appropriate measures in the event of violations.

It is not to be believed, however, that mere organization could be enough for an armed group, in actual practice, to be fully in a position to implement the law and to sanction violations and, above all, to be motivated to do so. From a purely practical point of view, other factors – not affecting the legal nature of a conflict – such as a group's level of control over the territory and its willingness to comply with the law may also play a role.

The level of territorial control

A certain level of territorial control is a condition for the implementation of Protocol II additional to the Geneva Conventions.[6] Such control by armed groups is advantageous when it comes to imposing penal sanctions, since it can enable the group to set up institutions which are similar to those which states are obliged to establish, and which are often necessary for ensuring compliance with the law.

When armed groups have a high level of control over part of a territory, the state has little or no control in that region and probably cannot ensure that the law is implemented and observed or carry out law enforcement duties. In the event of violations it may therefore be extremely difficult for the state to impose sanctions on members of armed groups. On the other hand, it may be possible for armed groups to take the necessary measures to ensure that the law is known and complied with and to react in the event of contraventions with measures such as criminal sanctions, since these groups have a long-standing and more stable presence and can thus take over state-like functions. When armed groups have such a high level of territorial control, they usually also have the necessary financial and military means to maintain control over long periods. This makes their actions sustainable, which is a prerequisite for prosecuting and punishing serious violations of international humanitarian law while honouring all essential judicial guarantees to the full (see below).

6 Article 1(1) of Protocol II (1977) additional to the Geneva Conventions of 1949 stipulates that it applies to "organized armed groups which, under responsible command, exercise such control over a part of [a] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".

In today's conflicts, however, it may be very difficult to look at the hostilities in terms of control over territory. They tend to be characterized by "isolated acts, often countered by covert operations coupled with repressive measures, [which] replace continual hostilities. The scene of actions shifts constantly, for an attack can take place at any time and in any country. There is no geographically circumscribed battlefield".[7]

The willingness of armed groups to respect international humanitarian law

The willingness of an armed group to abide by the law and to show that it can appropriately address situations of non-compliance is often linked with the aim it pursues.[8] For example, an armed group whose aim constitutes per se a flagrant violation of international humanitarian law, such as a group that pursues a policy of ethnic cleansing, is unlikely to be much concerned about sanctions. The same can be said of groups that inculcate a culture of demonization and dehumanization of the enemy as a basis for training their members.[9] On the other hand, groups that would welcome recognition and support from the international community clearly have a stake in preventing violations. They also have an incentive to show that they can and do mete out appropriate sanctions in the event that violations nevertheless do occur.

Unilateral declarations and special agreements

Allowing armed groups that are party to non-international armed conflict the opportunity to make a unilateral declaration stating their commitment to comply with international humanitarian law can be a useful tool for ensuring compliance in actual practice.[10] It should be borne in mind, however, that such statements could be issued for purely political purposes.

The ICRC and the Depositary of the Geneva Conventions and their Protocols have on many occasions received declarations of this kind from armed groups.[11]

7 Toni Pfanner, "Asymmetrical warfare from the perspective of humanitarian law and humanitarian action", *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, p. 155.

8 Note that the aim of the groups is irrelevant to definitions of such groups or of armed conflict under international humanitarian law. An exception to this are the armed groups fighting for national liberation, as provided for in Article 1(4) of Protocol II (1977) additional to the Geneva Conventions of 1949.

9 On demonization and dehumanization see in the English literature Lt. Col. Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, Little, Brown, New York, 1995. See in the French literature Harald Welzer, *Les exécuteurs. Des hommes normaux aux meurtriers de masse*, trans. Bernard Lortholary, Gallimard, Paris, 2007. See also the article by Emanuele Castano, Bernhard Leidner and Patrycja Slawuta, "Social identification processes, group dynamics and the behaviour of combatants", in this issue.

10 This possibility is mentioned expressly in Article 96(3) of Protocol I (1977) additional to the Geneva Conventions of 1949 for groups that fall within the scope of application set out in Article 1(4) of the Protocol.

11 They can be delivered in writing or orally. Although oral commitments do not have the same formal weight as written ones, they are useful for follow-up action and dissemination.

Many were published by the ICRC, some in this journal, without discussion of their validity or content.[12] These declarations provide the answer to a paradox of humanitarian law. For although armed groups, as we know, cannot be party to treaties of humanitarian law, it is nevertheless their responsibility to respect and to ensure respect for that body of law in all circumstances, even if in practice they are reluctant to be bound by the international obligations of the party they are fighting or by any laws which that party may have adopted. Although most of the declarations are limited to general statements of respect for international humanitarian law and do not include any concrete provisions regarding implementation mechanisms such as sanctions, they are a way for these groups to demonstrate and confirm that they are prepared to be bound by international humanitarian law and to ensure that it is implemented. This was in fact noted at the 27th International Conference of the Red Cross and Red Crescent convened in 1999,[13] and it was on this basis that the Geneva Call organization invited armed groups to sign a declaration of adherence to the rules enshrined in the Ottawa Convention on anti-personnel mines. To date, thirty-five armed groups have reportedly agreed to ban anti-personnel mines through this mechanism, and the results in the field have been conclusive.[14] These declarations send out a clear message from the hierarchy confirming its responsibility in the implementation of humanitarian law and can be an appreciable entry point for opening a dialogue with those groups on any particular aspect of implementing the law. Ideally, the declarations should include a pledge not only to comply with international humanitarian law, but also to include it in the internal disciplinary code of the group and to enforce compliance.

In addition to such declarations, there are special agreements (provided for in Article 3 common to the Geneva Conventions) between the parties to the conflict. These can provide an incentive to comply with international humanitarian law on the basis of the mutual consent of the parties. An example is the agreement between the various parties to the conflict in Bosnia and Herzegovina. It even included specific commitments as to its implementation and a commitment to undertake enquiries into allegations of violations of international humanitarian law and to take the steps needed to put an end to them and punish those responsible. The examples of such agreements are, however, rare,[15]either because the states are concerned about indirectly granting armed groups legitimacy, or because the parties do not want to commit themselves

12 Examples are the unilateral declarations by the Palestine Liberation Organization (*International Review of the Red Cross*, No. 274, January–February 1990, pp. 64–5), the National Union for the Total Independence of Angola (UNITA) (*International Review of the Red Cross*, No. 219, November–December 1980, p. 320) and the African National Congress of South Africa (*International Review of the Red Cross*, No. 220, January–February 1981, p. 20).

13 See 27th International Conference of the Red Cross and Red Crescent, *Plan of Action for the Years 2000–2003*, Final goal 1.1(3), available at www.icrc.org/Web/Eng/siteeng0.nsf/html/57JQ8K (last visited 14 July 2008).

14 The declaration can be consulted at www.genevacall.org/about/testi-mission/gc-04oct01-deed.htm (last visited 14 July 2008).

15 Attempts to conclude final agreements have failed for example in Colombia, Tajikistan and Jammu/Kashmir.

to more than the minimum for fear of their own members being prosecuted, or because the intention of one or both parties to respect international humanitarian law is not sincere.

The dissemination of international humanitarian law and training for members of armed groups

If the state or states on whose territory armed groups are operating fulfil their obligation to spread knowledge of international humanitarian law among the civilian population – in particular by making the instruments available in the national language or languages – it can be presumed that, as a result, the armed groups too will be informed, at least in general terms. This does not absolve those groups from all responsibility, however. On the contrary, they themselves must, as part of their responsibility to ensure respect, see to it that all their members, in both their political and their military branches, are familiar with the rules of humanitarian law and understand them. Those rules can only be appropriated if certain measures which the leadership is largely responsible for carrying out are in fact taken.

First, appropriate training must be provided and should be tailored to suit the level in the hierarchy and the degree of responsibility of the target groups. It should address both the practicalities of compliance and the mechanisms to be implemented in the event of violation. People who bear weapons must internalize not only the message about obeying the rules but also the message about sanctions that will be incurred for failing to do so. They must be made aware that everyone who takes part in a conflict, irrespective of allegiance, will be held to account for any criminal acts they have committed. Organizations such as the ICRC bear considerable responsibility in this regard, since, wherever they have access to armed groups, it is up to them to be absolutely clear about the sanctions involved and the consequences of any act constituting a serious violation of humanitarian law.

Second, the content of humanitarian law must be made accessible; it should be summarized in simple rules, which could be included in codes of conduct. Some armed groups have in fact stated that they follow this practice.[16] Most of these codes contain provisions regarding sanctions for violations. Finally, in order to ensure continuity of knowledge, armed groups should also attend to the training of skilled staff and, where possible, ensure the presence of legal advisers capable of providing commanders with information on applying and

16 Examples of armed groups that have developed internal codes of conduct are the United Self Defence Forces of Colombia (AUC), the National Liberation Army (ELN) and the Revolutionary Armed Forces of Colombia (FARC) in Colombia, the African National Congress (ANC) in South Africa, the Farabundo Martí National Liberation Front (FMLN) in El Salvador, the Patriotic Movement (MPCI) in Côte d'Ivoire, the Liberia United for Reconciliation and Democracy (LURD) in Liberia, the Maoists in Nepal, the Revolutionary United Front (RUF) in Sierra Leone, and the Sudan Armed Forces (SAF) and the Sudan People's Liberation Movement (SPLM) in Sudan.

adhering to humanitarian law in military operations. This practice is becoming increasingly common in the regular armed forces, and there is no reason why it should be any less important for armed groups also to have such staff at their disposal.

Identifying the most appropriate sanction

In the following paragraphs we shall extend our discussion of the sanctions issue beyond the criminal sanctions that must be imposed in the event of serious violations of humanitarian law. This is because, without wishing to detract from the importance of such sanctions in any way, it is our view that the deterrent effect of a sanction will always be uncertain if it relies only upon this single component. Efforts must therefore be made to introduce mechanisms and processes that lay a basis for censure to be transformed into practical effect whenever an offence is committed. One consequence of this approach is that disciplinary sanctions must be explored in depth.

Disciplinary sanctions

Although disciplinary measures are not sufficient to remedy serious violations of international humanitarian law, they are necessary and useful inasmuch as they enable the leaders of a group to react in a timely way to violations. These measures can take various forms, such as a note to file, a warning, demotion or dismissal. They can also involve the assignment of extra duty or the withdrawal of the soldier's weapons or uniform. In practice, they sometimes also include imprisonment and corporal punishment, including capital punishment. All these measures should naturally be taken in conformity with human rights standards.[17] Disciplinary measures focus on the status of the person concerned within the group hierarchy and can thus have a significant deterrent effect. They are the concrete expression of the reaction by the group's hierarchy and signal to other group members that prohibited conduct will not be tolerated, thus quite possibly preventing further violations from being committed in the future. Disciplinary measures are also very often the only means of sanctioning violations while a conflict is under way, since criminal prosecution requires more time and more resources. If such disciplinary action is to be effective and is to prevent further violations it must be severe enough and must be made public – two conditions that are sometimes difficult to fulfil and to reconcile in actual practice.[18] Simple rules laid down in writing and stating from the outset the penalty to be paid in the event of violation help to make the hierarchy's response predictable, with a view to

17 See Jelena Pejic, "Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence", *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 375–91.

18 Ibid.

avoiding disparity and disproportion. The usefulness of such rules is not to be underestimated.

Criminal sanctions

As mentioned above, criminal prosecution is necessary where serious violations of international humanitarian law have been committed. The crucial question is who can impose such sanctions when armed groups have committed war crimes.

The state

The primary responsibility of sanctioning violations lies with the state. In practice, a sanction should be imposed as close as possible to the place and persons involved in the crime in order for its deterrent effect to be optimized.

The imposition of sanctions by the state party which has been directly involved in the conflict is subject to a number of significant constraints and must overcome many challenges. First, the state must be capable of duly conducting proceedings and willing to do so – which is far from being a matter of course at the end of a conflict. Second, the state must establish procedures in which all of the parties can have confidence. To do so, it must guarantee equal and individualized treatment for all, irrespective of what group they belong to. It is only when these sine qua nons are fulfilled and when the standards applied are the same for all that armed groups can be reassured and their natural reluctance to hand over their members to the government can be to some extent overcome.

The fact that the state concerned applies the broadest possible amnesty to persons who have participated in the armed conflict, for acts that were not war crimes, ideally while the conflict is still under way, can play a decisive role in the parties' perception of that state's genuine intention to conduct impartial procedures.[19] If no amnesty is granted for the mere participation in hostilities, a state can at least grant a reduction in punishment in these cases, in the hope that this will have some positive impact on compliance with humanitarian law.[20] On the other hand, a situation where the state prosecutes the members of the armed group on the basis of its ordinary criminal law simply for having taken part in hostilities – thus refusing to recognize their ''combatant immunity'' – results in a lack of any incentive for them to comply with the rules of international humanitarian law, since they are likely to face domestic prosecution even if they

19 See Article 6(5) of Protocol II (1977) additional to the Geneva Conventions of 1949, and Rule 159 in Henckaerts and Doswald-Beck, above note 1, p. 611.

20 See ''Improving compliance with international humanitarian law'', ICRC, background paper prepared for informal high-level expert meeting on current challenges to international humanitarian law, Cambridge, 25–27 June 2004.

do comply. Of course, blanket amnesties that cover serious crimes committed in a conflict are unacceptable.[21]

Criminal justice proceedings can rarely be instituted during a conflict; it is generally necessary to wait until hostilities have come to an end and the state has regained control of its territory before justice can be served in accordance with procedures which provide the necessary guarantees of a fair trial. Furthermore, criminal procedures are generally complex and lengthy, particularly when they concern serious violations of international humanitarian law committed on a large scale or systematically, and can require expert opinions that are not available at national level, hence the importance of combining such proceedings with other immediate reactions.

Another way of overcoming the above-mentioned difficulties would be to involve a third state on the basis of universal jurisdiction – that is, the principle whereby states can bring to trial the perpetrators of international crimes irrespective of where the crime was committed or the nationality of either the perpetrator or the victim(s). There are few examples in contemporary state practice of recourse to (semi-)universal jurisdiction in order to try members of armed groups.[22]

The facts that recourse to universal jurisdiction is unpredictable and that, by its very nature, that jurisdiction is delocalized can detract from the deterrent message of the sanction. It must be recognized, however, that universal jurisdiction can be used to threaten those who have committed international crimes, even if they enjoy the inertia or connivance of the competent authorities.

Last, it should also be possible to benefit from the transitional justice mechanisms often set up after a conflict, including those that use traditional indigenous justice systems.[23] These mechanisms must, however, take due account of the interests, rights and obligations of all of the parties concerned. They must not give the impression that they are taking sides by failing to deal with all persons responsible for violations, regardless of which group they belong to. In addition,

21 The UN Security Council, Commission on Human Rights and Secretary-General have confirmed on various occasions that amnesties must not apply to war crimes. See for example Security Council Resolutions 1120 (1997) and 1315 (2000), Commission on Human Rights Resolution 2002/79 and the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone (S/2000/915). See also Simon M. Meisenberg, ''Legality of amnesties in international humanitarian law: the Lomé Amnesty Decision of the Special Court for Sierra Leone'', *International Review of the Red Cross*, Vol. 86, No. 856, December 2004, pp. 837–51.

22 One example of the use of universal jurisdiction against members of non-state groups (albeit with close links to a foreign government) is the case of *Jorgic*. According to findings of the Oberlandesgericht Düsseldorf, Germany, Bosnian Serb Nikola Jorgic was the leader of a paramilitary group that took part in acts of terror against the Muslim population in Bosnia. The crimes were carried out with the backing of the Serb rulers and were designed to contribute to their policy of ''ethnic cleansing''. He was found guilty of genocide and sentenced to life imprisonment. The judgment was found to be in compliance with the European Convention on Human Rights on 12 July 2007.

23 See for example the native Hawaiians' ''setting to right'' (*ho'oponopono*) and the Navajo's peacemaking processes, as described in Amedeo Cottino, ''Crime prevention and control: Western beliefs vs. traditional legal practices'', in this issue. See also the traditional justice mechanisms in Burundi (*Bashingantahe*) and in Rwanda (*gacaca*).

while these mechanisms may have the advantage of being swift, they must still uphold all fair-trial guarantees.

At all events, where the fairness of the sanctioning process is doubtful or where the conditions discussed above are not met – when states are unable or unwilling to meet their responsibility to impose sanctions for violations of international humanitarian law, for example – international or mixed tribunals could prove to be the better option for effectively sanctioning violations committed in internal armed conflicts.

International or mixed tribunals

International or mixed tribunals can provide a satisfactory solution to several problems which may arise when the parties dispense justice themselves. In principle, these tribunals provide a guarantee of independent and impartial justice, which is sometimes lacking – or appears to be lacking – at national level. In addition, they should be in a position to deal equitably with all those who have committed acts of violence, so that the reality in the court – however imperfect it may be – is brought as close as possible to the reality on the ground. This would seem to be essential if a radicalization of positions is to be avoided and sanctions are to contribute in some way to a return to peaceful existence. It is in fact the approach adopted by the International Criminal Court, where crimes committed not only by states but also by armed groups are prosecuted.[24] The office of the prosecutor bears a particular responsibility in this regard in determining the court's prosecution policy.

However, international courts have the disadvantage of being located at a considerable distance from the places and persons concerned, which can reduce the effect that sanctions are expected to have. Furthermore, it should be pointed out that there is a growing tendency for internationalized proceedings to be instituted as close as possible to the place where the crimes were committed. In the same line of thought, it would seem essential that these international initiatives provide for links with the national systems concerned, so that cases can be transferred directly, and for strengthened national capacities, so that the cases can be dealt with as soon as possible after the conflicts in accordance with fair-trial guarantees.

The armed groups

Where the state is unable to impose criminal sanctions on individuals who have seriously violated international humanitarian law, the question arises of whether

24 To date, nine members of armed groups in Uganda, the Democratic Republic of the Congo, Sudan and the Central African Republic face warrants of arrest issued by the International Criminal Court. Only one warrant of arrest concerns a former Minister of State for the Interior of the government of Sudan and, most recently, charges were brought against the sitting head of state of Sudan. Information available at www.icc-cpi.int/cases.html (last visited 14 July 2008).

an armed group could itself impose such sanctions, thereby performing one of the functions typically regarded as a prerogative of state sovereignty. International humanitarian law contains no explicit provision on this subject. However, the provision on the passing of sentences in Article 3(1)(d) common to the Geneva Conventions implies that armed groups may pass sentences, since the rule is applicable to ''each Party to the conflict'' and not only to states. Article 6 of Additional Protocol II and its Commentary do not rule out the prosecution and punishment of criminal offences by non-state entities either.[25]

Recognizing the right not only of states but also of armed groups to bring people to trial would be consistent with the principle of ''equality of belligerents'', which underlies the contemporary law of armed conflict.[26] There do exist examples of armed groups that have endeavoured to hold trials and punish their own members.[27] Where states are unable to enforce the law, the perpetrators of serious violations of international humanitarian law would in many cases remain unpunished, at least until the end of the conflict, if armed groups had no possibility of imposing criminal sanctions. Of course, this does not prevent them from imposing disciplinary sanctions, as discussed above. A functioning judicial system in territories controlled by armed groups could also have a strong deterrent effect and thus prevent violations of international humanitarian law. There are, however, a number of practical problems linked to the imposition of penal sanctions by armed groups.

First, the armed groups would need to be sufficiently well organized and have the stability, time, determination and resources required to build up such a judicial system and hold trials. Second, the trials would have to be held in

25 The commentary on Additional Protocol II, in C. Pilloud et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, states that ''like common Article 3, Protocol II leaves intact the right of the *established authorities* to prosecute, try and convict members of the armed forces and civilians who may have committed an offence related to the armed conflict'', pp. 1396–7 (emphasis added).

26 See ''International humanitarian law and the challenges of contemporary armed conflicts'', report prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent, 2–6 December 2003, ICRC, Geneva, 2003, available at www.icrc.org/Web/eng/siteeng0.nsf/html/5XRDCC (last visited 14 July 2008), in which it is stated that ''The principle of equality of the belligerents underlies the law of armed conflict'', p. 19.

27 The Frente Farabundo Martí para la Liberación Nacional (FMLN) in El Salvador wanted to bring two of its own members to trial for executing two wounded American servicemen after their helicopter was shot down in January 1991. The Salvadoran government demanded that the FMLN members be handed over to the state judicial system, and the head of El Salvador's supreme court warned that any foreigner or Salvadoran national participating in an FMLN trial would be subject to criminal proceedings under Salvadoran law. The trial apparently never took place as the FMLN decided instead to hand over the defendants to the national truth and reconciliation commission. See Human Rights Watch, *1992 Annual Report* (El Salvador chapter), posted at www.hrw.org/reports/1992/WR92/AMW-08.htm (last visited 18 September 2007). The Communist Party of Nepal-Maoist (CPN-M) ''established ''Peoples Courts'', which operated during hostilities and reportedly blossomed after the cessation of hostilities. Furthermore, the CPN-M … created its own ''wartime and transitional'' comprehensive public legal code from 2003/04, which covers civil provisions as well as penal provisions both related and unrelated to the conflict''. Jonathan Somer, ''Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict'', *International Review of the Red Cross*, Vol. 89, No. 867, September 2007, p. 681.

compliance with the standards imposed by human rights law and international humanitarian law.

International humanitarian law prohibits the passing of sentences in circumstances that fail to provide all the essential judicial guarantees afforded by a regularly constituted court, a precondition which we shall examine in greater detail below.[28] Such guarantees aim to eliminate the possibility of judicial errors resulting from "summary justice",[29] and in particular summary executions.

The precondition of judicial guarantees is set out in considerable detail in international humanitarian law, backed up to a large extent by human rights law, in particular the relevant provisions of the International Covenant on Civil and Political Rights. The guarantees that must be granted include the presumption of innocence, the right of defendants to be informed without delay of their alleged offences, the right to mount a full and fair defence and the necessary means for doing so, and the obligation to fully comply with the principles of *nullum crimen sine lege* and *nulla poena sine lege*.[30] These guarantees must be upheld in all armed conflicts, whatever their nature. Depriving a person of the right to a fair trial constitutes a war crime.[31]

Clearly, upholding these guarantees raises a number of challenges for armed groups, since doing so requires a relatively well-organized judiciary, defence lawyers, interpreters and support for the indigent. Only well-organized and stable groups with adequate means and in control of territory can set up such a judicial system. Furthermore, the requirement of compliance with the principle of legality raises the question of what body of law the armed groups would apply. Authors hold conflicting views on this issue.[32] However, in the interests of the defendants and of good faith it is paramount that no one be convicted of any offence on

28 For non-international armed conflict, see Article 3 common to the Geneva Conventions and Article 6(2) of Additional Protocol II. See also Rules 100–102, Henckaerts and Doswald-Beck, above note 1, pp. 352–74.

29 See Jean S. Pictet (ed.), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Vol. IV of The Geneva Conventions of 12 August 1949: Commentary*, ICRC, Geneva, 1958, p. 39.

30 Article 6(2) of Additional Protocol II supplements Common Article 3 with an extended list of judicial guarantees. See also Rule 100 of Henckaerts and Doswald-Beck, above note 1, pp. 352–71.

31 See Article 8(2)(c)(iv) of the Rome Statute of the International Criminal Court, which codifies a decision handed down by the International Criminal Tribunal for the former Yugoslavia in the case of *Prosecutor v. Dusko Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case no. IT-94-1-AR72, Appeals Chamber, 2 October 1995, paras 87–136). According to this decision, breaches in internal armed conflicts of Article 3 common to the Geneva Conventions involve individual criminal responsibility. Rule 156 of the ICRC's Customary Law Study, listing serious violations of IHL that constitute war crimes in both international and non-international armed conflicts, also includes the wilful deprivation of a POW or other protected person of the right to a fair and regular trial. See Henckaerts and Doswald-Beck, above note 1, p. 574.

32 For Zegveld, state law applies. See Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 187. Jonathan Somer summarizes the view of Bothe et al. as follows: "armed opposition groups would be able to meet the *nullum crimen sine lege* criterion by relying on international law with respect to international crimes, while relying on either existing state legislation or their own existing "legislation" to prosecute crimes related to the mere participation in hostilities." Somer, above note 27, p. 676. See Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff Publishers, The Hague, 1982, p. 606.

account of any act or omission that did not constitute an offence under the law at the time it occurred.[33]

The precondition of a regularly constituted court sets the bar particularly high for an armed group that might wish to establish its own judicial system. If ''regularly constituted'' is interpreted as ''regularly constituted within the meaning of national legislation,'' or ''established by law,'' it is hard to imagine that an armed group could set up such a court.[34] To avoid requesting the impossible, some argue that emphasis should instead be laid on the fairness of the system and on ensuring its independence and impartiality[35] in line with Additional Protocol II and the more recent Elements of Crimes of the International Criminal Court.[36]

Maintaining an open debate on the ways in which armed groups should comply with the requirements of international humanitarian law concerning the holding of a fair trial, affording all judicial guarantees, by no means implies that these guarantees should be relaxed or downgraded. Processes, methods and means should be identified which armed groups could use to give concrete form to these essential guarantees and to honour them in actual practice.

Conclusions

The role sanctions can play in influencing the behaviour of armed groups is an issue that is far from easy to deal with. The fact that little is known of practices that may have been developed in the field by armed groups does not make things any easier. However, where organized armed groups are involved, it is difficult to depart from the paradigm applying to government armed forces, which provides a framework for discussing the factors and conditions which can make sanctions more effective. Those factors are based on a good knowledge of humanitarian law including the sanctions associated with non-compliance, and the assimilation of that knowledge. Hierarchical superiors play a crucial role in this context, for it is they who ensure, by giving clear instructions and orders, that subordinates comply with the law, and it is they who react promptly in the event of non-compliance. Moreover, a prompt reaction must be a factor which subordinates have to reckon with before engaging in deviant behaviour.

Once it has been recognized that sanctions play a role in ensuring better compliance with the law, it is essential to examine the nature of sanctions and the body best placed to impose them. It becomes clear that limiting sanctions to the

33 See the Commentary on Protocol II in Pilloud et al., above note 25, p. 4606.

34 International Committee of the Red Cross, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary*, ICRC, Geneva, 1973, p. 142: ''… the words ''regularly constituted'', qualifying the word ''court'' in common Article 3, were removed, as some experts considered that it was not very likely that such a court could be regularly constituted within the meaning of the national legislation if it were set up by the insurgent party''.

35 See James Bond, ''Application of the law of war to internal conflict'', *Georgia Journal of International and Comparative Law*, Vol. 3 (2) (1973), p. 372, and Somer, above note 27.

36 See Element 4 of Article 8(2)(c)(iv) of the Rome Statute of the International Criminal Court, Elements of Crimes.

penal component alone – although compulsory in cases of serious violation of international humanitarian law – makes the preventive capacity of such sanctions more ''random''. It is necessary to go further and attempt to pinpoint all the factors that can result in the sanctions producing the anticipated effects to the full, hence the advantage of exploring any disciplinary measures that armed groups might take or the involvement of such groups in mechanisms of transitional and traditional justice.

The question of criminal sanctions remains at the core of international humanitarian law, however, whenever serious violations are committed. While requiring that the procedure that is established be compatible with fair justice, humanitarian law does not preclude the possibility that criminal sanctions may be imposed by bodies other than states, including the armed groups concerned. It would seem obvious, however, that studies carried out in greater depth are required in order to identify the conditions that could enable armed groups to exercise justice by establishing mechanisms which comply with the requirements of the law to the full and which can contribute to the active role played by sanctions in enhancing compliance with humanitarian law.