

Volume 93 Number 881 March 2011

INTERNATIONAL **REVIEW** of the Red Cross

Humanitarian debate: Law, policy, action

Conflict in Afghanistan II



ICRC

Aim and scope

The International Review of the Red Cross is a periodical published by the ICRC. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law and contribute to the prevention of violations of rules protecting fundamental rights and values. The Review offers a forum for discussion about contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the Review informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

International Committee of the Red Cross

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.

Members of the Committee

President: Jakob Kellenberger

Vice-President: Olivier Vodoz

Permanent Vice-President: Christine Beerli

Christiane Augsburger

Paolo Bernasconi

François Bugnion

Bernard G. R. Daniel

Paola Ghillani

Jürg Kesselring

Claude Le Coultre

Yves Sandoz

Rolf Soiron

Bruno Staffelbach

Daniel Thürer

André von Moos

Editorial Team

Editor-in-Chief: Vincent Bernard

Editorial assistant: Michael Siegrist

Publication assistant:

Claire Franc Abbas

International Review of the Red Cross

19, Avenue de la Paix

CH - 1202 Geneva, Switzerland

t +41 22 734 60 01

f +41 22 733 20 57

e-mail: review@icrc.org

Editor-in-Chief

Vincent Bernard

ICRC

Editorial Board

Ahmed Abou El-Wafa

Cairo University, Egypt

Daniel Bar-Tal

Tel Aviv University, Israel

Annette Becker

Université Paris X, France

Antônio Cançado Trindade

University of Brasília, Brazil

Marika Fahlen

Ministry for Foreign Affairs, Stockholm,
Sweden

Bernard Haykel

Princeton University, USA

Venkateswara S. Mani

Jaipur National University, Jaipur,
Rajasthan, India

Herfried Münkler

Humboldt University, Berlin, Germany

Mona Rishmawi

Office of the United Nations High
Commissioner for Human Rights, Geneva

Elizabeth Salmón Gárate

Pontificia Universidad Católica del Perú,
Lima, Perú

Marco Sassòli

University of Geneva, Switzerland

Michael N. Schmitt

Marshall Center (CISS-Dean),
Garmisch-Partenkirchen, Germany

Terence Taylor

International Council for the Life Sciences,
Washington DC, USA

Bakhtiyar R. Tuzmukhamedov

Diplomatic Academy, Moscow, Russian
Federation

Peter Walker

Feinstein International Center, Friedman
School of Nutrition Science and Policy,
Tufts University, USA

Wenqi Zhu

Law School, Renmin University of China,
Beijing, People's Republic of China

Volume 93 Number 881 March 2011

INTERNATIONAL REVIEW of the Red Cross

Humanitarian debate: Law, policy, action

Conflict in Afghanistan II

Part 2: Law and humanitarian action

CONTENTS

- 5** Interview with Ms Fatima Gailani, *President of the Afghan Red Crescent Society*

Articles

The law

- 11** Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?
Robin Geiss and Michael Siegrist
- 47** International law and armed non-state actors in Afghanistan
Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen
- 81** The *Layha* for the *Mujahideen*: an analysis of the code of conduct for the Taliban fighters under Islamic law
Muhammad Munir
- 103** Annex: The Islamic Emirate of Afghanistan. The Layha [Code of Conduct] For Mujahids
- 121** Combatants, not bandits: the status of rebels in Islamic law
Sadia Tabassum

Humanitarian action

- 141** Between a rock and a hard place: integration or independence of humanitarian action?
Antonio Donini
- 159** 30 years in Afghanistan. ICRC photo archives account by Alberto Cairo
- 173** The International Committee of the Red Cross in Afghanistan: reasserting the neutrality of humanitarian action
Fiona Terry

Articles published by the Review reflect the views of the author alone and not necessarily those of the ICRC or of the Review. Only texts bearing an ICRC signature may be ascribed to the institution.

Selected articles on international humanitarian law

- 189 The protective scope of Common Article 3: more than meets the eye**
Jelena Pejic

Reports and documents

- 227 National implementation of international humanitarian law**
Biannual update on national legislation and case law:
July – December 2010

Books and articles

- 239 Recent acquisitions of the Library and Research Service, ICRC**

THE FOLLOWING PAPERS APPEARED IN Vol. 92 No. 880 (Conflict in Afghanistan I):

- 841 Editorial**

Conflict in Afghanistan I

- 847 Interview with Dr Sima Samar**
Chairperson of the Afghan Independent Human Rights Commission.

Articles

Socio-political and humanitarian environment

- 859 Afghanistan: an historical and geographical appraisal**
William Maley

Articles published by the Review reflect the views of the author alone and not necessarily those of the ICRC or of the Review. Only texts bearing an ICRC signature may be ascribed to the institution.

877 Dynamic interplay between religion and armed conflict in Afghanistan
Ken Guest

899 Transnational Islamic networks
Imtiaz Gul

925 Impunity and insurgency: a deadly combination in Afghanistan
Norah Niland

951 The right to counsel as a safeguard of justice in Afghanistan: the contribution of the International Legal Foundation
Jennifer Smith, Natalie Rea, and Shabir Ahmad Kamawal

967 State-building in Afghanistan: a case showing the limits?
Lucy Morgan Edwards

993 The future of Afghanistan: an Afghan responsibility
Taiba Rahim

Books and articles

1003 Recent acquisitions of the Library and Research Service, ICRC



Interview with Fatima Gailani*

President of the Afghan Red Crescent Society.

Ms Fatima Gailani was appointed as the President of the Afghan Red Crescent Society in 2005. She was born in 1954 in Kabul and is the daughter of Pir Sayed Ahmed Gailani, the leader of the National Islamic Front of Afghanistan, who fought against the Soviet occupation of Afghanistan in the 1980s. She lived in exile during the Soviet invasion of Afghanistan and acted as spokesperson in London for the Afghan Mujahideen. After her return to Afghanistan she was chosen as a delegate to the Emergency Loya Jirga (Grand Council) of June 2002 and was appointed as a constitution-drafting and -ratifying commissioner. Ms Gailani is the author of two books (The Mosques of London and a biography of Mohammad Musa Shafiq).

: : : : : :

How do you see the conflict in Afghanistan?

It's been going on now for more than thirty years, and I should get used to it. In Afghanistan we went through different stages of conflicts, from an invasion by the superpower of the time to civil war between ethnic or linguistic groups and Islamic sectarian fighting. As Afghans we should get used to it, but conflict is neither normal nor natural, so of course we will not.

My hope is that one day we will see the end of it. I am an optimist by nature, and in my plans and my imagination I always look ahead to the time that, if God wills, there will be no conflict, as it was when I was brought up in Afghanistan. I was lucky enough to see Afghanistan before the wars: a country that was respected, where we lived in harmony. This is all I have been able to do – to hope for the best and deal with what comes today.

* The interview was conducted in Kabul, Afghanistan, on 8 March 2011 by Walid Akbar Sarwary, Spokesperson and Head of the Information and Dissemination Department of the Afghan Red Crescent Society.

What are the biggest challenges that war brings to the Afghan community?

It depends who you are speaking to. There are personal problems, of course, such as losing one's livelihood or health. You know, for instance, that we have millions of disabled people. After losing a limb they have to live on, and they have to cope with their disability for the rest of their lives. Some do, some can't. Some lose all interest in life; they turn to drugs, they get up to mischief and suchlike. We have seen it all.

But as someone who was exiled because of the conflict and came back hoping that it was over, but then saw it erupt again, I take a more professional point of view. As the head of the Afghan Red Crescent Society I ask myself what I can do, and, if I cannot end the conflict for these people, how best to approach them to at least ease some of their problems. These problems include poverty and instability, or being an orphan, or a widow with young children. So whatever I can do, I want to do it perfectly for their sake.

The people working for the Afghan Red Crescent certainly are here to provide services for the people who are affected by war. Who typically seeks help from the Afghan Red Crescent?

In conflict we can take different approaches. They will depend on the number of people affected, whether they are wounded, whether they are internally displaced persons, and so on. If there are large numbers of such people within a certain time, such as soon after the conflict, we at least have the luxury of being helped by the ICRC [International Committee of the Red Cross]. With that help we are able to look after them. But there are times when a smaller number of people are affected by that same conflict: they lose their livelihood, their homes, their health – their ordinary everyday life is destroyed. Though there are not so many of them, this happens quite frequently. Since they come to us a little late, they don't correspond to the criteria for ICRC assistance. Then, of course, we have to deal with them on our own.

For instance, in the minds of people who are disabled, either mentally or physically, the Red Crescent Society is the first place to go to seek help. They come to us for initial treatment, and sometimes, when they are totally exhausted, they come to us again for support. And you cannot argue with them. You cannot tell them they have come too late and that it is no longer within our mandate to help them, or that they don't match our criteria. When someone is sick, tired, with only a penny in their pocket, you cannot reason with them. Somehow you have to help them. Again, a considerable amount of our time and resources is devoted to those people.

And then there are the women and children who are victims of conflict – I don't ever want to get used to that, although I see them every day. You can never imagine how it is when a widow comes with small children. They have lost their father, the family's only breadwinner, and there the woman is, illiterate, without any skills, young and vulnerable, with at least three children to care for. So we have to step in. And there is nowhere else for her to go.

What are the biggest challenges you face in helping those people?

We don't have the luxury of singling out one or two or even three challenges. We have lots of challenges because the needs are so vast and our funds are so often inadequate. So lack of funds is the main problem. Another problem is that sometimes we cannot get to those people because Afghanistan is full of mountains and deep valleys, and the roads are not good. Even if you are not empty-handed and do have something to give, it is extremely hard to reach them. And sometimes, for instance after the earthquake that struck a valley south of Samangan, it takes them a long time to get to us or even to contact the government somewhere so that we are informed. The terrain is extremely difficult, and, although telecommunication is now really good, there are still places without access to it.

So sometimes we are too late in getting to them, or – most of the time – they are too late in coming to us. Even so, we are in a much better position than anyone else because of the presence of our volunteers. We will know much sooner than others, but still not as soon as I want it to be.

The armed conflict in Afghanistan is ongoing, and many provinces or districts that were safe before are now increasingly facing security challenges. What are your concerns about this development?

Naturally, as a normal Afghan, my concern is: when will peace come? When am I going to have a normal life? That is my question mark. But apart from that, as the president of such a big humanitarian institution and speaking on its behalf, our concern is that the expectations are much greater than our possibilities. This means that we will have more of a problem financially. And then, of course, even access to areas where people need our help is of constant concern. It is thanks to our neutrality that we have been able to reach people, be accepted by both sides, and have far better access than anyone else in Afghanistan. But to maintain that access, we have to be politically very careful, very alert, aware that the slightest violation of our neutrality or independence could endanger it. That is vitally important to ensure that we do not lose our ability to reach those people.

Yet even if we preserve our independence and neutrality perfectly and thus have access and are accepted by all sides, how can we deal with such vast problems if our hands are empty? And don't forget, in Afghanistan it's not just conflict alone, but conflict and natural disasters everywhere. So we can really do very little when confronted with the problems there today.

What are the future plans for the National Society, and especially its activities in aid of people who are or may in future be affected by the conflict?

My hope is to gain the support of people or organizations that can help us. But again, we have to be extremely careful not to violate our neutrality and independence. That is not easy. It's like walking on a tightrope: we have to maintain the balance. But we also have to be much better at our own work, so at least, if we are more efficient, our small funds will be too. I hope to introduce reforms in some areas where our efforts have been unsuccessful and thus to attain that objective.

Today Afghanistan is experiencing donor fatigue, whether within the International Red Cross and Red Crescent Movement or more widely with regard to the country as a whole. For thirty-two years, which is a long, long time, we have needed help from others. So I am trying very hard to set a new course. Our New Year starts very soon, and my promise to myself – more to myself than to others – is that I will reactivate our own resources and capabilities, so that, if one day we stand alone, we will at least have something in hand.

Focus on the Afghan Red Crescent Society

The Afghan Red Crescent Society (ARCS) came into being in 1929, under the name National Assisting Council, and had twenty members. Under the name Red Adytum the Council became a branch office within the framework of the Ministry of Finance in 1932, and a few months later was attached to the Ministry of Public Health.

In 1934, the Council was renamed the Red Crescent and joined the Ministry of the Interior. In 1951, the responsibilities and obligations of the organization (which had an independent status) were defined in its charter, and it became an independent charity. Four years later it was officially recognized by the International Committee of the Red Cross (ICRC) and admitted as a full member to the International Federation of Red Cross and Red Crescent Societies (then the League).

The Afghan Red Crescent Society is the only humanitarian, neutral, impartial, and independent National Society in the country. Today it has thirty-four branches and over 45,000 registered volunteers, whose close proximity to communities provides it with a comparative advantage of delivering timely humanitarian aid where others cannot. It is the only Afghan civil society organization with a countrywide presence assisting destitute and other affected people during natural and manmade disasters.

The ARCS endeavours to fulfil the objectives of the International Red Cross and Red Crescent Movement, namely to prevent and alleviate human suffering and to provide support to the most vulnerable people of the country. The provision of assistance without any discrimination to the destitute and the victims of disaster is one of the main responsibilities of the ARCS, which are clearly laid down in its Constitution. When necessary, and within its capabilities, it also carries out other activities to alleviate human suffering at specific times and in specific circumstances.

The ARCS provides its services in various fields, such as health care, disaster management, Marastoons,¹ food-for-work/vocational training projects, youth and volunteers' activities, tracing relatives and restoring family links for detainees whose contacts with their families have been cut, dissemination of humanitarian values and promotion of respect for human dignity, and dissemination of international humanitarian law.

1 The ARCS Marastoons, meaning 'places to find help', are a social institution with a long history, traditionally focusing on providing temporary shelter for destitute people. The homes have a special place in the history of the Afghan people. By offering vocational training and work experience in areas such as tailoring, carpentry, and carpet-weaving, they help facilitate the resettlement of residents back into their communities.

Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?

Robin Geiß and Michael Siegrist*

Robin Geiß is Professor at the Faculty of Law, University of Potsdam, Germany.

Michael Siegrist is editorial assistant of the *International Review of the Red Cross*, and holds an LLM from the Geneva Academy of International Humanitarian Law and Human Rights.

Abstract

The armed conflict in Afghanistan since 2001 has raised manifold questions pertaining to the humanitarian rules relative to the conduct of hostilities. In Afghanistan, as is often the case in so-called asymmetric conflicts, the geographical and temporal boundaries of the battlefield, and the distinction between civilians and fighters, are increasingly blurred. As a result, the risks for both civilians and soldiers operating in Afghanistan are high. The objective of this article is to assess whether – and if so how much – the armed conflict in Afghanistan has affected the application and interpretation of the principles of distinction, proportionality, and precaution – principles that form the core of legal rules pertaining to the conduct of hostilities.

: : : : : :

* Part of the material contained in this article was previously published in Robin Geiß, 'The conduct of hostilities in asymmetric conflicts: reciprocity, distinction, proportionality, precautions', in *Humanitäres Völkerrecht – Informationsschriften (Journal of International Law of Peace and Armed Conflicts)*, Vol. 23, No. 3, 2010, pp. 122–132. The content of the current article reflects the views of the authors and not necessarily those of the organizations to which they are or were associated.

For almost a decade the armed conflict in Afghanistan has been posing many challenging questions for military personnel, international lawyers, and the humanitarian community alike. Even today, hardly a day passes without news about civilian casualties or losses among Afghan, International Security Assistance Force (ISAF), and Operation Enduring Freedom (OEF) forces, or those of the armed opposition.¹ While it is in the nature of armed conflict that soldiers and fighters are injured or killed, it should not be the case for civilians. One factor that has greatly affected warfare in Afghanistan is the huge disparity of technological capacity and military power between the parties to that conflict. The military might of the United States and its allies has forced the armed opposition to adopt guerrilla warfare geared to an endurance and attrition strategy.² In accordance with this strategy, the armed opposition tries to evade the classical battlefield by shifting the hostilities from one location to another – often in proximity to civilians, and thus blurring the lines of distinction between those who fight and persons taking no active part in the hostilities. At the same time, an important part of contemporary counterinsurgency strategy is to focus on, and to be in as close proximity as possible to, the civilian population.³ The blurring of distinctions goes hand in hand with increased challenges for the parties to the conflict in identifying military objectives and applying the principles of proportionality and precaution. All this has at times prompted attempts either to broaden certain concepts of international humanitarian law (IHL), such as the definition of direct participation in hostilities,⁴ or to otherwise limit its protective scope.⁵ Over time and with increasing

- 1 The armed opposition operating against the Government of the Islamic Republic of Afghanistan and the international military presence is commonly referred to as the ‘Taliban’, who describe themselves as the Islamic Emirate of Afghanistan. This is a shorthand for a fragmented alliance between different groups such as the Quetta Shura Taliban in Southern Afghanistan, Hezb-i Islami Gulbuddin (HiG) and Hezb-i Islami Khalis in the east, and the Haqqani Network. See a description of non-state armed groups operating in Afghanistan by the Human Security Report Project (HSRP), Afghanistan Conflict Monitor, available at: <http://www.afghanconflictmonitor.org/armedgroups.html> (last visited 22 March 2011).
- 2 Patrick Quinn, ‘Taliban leader: insurgents waging war of attrition’, in *The Seattle Times*, 15 November 2010, available at: http://seattletimes.nwsource.com/html/nationworld/2013436796_apasafghantalianmessage.html (last visited 15 March 2011). See also Ehsan Mehmood Khan, ‘A strategic perspective on Taliban warfare’, in *Small Wars Journal*, 22 March 2010, available at: <http://smallwarsjournal.com/blog/2010/03/a-strategic-perspective-on-tal/> (last visited 15 March 2011).
- 3 See, e.g., Canadian Army, ‘Troops get close to Afghans’, 15 February 2011, available at: <http://www.army.forces.gc.ca/land-terre/news-nouvelles/story-reportage-eng.asp?id=5024> (last visited 15 March 2011); David Axe, ‘US-led alliance concentrates on Afghan population centers’, in *Voice of America*, 9 May 2011, available at <http://www.voanews.com/english/news/asia/US-led-Alliance-in-Concentrates-on-Afghan-Population-Centers-121518749.html> (last visited 27 June 2011).
- 4 See Kenneth Watkin, ‘Opportunity lost: organized armed groups and the ICRC “Direct participation in hostilities” interpretative guidance’, in *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, pp. 641–695; Michael N. Schmitt, ‘Deconstructing direct participation in hostilities: the constitutive elements’, in *ibid.*, pp. 697–739; Bill Boothby, ‘“And for such time as”: the time dimension to direct participation in hostilities’, in *ibid.*, pp. 741–768.
- 5 For instance, with regard to combatant status of Taliban and Al Qaeda fighters and their detention see, e.g., W. Hays Park, ‘Combatants’, in Michael N. Schmitt (ed.), *The War in Afghanistan: A Legal Analysis*, US Naval War College International Law Studies, Vol. 85, Naval War College Press, Newport, RI, 2009, pp. 269–275. For a critique of the collective denial of prisoner-of-war status and an analysis of the legal bases of detention see Stéphane Ojeda, ‘US detention of Taliban fighters: some legal considerations’, in *ibid.*, pp. 360–369.

civilian casualties, however, it has turned out that the tendency to limit the protective scope of IHL has proved contrary to the achievement of the long-term strategic goals. As a result, policy and operational considerations have led to the adoption of rules of engagement that in some aspects are more restrictive than what would be required by IHL.⁶

The article proceeds in several steps. First, the different stages of the armed conflict taking place in Afghanistan since 2001 are classified. This step is important for identifying the legal framework governing the ongoing hostilities. Second, it assesses whether the asymmetric nature of the armed conflict in Afghanistan has affected IHL, in particular the interpretation and application of the rules relative to the conduct of hostilities. This analysis focuses on the concepts of distinction, proportionality, and precautions, and uses the challenges faced by the international military forces as a case study. Third, the article sheds some light on the sometimes difficult distinction between the law enforcement paradigm and the paradigm of hostilities in certain operations. One example where these two paradigms potentially overlap is provided by (vehicle) checkpoints, which are an important security measure in Afghanistan. Finally, the article looks at possible challenges, and advantages, that new technologies may present in the conduct of hostilities. Especially in recent years, unmanned aerial vehicles (UAVs) – that is, drones – have been employed in Afghanistan for surveillance purposes but also increasingly for the actual conduct of hostilities, namely in the context of so-called targeted killings.

The legal qualification of the Afghan conflict, 2001–2011

The situation in Afghanistan is complex, not only from a factual but also from a legal perspective. Several parties have been involved in the conflict since 2001 and it is today widely accepted that this conflict can be divided into a phase of international armed conflict between the US-led Coalition (OEF) and the Taliban governing Afghanistan, lasting from 7 October 2001 to 18 June 2002,⁷ followed by an ‘internationalized’ non-international armed

6 For instance: ‘Prior to the use of fires, the commander approving the strike must determine that no civilians are present. If unable to assess the risk of civilian presence, fires are prohibited, except under [one] of the following two conditions (specific conditions deleted due to operational security; however, they have to do with the risk to ISAF and Afghan forces).’ See ISAF, *General Petraeus issues updated tactical directive: emphasizes ‘disciplined use of force’*, News Release, 2010-08-CA-004, Kabul, 4 August 2010, available at: <http://www.isaf.nato.int/article/isaf-releases/general-petraeus-issues-updated-tactical-directive-emphasizes-disciplined-use-of-force.html> (last visited 15 March 2011).

7 See S. Ojeda, above note 5, pp. 358–359. In accordance with the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), an international armed conflict exists ‘whenever there is a resort to armed force between States’. See ICTY, *Prosecutor v. Dushko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70. According to the commentary to the Geneva Conventions of 1949, an international armed conflict takes place whenever there is ‘Any difference arising between two States and leading to the intervention of armed forces’. Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, ICRC, 1952, p. 32.

conflict⁸ since 19 June 2002, in which the new Afghan government, supported by ISAF and OEF forces, fights the armed opposition.⁹ This conflict phase still continues today.

International armed conflict before 19 June 2002

Active hostilities in Afghanistan began with air strikes against the Taliban on 7 October 2001 as part of ‘Operation Enduring Freedom’, a US-led military campaign directed against the Taliban and Al Qaeda in Afghanistan as a response to the 11 September 2001 terrorist attacks on the United States.¹⁰ Although only a few states recognized the Taliban as the legitimate government of Afghanistan at the time, it is widely agreed that they represented the *de facto* Afghan government¹¹ because they controlled the majority of Afghanistan’s territory, passed and enforced decrees, and provided a certain (however questionable) degree of ‘security’ in the areas that they controlled.¹² The fall of Mazar-i Sharif on 9 November 2001 marked the decline of the Taliban rule, and when Northern Alliance forces entered Kabul on 13 November,¹³ followed by the fall of Kandahar on 7 December,¹⁴ the majority of the Taliban were believed to have disbanded.¹⁵ This decline of the

8 Note that this expression does not depict a ‘third’ type of armed conflict but covers non-international armed conflicts with an ‘international’ dimension. The expression is used in situations where a state (or a multinational force) becomes a party to a pre-existing non-international armed conflict. Such an intervention may result in three outcomes: (1) the existing armed conflict remains a non-international armed conflict if a state or multinational force supports another state against the armed opposition; (2) the armed conflict is transformed into an international armed conflict if the acts of the armed opposition can be attributed to the intervening state or multinational force; or (3) it develops into a ‘mixed conflict’, where the relations between the parties are governed in part by the rules of international armed conflict and in part by those of non-international armed conflict.

9 S. Ojeda, above note 5, pp. 359–360.

10 Operation Enduring Freedom was based upon UN Security Council resolution 1368 of 12 September 2001, recognizing the individual and collective right of self-defence in accordance with the UN Charter, condemning the ‘terrorist attacks’ in the United States, and regarding them as a threat to international peace and security. In addition, NATO invoked Article 5 of the North Atlantic Treaty, which considers an armed attack against one or more NATO parties as an attack against all of them. See Article 5 of the North Atlantic Treaty of 4 April 1949; NATO Update, ‘Invocation of Article 5 confirmed’, 2 October 2001, available at: <http://www.nato.int/docu/update/2001/1001/e1002a.htm> (last visited 14 March 2011). See also ‘7 October 2001: US launches air strikes against Taleban’, in BBC, ‘On this day’, 7 October 2001, available at: http://news.bbc.co.uk/onthisday/hi/dates/stories/october/7/newsid_2519000/2519353.stm (last visited 22 March 2011).

11 Only Pakistan, Saudi Arabia, and the United Arab Emirates recognized the Taliban as *de jure* government. For a discussion of their recognition, see Rüdiger Wolfrum and Christine E. Phillip, ‘The status of the Taliban: their obligations and rights under international law’, in J. A. Frowein and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, Vol. 6, 2002, pp. 571–577 and 584–586.

12 *Ibid.*, p. 566; see also Report of the Secretary-General, *The situation in Afghanistan and its implications for international peace and security*, 17 August 2001, UN Doc. S/2001/789.

13 John Simpson, ‘Eyewitness: the liberation of Kabul’, in BBC News, available at: http://news.bbc.co.uk/2/hi/south_asia/1654353.stm (last visited 10 March 2011).

14 ‘7 December 2001: Taleban surrender Kandahar’, in BBC ‘On this day’, available at: http://news.bbc.co.uk/onthisday/hi/dates/stories/december/7/newsid_4031000/4031711.stm (last visited 22 March 2011).

15 See Barbie Dutter and Stephen Robinson, ‘Reign of the Taliban is over’, in *The Telegraph*, 7 December 2001, available at: <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/1364622/Reign-of-the-Taliban-is-over.html> (last visited 22 March 2011).

Taliban then cleared the way for the establishment of a new transitional government. The legal discussion during this conflict phase focused mainly on questions relating to the status of enemy fighters and the status and treatment of detainees.¹⁶

Non-international armed conflict from 19 June 2002 onwards

In accordance with the Bonn Agreement of 5 December 2001, the emergency *Loya Jirga* established the Afghan Transitional Administration on 19 June 2002 and elected Hamid Karzai as the new head of government recognized by the international community.¹⁷ At this point, the international armed conflict came to an end because it no longer opposed two or more states.¹⁸ However, hostilities soon resumed as the armed opposition adapted to the new situation.¹⁹ Since then the hostilities have been taking place in various locations and to various degrees between the new Afghan government with the support of ISAF²⁰ and OEF forces on the one hand, and the armed opposition on the other. The organisation of the armed opposition, and the hostilities, have reached such a level that one can safely admit the existence of a non-international armed conflict to which Common Article 3 to the four Geneva Conventions of 1949 (Common Article 3) and customary IHL (relevant to this threshold) apply.²¹

Since Afghanistan ratified Additional Protocol II on 10 November 2009, the hostilities between the Afghan National Army and the armed opposition could

16 On this discussion see, *inter alia*, Jelena Pejic, “‘Unlawful/enemy combatants’: interpretation and consequences”, in Michael N. Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines – Essays in Honour of Yoram Dinstein*, Martinus Nijhoff Publishers, Leiden, 2007, pp. 335–336; Gabor Rona, ‘Legal issues in the “war on terrorism”: reflecting on the conversation between Silja N.U. Voneky and John Bellinger’, in *German Law Journal*, Vol. 9, No. 5, 2008, pp. 711–736.

17 See UN Security Council resolution 1419 (2002), of 26 June 2002, welcoming the election of Hamid Karzai. See also Report of the Secretary-General, *The situation in Afghanistan and its implications for international peace and security*, 11 July 2002, UN Doc. S/2002/737. The International Conference on Afghanistan held in December 2001 led to the ‘Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (“Bonn Agreement”)’, S/2001/1154, of 5 December 2001, establishing an interim authority and calling for the establishment of an emergency *Loya Jirga*. See Lucy Morgan Edwards, ‘State-building in Afghanistan: a case showing the limits?’, in *International Review of the Red Cross*, Vol. 92, No. 880, 2010, pp. 967–991; Norah Niland, ‘Impunity and insurgency: a deadly combination in Afghanistan’, in *ibid.*, pp. 931–950.

18 For the opinion expressed in 2009 that the nature of the conflict between the Coalition states and the armed opposition has not changed, i.e. that the conflict remains an international armed conflict, see, e.g., Yoram Dinstein, ‘Terrorism and Afghanistan’, in M. N. Schmitt, above note 5, pp. 51–53.

19 See Report of the Secretary-General, *The situation in Afghanistan and its implications for international peace and security*, 18 March 2002, UN Doc. S/2002/278, paras. 45–54.

20 For the mandate of ISAF see in particular UN Security Council resolution 1386 of 20 December 2001; UN Security Council resolution 1510 of 13 October 2003; and UN Security Council resolution 1890 of 8 October 2009.

21 A clear and uniform definition of what constitutes a non-international armed conflict does not exist in international law. However, it is generally accepted that the existence of such a conflict is based on objective criteria, namely the intensity of the violence and the organization of the parties. For a description of the threshold criteria, see International Committee of the Red Cross (ICRC), *How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?*, ICRC Opinion Paper, March 2008, available at: <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (last visited 22 March 2011).

possibly be governed by this Protocol also. This would require the armed opposition to control at least part of Afghanistan in a way that enables them to ‘carry out sustained and concerted military operations and to implement [Additional Protocol II]’.²² The armed opposition seems to have succeeded in establishing a ‘shadow government’ throughout Afghanistan, where they control parts of the Afghan population and are operating courts.²³ This factual background militates in favour of applying Additional Protocol II between the armed opposition and the Afghan government armed forces.

In this regard it is questionable whether other states are bound by the provisions of Additional Protocol II with respect to the conflict in Afghanistan. Certainly, the Protocol cannot directly bind states that, like the US, have not ratified it.²⁴ Furthermore, the wording of Article 1(1) of Additional Protocol II suggests that it applies only to armed conflicts between the contracting state and opposing non-state parties that control part of that state’s territory.²⁵ It thus seems that states other than Afghanistan that are party to the armed conflict are not directly bound by Additional Protocol II either, even if they have ratified it. Notwithstanding, every party to the conflict has to comply with those rules that have attained customary law status.²⁶

The legal framework applicable to all parties to the armed conflict in Afghanistan is thus Common Article 3, as well as customary IHL applicable in non-international armed conflicts. In addition, the armed conflict between the government of Afghanistan and the armed opposition is governed by the rules of Additional Protocol II. The discrepancy that results from the application of Additional Protocol II only between the armed opposition and Afghanistan is, however, relatively marginal. Most provisions of Additional Protocol II have acquired customary law status and therefore apply also to other states party to the armed conflict in Afghanistan. With regard to the geographical scope of application of IHL it is important to stress that these rules are not limited to the area where active hostilities take place and hence apply to the entire Afghan territory.²⁷

22 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 1.

23 See David Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One*, Oxford University Press, Oxford, 2009, pp. 47–48 and 49–50. See also Griff Witte, ‘Taliban shadow officials offer concrete alternative’, in *The Washington Post*, 8 December 2009; Anand Gopal, ‘Some Afghans live under Taliban rule – and prefer it’, in *The Christian Science Monitor*, 15 October 2008, available at: <http://www.csmonitor.com/World/Asia-South-Central/2008/1015/p01s01-wosc.html> (last visited 22 March 2011).

24 See Article 34 of the Vienna Convention on the Law of Treaties of 23 May 1969, expressing the general rule that ‘a treaty does not create either obligations or rights for a third State without consent’.

25 See Article 1(1) of Additional Protocol II, stating: ‘This Protocol ... shall apply to all armed conflicts ... which take place in the territory of a High Contracting Party between *its* armed forces and ... organized armed groups which ... exercise ... control over a part of *its* territory ...’ (emphasis added).

26 See Article 38 of the Vienna Convention on the Law of Treaties.

27 See, e.g., ICTY, *Prosecutor v. Dusko Tadić*, above note 7, paras. 86 and 89; International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision of 2 September 1998, paras. 635 and 636.

Afghanistan: an asymmetric armed conflict

One of the major challenges of the armed conflict in Afghanistan is the significant discrepancy of military power and technological capacity between the international military/ISAF forces on the one hand and the armed opposition on the other. Afghanistan has thus become the paradigmatic example of an asymmetric armed conflict.²⁸

Of course, 'asymmetric warfare' is a multifaceted notion. No common understanding exists, much less a clear-cut definition of what 'asymmetric warfare' means. Some have even argued that the concept of asymmetry has been 'twisted beyond utility'.²⁹ Be that as it may, in legal doctrine the phrase 'asymmetric warfare' is commonly used as descriptive shorthand for the changing structures of modern armed conflicts and for the corresponding challenges that this development poses for the application of IHL. In this context, the term 'asymmetric warfare' is used to describe inequalities and imbalances between belligerents involved in modern armed conflicts that can reach across the entire spectrum of warfare.³⁰ Most often, reference is made to a disparate distribution of military power and technological capacity.³¹ The power imbalances between the parties involved may be so pronounced that from the outset the inferior party is bereft of any realistic prospect of winning the conflict militarily. Military victory in the classical sense may not even be the objective of the parties involved.³²

The situation in Afghanistan is a conspicuous example, showing that there is an evident chain of cause and effect between such power imbalances and what is called guerrilla warfare.³³ The military strength of the multinational forces in Afghanistan induces the armed opposition to adopt so-called guerrilla tactics so as

28 See Claus Kress and Georg Nolte, 'Im ungleichen Krieg', in *Frankfurter Allgemeine Zeitung*, available at: <http://www.faz.net/s/RubD5CB2DA481C04D05AA471FA88471AEF0/Doc~E0AAA1FCF923947BEB8C20C7D45EFA2DC~ATPl~Ecommon~Scontent.html> (last visited 22 March 2011); Andreas Paulus and Mindia Vashakmadze, 'Asymmetrical war and the notion of armed conflict: a tentative conceptualization', in *International Review of the Red Cross*, Vol. 91, No. 873, 2009, p. 108. Generally, see Herfried Münkler, 'The wars of the 21st century', in *International Review of the Red Cross*, Vol. 85, No. 849, 2003, p. 7.

29 Stephen J. Blank, *Rethinking Asymmetric Threats*, U.S. Army War College, Strategic Studies Institutes, September 2003, available at: <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=103> (last visited 22 March 2011).

30 See Michael N. Schmitt, 'Asymmetrical warfare and international humanitarian law', in Wolff Heintschel von Heinegg and Volker Epping (eds), *International Humanitarian Law Facing New Challenges*, Springer Science and Business Media, Berlin and Heidelberg, 2007, pp. 11–48.

31 Robin Geiß, 'Asymmetric conflict structures', in *International Review of the Red Cross*, Vol. 88, No. 864, 2006, pp. 757–777; Toni Pfanner, 'Asymmetrical warfare from the perspective of humanitarian law and humanitarian action', in *International Review of the Red Cross*, Vol. 87, No. 857, 2005, pp. 149–174.

32 William C. Martel, *Victory in War: Foundations of Modern Military Policy*, Cambridge University Press, Cambridge, 2007.

33 See, for instance, D. Kilcullen, above note 23, p. 39 onwards. Traditionally, especially in military theory, asymmetric warfare has often been equated with guerrilla and partisan warfare. See Stephen Metz and Douglas V. Johnson II, *Asymmetry and U.S. Military Strategy: Definition, Background, and Strategic Concepts*, US Army War College, Strategic Studies Institute, January 2001, available at: <http://www.au.af.mil/au/awc/awcgate/ssi/asymmetry.pdf> (last visited 3 January 2011).

to evade direct military confrontation with a superior enemy and to level out their inferiority. Some authors also suggest that the armed opposition in Afghanistan primarily adopts an exhaustion strategy to gain control over the Pashtun regions, instead of seeking a direct overthrow of the Afghan government.³⁴ This simple logic is not new; it has a long history in warfare.³⁵ In the twentieth century, the wars of national liberation and the vast majority of non-international armed conflicts were all inherently asymmetric in this sense.

Notwithstanding their limited military means, the armed opposition has shown itself to have the capacity to obstruct the strategic aims of its superior adversaries in the furtherance of its own.³⁶ The duration of the non-international armed conflict in Afghanistan is testament to this reality. To date the conflict has lasted almost ten years.³⁷ The conflict in Afghanistan is highly dynamic. It tends to evade clear-cut spatial and temporal demarcations. The level of violence is fluctuating; hostilities erupt at any time and potentially anywhere. Thus battle space is everywhere and traditional conceptions of a distinct 'battlefield' often seem rather obsolete in this constellation.³⁸ The Taliban in Afghanistan appears to consist of a core of guerrilla fighters that move from one valley to another (especially when their security is threatened), mounting ambushes, placing mines or improvised explosive devices (IEDs – either person- or vehicle-activated, or remote-controlled), using snipers, and even committing suicide attacks.³⁹ These moving fighters are often supported by local 'part-time' guerrillas and village cells (acting as a co-ordinating and intelligence mechanism).⁴⁰

34 See, e.g., D. Kilcullen, above note 23, pp. 50 and 52.

35 Andrew J. R. Mack, 'Why big nations lose small wars: the politics of asymmetric conflict', in *World Politics*, Vol. 27, No. 2, 1975, pp. 175–200.

36 Ivan Arreguín-Toft, *How the Weak Win Wars: A Theory of Asymmetric Conflict*, Cambridge University Press, Cambridge, 2005.

37 'Is the Afghan War really the longest in U.S. history?', in *The Week*, 10 June 2010, available at: <http://theweek.com/article/index/203842/is-the-afghan-war-really-the-longest-in-us-history> (last visited 22 March 2011).

38 H. Münkler, above note 28, pp. 7–22; Herfried Münkler, *Der Wandel des Krieges: Von der Symmetrie zur Asymmetrie*, 2nd edn, Velbrück Wissenschaft, Weilerswist, 2006.

39 D. Kilcullen, above note 23, p. 55. Note that the armed opposition uses the expression 'martyrdom attacks'. See the unofficial ICRC translation in this issue (pp. 000–000) of, 'The Islamic Emirate of Afghanistan: the laiha [code of conduct] for mujahids', version of 29 May 2010, Art. 57. For examples of recent suicide and other attacks see, *inter alia*, Heidi Vogt and Mirwais Khan, 'Afghanistan suicide bomber kills 6 NATO troops', in *The Huffington Post*, 12 December 2010, available at: http://www.huffingtonpost.com/2010/12/12/afghanistan-suicide-bomber_n_795588.html (last visited 22 March 2011); Alissa J. Rubin, '31 killed in suicide attack on Afghan census office' in *The New York Times*, 21 February 2011, available at: <http://www.nytimes.com/2011/02/22/world/asia/22afghanistan.html> (last visited 22 March 2011); and 'Taliban attack Afghanistan Nato bases', in *RFI*, 28 August 2010, available at: <http://www.english.rfi.fr/asia-pacific/20100828-taliban-attack-afghanistan-nato-bases> (last visited 22 March 2011). According to a report by the UN Secretary-General, there were about three suicide attacks per week in 2010, mainly targeting international military forces. See Report of the Secretary-General, *The situation in Afghanistan and its implications for international peace and security*, 10 December 2010, UN Doc. S/2010/630, para. 15.

40 D. Kilcullen, above note 23, pp. 83–86.

Asymmetric conflict structures raise an array of different (legal) problems.⁴¹ As far as the actual conduct of hostilities is concerned, discussions centre on the impact of increasingly blurred lines of distinction on the application and adequacy of the respective humanitarian rules. The constant evasion of direct military confrontation, the deliberate shifting of hostilities from one location to another, the adoption of population-centric approaches – all strategies frequently bringing hostilities into the proximity of urban and civilian surroundings – all aggravate the distinction between those who fight and protected civilians. In practice, determining who or what may be attacked is increasingly difficult. As a result, the risks for the civilian population are increased. At the same time, soldiers operating on the ground also face greater security challenges as they cannot always discern the difference between those who are participating in hostilities and those who are not. This deplorable trend is well known.⁴² Time and again international fora have expressed concern that civilians continue to bear the brunt of modern armed conflicts.⁴³ Less attention, however, has been devoted to the various ‘follow-up’ questions that blurred lines of distinction raise when it comes to the identification of legitimate military objectives, the application of the proportionality principle, and the precautionary measures prescribed by virtue of Article 57 of Additional Protocol I and customary law. Asymmetric conflicts, it seems, bring to the fore a number of long-standing questions and ambiguities pertaining to the humanitarian rules regarding the conduct of hostilities. This article analyses these questions against the backdrop of the prolonged conflict in Afghanistan, mainly by using the challenges faced by the international military forces as a case study.

The conduct of hostilities in asymmetric conflicts

The evasion of direct confrontation and the preservation of one’s own forces become compelling priorities, especially for a militarily inferior belligerent. This may particularly challenge the fundamental principle of distinction. Direct attacks may easily be evaded by assuming civilian guise. Feigning protected status, mingling with the civilian population, and launching attacks from objects that enjoy special protection are all most deplorable but seemingly inevitable consequences of this logic. Protection of military objectives that cannot so readily be concealed may be sought by the use of human shields, thereby manipulating the enemy’s

41 The notion and definition of armed conflict under international humanitarian law has consequentially received considerable attention in the recent literature. See A. Paulus and M. Vashakmadze, above note 28, pp. 95–125.

42 *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, document prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, 30IC/07/8.4, October 2007, available at: <http://www.icrc.org/eng/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf> (last visited 22 March 2011).

43 See *ibid.*; UN Security Council, ‘Despite progress, civilians continue to bear brunt of conflict, says Under-Secretary-General in briefing to Security Council’, press release of 26 June 2009, SC/9692, available at: <http://www.un.org/News/Press/docs/2009/sc9692.doc.htm> (last visited 22 March 2011).

proportionality assessment, in addition to violating the precautionary principle laid out in Article 58 of Additional Protocol I and part of customary IHL applicable in both international and non-international armed conflict.⁴⁴

Reciprocity and other incentives for compliance

Repeated violations of humanitarian rules by one side are likely to influence the other side's behaviour also. The theoretical worst-case scenario is a dynamic of negative reciprocity, that is, a spiral-down effect that ultimately culminates in mutual disregard for the rules of IHL. If one belligerent constantly violates humanitarian law and if such behaviour yields a tangible military advantage, the other side may eventually also be inclined to disregard these rules in order to enlarge its room for manoeuvre and thereby supposedly the effectiveness of its counter-strategies.

The vicious circle of forthright reciprocal disregard of humanitarian rules, however, has remained largely theoretical.⁴⁵ Experience, especially in Afghanistan, has shown that strict adherence to fundamental humanitarian precepts is conducive to the achievement of long-term strategic objectives. Conversely, repeated violations of humanitarian law, even if they seem to promise short-term military gains, in the long run may undermine the credibility and reputation of a party to the conflict, with potentially detrimental consequences for its ability to pursue diplomatic, humanitarian, developmental, and other strategies that may be vital for achieving long-term strategic goals.⁴⁶ Even the short-term military advantages that may be hoped to be gained by violating humanitarian rules are often negligible. Superfluous injury and unnecessary suffering are just that: superfluous and unnecessary. They hardly further the (military) objectives pursued.⁴⁷ Thus far, the central lesson in Afghanistan has been that the conflict will not be won solely by military force or even primarily by that strategic instrument. Rather, winning the 'hearts and minds' of the Afghan population has become the overall strategic priority. Thus, since 2009, ISAF has operated on the premise that civilian casualties and damages are to be minimized as much as possible.⁴⁸ This doctrine appears to have led to rules of engagement that partially exceed, to some extent, the

44 See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, ICRC and Cambridge University Press, Cambridge, 2005, Rule 15, p. 51.

45 The ICTY has aptly noted that: 'After the First World War, the application of the laws of war moved away from a reliance on reciprocity between belligerents, with the consequence that, in general, rules came to be increasingly applied by each belligerent despite their possible disregard by the enemy. The underpinning of this shift was that it became clear to States that norms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals qua human beings'. ICTY, *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, 14 January 2000, para. 518.

46 Robert D. Sloane, 'Prologue to a voluntarist war convention', in *Michigan Law Review*, Vol. 106, December 2007, p. 481.

47 *Ibid.*

48 Gregor Peter Schmitz and Gabor Steingart, 'Generäle gegen Obama', in *Der Spiegel*, 26 September 2009, pp. 107–109.

limitations imposed by IHL.⁴⁹ The multinational forces thus frequently act within a framework that puts stricter limitations on them and that seems necessary in a context where casualties and destructions, even when within the limits of IHL, could endanger the primary strategic goals.⁵⁰ It therefore seems safe to conclude that, in Afghanistan, frequent disregard of humanitarian rules has not led to a forthright race to the bottom in terms of compliance with humanitarian rules. The predominant realization is rather that compliance with IHL continues to serve vital (state) interests even in the absence of traditional conceptions of reciprocity.⁵¹

The principle of distinction

Other strategies often adopted in asymmetric war situations may result in far more diversified and subtle challenges to IHL than an outright disregard of that law in direct response to preceding violations. These asymmetric situations may lead to blurring the distinction between civilians and fighters and between civilian objects and military objectives. In the context of Afghanistan this is exemplified by the following two examples: first, the 2010 Code of Conduct for the Mujahideen recommends, *inter alia*, that the 'Mujahids should adapt their physical appearance such as hairstyle, clothes, and shoes in the frame of Sharia and according to the common people of the area. On one hand, the Mujahids and local people will benefit from this in terms of security, and on another hand, will allow Mujahids to move easily in different directions.'⁵² Second, in the pursuit of 'winning hearts and minds' and of a population-centric counterinsurgency (COIN) strategy,⁵³ proximity to the local population is sought, use of provincial reconstruction teams (PRTs) – co-locating civilian and military components – for relief activities is made,⁵⁴ or soldiers dress in civilian clothing.⁵⁵ While no IHL rule relative to non-international armed conflict explicitly prohibits such practices *per se*, this raises

49 For unclassified excerpts of a new Tactical Directive of 1 August 2010 (replacing the 1 July 2009 version), see ISAF, above note 6. It is from these excerpts that one can draw some conclusions as to the rules of engagement that were in force.

50 *Ibid.*

51 See also R. D. Sloane, above note 46, p. 481.

52 See 'The Islamic Emirate of Afghanistan: the *laiha* [code of conduct] for mujahids', above note 39, Art. 81.

53 See US Department of the Army, *FM 3-24.2: tactics in counterinsurgency*, Washington, DC, 21 April 2009, in particular on clear-hold-build operations, para. 3-106 *et seq.*

54 See, e.g., Save the Children, *Provincial Reconstruction Teams and Humanitarian: Military Relations in Afghanistan*, London, 2004. In addition, for at least the period between 11 September 2001 and 1 May 2003, US and/or Coalition forces sometimes wore 'indigenous clothing to blend in with the forces that they were supporting' or 'civilian clothes while engaged in humanitarian relief efforts'. Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, *Legal Lessons Learned from Afghanistan and Iraq, Volume I: Major Combat Operations (11 September 2001–1 May 2003)*, United States Army, 2004, pp. 64–69.

55 See, e.g., ISAFMEDIA, 'Meet a Marine Sergeant who blends in with the Afghan people to do his job', 02 May 2011, available at: http://www.youtube.com/watch?v=VoTH5tfTHIQ&feature=youtube_gdata (last visited 5 May 2011).

great concern with regard to the respect of the principle of distinction. The sheer inconceivability of an often unfathomable and indistinguishable enemy has sparked debate about where to draw the line between protected and unprotected persons, and civilian and military objects, and whether this binary categorization inherent in the principle of distinction is still adequate on the modern battlefield and in highly dynamic combat situations.

Distinguishing persons who are protected against direct attack from persons who may be attacked

Blurred lines of distinction have occasionally led some authors to argue in favour of rather lenient interpretations of those legal criteria that are determinative for a loss of protection from direct attack. Put simply, in response to an increasingly difficult distinction between fighters and protected persons in practice, proponents of this view suggest a widening of the legal category of persons who may be legitimately attacked. Generally speaking, this line of argument is often based on the premise that the modern battlefield has become ever more dangerous for the soldiers operating therein and that therefore their margin of discretion regarding the use of lethal force should be enlarged. Contemporary debate surrounding the interpretation of the notion of ‘direct participation in hostilities’ – an activity that temporarily deprives civilians of their protection from direct attack – particularly the endorsement of rather generous interpretations of this notion and its temporal scope, are reflective of this tendency.⁵⁶ For example, the assumption that so-called voluntary ‘human shields’ are *per se* directly participating in hostilities, thereby losing their protection from direct attack as well as the suggestion that in case of doubt there should be a presumption that ‘questionable’ activity amounts to a ‘direct participation in hostilities’, are symptomatic of this trend.⁵⁷

In the same vein, there have been proposals to define membership in organized armed groups rather broadly.⁵⁸ Members of organized armed groups cease to be civilians and therefore lose protection against direct attack for as long as their membership lasts.⁵⁹ They no longer benefit from the so-called ‘revolving

56 For an in-depth discussion, see the various contributions in the *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, available at: <http://www.law.nyu.edu/journals/jilp/issues/jilpvolume42/index.htm> (last visited 22 March 2011).

57 M. N. Schmitt, above note 4, p. 737 and n. 123 citing Michael N. Schmitt, “Direct participation in hostilities” and 21st century armed conflict’, in Horst Fischer *et al.* (eds), *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berlin, Berliner Wissenschafts-Verlag, 2004, p. 509. The author argues that ‘[g]ray areas should be interpreted liberally, i.e., in favour of finding direct participation’.

58 K. Watkin, above note 4, p. 691.

59 In non-international armed conflicts, the membership approach is not uncontested: see e.g. Noam Lubell, *Extraterritorial Use of Force Against Non-state Actors*, Oxford, Oxford University Press, 2010, pp. 148–155. In its study on direct participation, the ICRC adopted a membership approach based on continuous combat function. See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, May 2009, pp. 31–36.

door' of civilian protection, meaning that – unlike civilians – they do not automatically regain their protection from direct attack the moment they stop directly participating in hostilities. Rather, as fighters, they may be directly attacked at any time according to the same principles as members of the armed forces, that is to say, independently from any actual direct participation in hostilities at the time of the attack. However, identification of members of an organized armed group can be extremely difficult. The situation in Afghanistan clearly demonstrates the difficulties in distinguishing between a peaceful civilian and an armed opposition fighter or a civilian directly participating in hostilities.⁶⁰ The carrying of weapons alone can certainly not be taken as a sign of direct participation in hostilities and even less as a sign of membership in an organized armed group because Afghan civilians traditionally have weapons in their homes to protect themselves and their families.⁶¹ Moreover, reports suggests that intelligence gathering is rendered more complicated because Afghan informants occasionally dupe the international military forces into killing personal rivals rather than high-ranking members of the armed opposition.⁶² Evidently, if membership in an organized armed group was to be determined merely on the basis of a person's support for or sympathy with such a group – for instance, logistical support not related to military operations, out of tribal solidarity – the category of unprotected persons ('fighters') would be enlarged considerably. What is more, any such determination would probably be prone to arbitrariness in the absence of objectively ascertainable criteria for a person's affiliation with an armed group.⁶³

A diametrically opposed tendency however, rejects any attempts to further broaden the categories of those who may legitimately be attacked.⁶⁴ Proponents of this trend, in view of the diffuse structures of asymmetric (non-international)

60 Note that civilians also include members of the Taliban without continuous combat function and who are not directly participating in hostilities. At least in the period between 11 September 2001 and 1 May 2003, the Operation Enduring Freedom rules of engagement did not declare any forces hostile. Instead, they relied upon the notion of 'likely and identifiable threat (LIT)' and positive identification (PID) thereof, which caused confusion among the troops. The forces were trained for the usual three-pronged approach, including declaration of hostile forces (targetable at any time), addressing direct participation in hostilities, and, for situations not connected to hostilities, incorporating the concept of self-defence. See Center for Law and Military Operations, above note 54, pp. 96–103; Michael N. Schmitt, 'Targeting and international humanitarian law in Afghanistan', in M. N. Schmitt, above note 5, p. 314.

61 It is estimated that about a million guns are held by Afghan civilians, which equates to about 4.4 firearms per 100 people. See data compiled by GunPolicy.org, available at: <http://www.gunpolicy.org/firearms/region/afghanistan> (last visited 22 March 2011).

62 See, e.g., Allan Hall, 'US troops "tricked into killing Afghan drug clan's rival"', in *The Telegraph*, 30 March 2009, available at: <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/5079429/US-troops-tricked-into-killing-Afghan-drug-clans-rival.html> (last visited 22 March 2011); Kim Sengupta, 'Taliban factions may be using British forces to assassinate rival commanders', in *The Independent*, 25 July 2008, available at: <http://www.independent.co.uk/news/world/asia/taliban-factions-may-be-using-british-forces-to-assassinate-rival-commanders-876801.html> (last visited 22 March 2011).

63 For an in-depth overview of the discussion, see Nils Melzer, 'Keeping the balance between military necessity and humanity: a response to four critiques of the ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities*', in *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, p. 831.

64 See *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Philip Alston, Addendum: study on targeted killings, UN Doc. A/HRC/14/24/Add. 6, 28 May 2010, para. 65. See also

conflicts tend to perceive the binary code of IHL – that is, the categorical distinction between fighters on the one hand and protected civilians on the other – as overly rigid and inflexible.⁶⁵ Some have even claimed that IHL's status categories have outlived their utility altogether. For example, it has been suggested that one should refer to human rights law, disregarding the principle of distinction, as the applicable law in times of non-international armed conflict also.⁶⁶ In particular, the Isayeva judgments of the European Court of Human Rights (ECtHR) of 2005 sparked debate as to whether, especially in non-international armed conflicts, a higher but still realistic degree of protection could not possibly be achieved through the (exclusive or preferential) application of human rights law.⁶⁷

Leaving aside the question of whether international human rights law is binding on armed groups as well as the problem of the extraterritorial application of human rights law that arises whenever third states intervene in a non-international armed conflict such as that in Afghanistan (note that it is undisputed that IHL is binding on armed groups and that it applies extraterritorially in case of an international or an internationalized non-international armed conflict), as far as the conduct of hostilities is concerned predominant recourse to human rights law rather than IHL would mark a paradigm shift that, at least for the time being, finds little support in state practice. Unlike IHL, human rights law would allow the use of potentially lethal force only in response to an imminent and sufficiently grave threat. In particular, human rights law requires the taking into consideration of the concrete circumstances of a given situation, irrespective of any binary distinction between targetable combatants or fighters and protected civilians.⁶⁸ The force employed must be proportionate in relation to the acute threat posed.⁶⁹ This standard is more protective. Most importantly, it is threat-proportionate and case-specific.

Derek Jinks, 'Protective parity and the laws of war', in *Notre Dame Law Review*, Vol. 79, 2004, pp. 1524–1528.

65 Rosa Ehrenreich Brooks, 'War everywhere: rights, national security law, and the law of armed conflict in the age of terror', in *University of Pennsylvania Law Review*, Vol. 153, 2004, pp. 675 and 757: 'It would be far better to make combatant status a purely functional question, one that hinges not on technicalities, but on the degree to which a person is directly, actively, and primarily involved in knowingly or intentionally planning or carrying out acts of violence'; Larry May, 'Killing naked soldiers: distinguishing between combatants and noncombatants', in *Ethics and International Affairs*, Vol. 19, No. 3, 2005, p. 39.

66 See William Abresch, 'A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya', in *The European Journal of International Law*, Vol. 16, No. 4, 2005, pp. 758–760 and 767.

67 European Court of Human Rights (ECtHR), *Isayeva, Yusupova and Bazayeva v. Russia*, ECtHR, App. Nos. 57947–49/00 (24 Feb. 2005); *Isayeva v. Russia*, ECtHR, App. No. 57950/00 (24 Feb. 2005).

68 In its country report on Colombia (1999), the Inter-American Commission of Human Rights (IACHR) emphasized that, under Article 4 ACHR, the use of lethal force in law enforcement operations could not lawfully be based on mere suspicion or on collective criteria, such as membership in a group. According to the report: 'the police are never justified in depriving an individual of his life based on the fact that he belongs to a "marginal group" or has been suspected of involvement in criminal activity. Nor may the police automatically use lethal force to impede a crime or to act in self-defence. The use of lethal force in such cases would only be permissible if it were proportionate and necessary'; IACHR, Report Colombia 1999, Chapter IV, para. 213.

69 Moreover, the justification of so-called collateral damage, while it is not illegal *per se* under international human rights law, would be far more difficult than it is under IHL.

In practice, however, it is still widely perceived as battlefield-inadequate, risky to implement, and therefore unrealistic. Consequently, it is submitted that in Afghanistan the principle of distinction, in spite of its inherent deficiencies in asymmetric conflict situations, has not been put into question as a fundamental legal precept of the humanitarian legal order, even though some authors have proposed rather lenient interpretations. IHL's categories of those who may legitimately be attacked thus continue to remain central to states operating in modern asymmetric armed conflicts such as Afghanistan.

The two strains of argument are reflective of the diametrically opposed impulses on which IHL is based: military necessity and humanity. The former line of reasoning, which argues in favour not only of the maintenance of IHL's categories based on the binary distinction but at least partially also of their extension, seems to be predominantly concerned with the minimization of risks for operating soldiers – at times apparently without giving due regard to the protection of civilians. Conversely, the latter opinion, while rightly aiming to enhance the protection of the civilian population – as mentioned before, civilians continue to bear the brunt in modern armed conflicts – at times seems to neglect the realities in which soldiers operate. Of course, a middle way might allow us to strike a more subtle balance between the impulses of military necessity and humanity without according categorical predominance to one or the other. Theoretically, such a middle way could be sought by increasing the flexibility of humanitarian legal standards towards greater protectiveness, or by increasing the flexibility of human rights standards towards greater permissiveness, which is what the ECtHR seemed to be doing in *Isayeva*, or by combining elements of both legal regimes.⁷⁰

The International Committee of the Red Cross (ICRC)'s *Interpretive Guidance on the Notion of Direct Participation in Hostilities* also pursues a middle way, based on the interpretation of the law as it currently stands. On the one hand, the *Interpretive Guidance* reconfirms the application of the principle of distinction in modern armed conflicts and clarifies its application. Especially with regard to non-international armed conflicts, the group of persons ('fighters') who are not civilian and who may lawfully be attacked is defined on a functional basis, by reference to their 'continuous combat function'.⁷¹ On the other hand, the *Interpretive Guidance* reiterates an important constraint in relation to the use of force against persons who are not protected against direct attack. The kind and degree of force that is permissible against such persons must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.⁷² Concern has been expressed that this standard imposes an overly restrictive 'law enforcement paradigm' that aims to subject wartime military operations 'to an unrealistic use-of-force continuum beginning with the least-injurious action before resorting to "grave injury" in attack of an enemy combatant

70 See also Francisco Forrest Martin, 'Using international human rights law for establishing a unified use of force rule in the law of armed conflict', in *Saskatchewan Law Review*, Vol. 64, 2001, pp. 347–396.

71 ICRC, above note 59, pp. 27–36.

72 *Ibid.*, pp. 77–82.

or a civilian taking a direct part in hostilities'.⁷³ The obligation to employ the least harmful among equally effective means or methods, however, does not amount to an extension of a 'law enforcement paradigm' or, in other words, the application of the human rights principle of proportionality vis-à-vis fighters in an armed conflict. The principle of distinction already entails the prescription that, during an armed conflict, the relative 'value' inherent in the rendering *hors de combat* of enemy combatants/fighters or civilians directly participating in hostilities outweighs the right to life, physical integrity, and liberty of these persons. This alleviates individual soldiers of intricate value-balancing judgements in the heat of combat. The necessity-restraint, by contrast – without interfering with this value judgement – merely implies that there is no categorical relaxation of the purely factual and in any case situational assessment whether less harmful measures of equal effectiveness are available in a given situation.⁷⁴ If an enemy can already be rendered *hors de combat* by way of capture he must not be killed. Of course, in the frontline of combat capture will almost always be impossible without taking a considerable risk for one's own troops, whereas in other situations – for example, in the context of house searches⁷⁵ or road blocks – this risk is often likely to be mitigated to a level where capture instead of killing becomes obligatory. The *Interpretive Guidance's* prescription that force 'must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances' is flexible enough to accommodate these different scenarios.⁷⁶

Distinguishing military objects from civilian objects: The problem of 'dual use'

Challenges regarding the application of the principle of distinction exist not only with regard to persons but also in relation to objects. Of course, debate about the definition and identification of military objectives is not new. It existed long before the term asymmetric warfare was coined and popularized. Yet the shift of hostilities into the proximity of urban population centres and increasing possibilities of using civilian objects to make an effective contribution to military action are pushing this particular problematic more and more to the fore. Discussions about which objects constitute a legitimate military objective, particularly in relation to so-called 'dual-use' and war-sustaining objects, are

73 W. Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" study: no mandate, no expertise, and legally incorrect', in *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, p. 815.

74 See US Department of the Air Force, Air Force Pamphlet (AFP 110-31), *International Law: The Conduct of Armed Conflict and Air Operations*, Judge Advocate General Activities, 19 November 1976, para. 1-3(1), pp. 1–5 recalling that: 'Armed conflict must be carried on ... within the limits of the prohibitions of international law, including the restraints inherent in the principle of necessity'.

75 For statistics of civilian casualties see United Nations Assistance Mission in Afghanistan (UNAMA), *Annual Report 2010: Protection of Civilians in Armed Conflict*, Kabul, March 2011, p. 29.

76 ICRC, above note 59, p. 77.

ongoing.⁷⁷ Generally speaking, it is not disputed that power grids, industrial and communication facilities, computer and cell-phone networks, transportation systems, and other infrastructure including airports and railways – all of which primarily fulfil civilian functions – can become lawful military targets if they meet the criteria laid out in Article 52 paragraph 2 of Additional Protocol I, also reflecting customary IHL applicable in non-international armed conflicts.⁷⁸ In fact, each and every civilian object could theoretically become a military objective, provided that it cumulatively fulfils the respective criteria. For instance, even religious sites, schools, or medical units may temporarily become military objectives if 1) they make an effective contribution to military action by being used as a firing position, to detonate improvised explosive devices, or to take cover; and 2) their total or partial destruction offers a definite military advantage. ‘Dual-use’ is the colloquial, non-legal denomination given to those civilian objects that serve both military and civilian purposes. Thus, with regard to these so-called ‘dual-use’ objects, the problem is not whether such objects can theoretically become military objectives but under what circumstances (and for how long) an attacker may conclude that they are legitimate military objectives.

Broadly speaking, the discussion focuses on whether only actual or also potential military benefit may qualify an object as a legitimate military objective.⁷⁹ Evidently, if a so-called ‘dual-use object’ is visibly being used to make an effective contribution to military action, then its legal classification will raise no particular problems. However, if it is not being so used, the object’s status determination will turn on its nature, purpose, or location. This is problematic because the distinction between the two criteria of nature and purpose in particular remains somewhat ambiguous. The criterion of purpose is problematic because of the difficulty in determining at what point it becomes sufficiently clear or sufficiently reasonable to assume that an object’s purpose is to contribute effectively to military action. It is ambiguous because it is not entirely clear whether the criterion aims to encapsulate an object’s inherent purpose – which would seem to denote the object’s design or an intrinsic characteristic and therefore render redundant the distinction between ‘nature’ and ‘purpose’ in Article 52 paragraph 2 of Additional Protocol I – or the purpose that a person has (individually) accorded to the object. The ICRC Commentary speaks of the ‘intended future use’ of an object, thereby apparently invoking the latter

77 W. Hays Parks, ‘Asymmetries and the identification of legitimate military objectives’, in W. Heintschel von Heinegg and V. Epping, above note 30, pp. 65–116.

78 Although there is discussion about the interpretation of Article 52 of Additional Protocol I, the wording itself is undisputed and it is not contested that the definition has customary law status: see J.-M. Henckaerts and L. Doswald-Beck, above note 44, Rule 8.

79 Françoise J. Hampson, ‘Proportionality and necessity in the Gulf conflict’, in *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 86, 1992, pp. 45 and 49; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 93; Michael Bothe, ‘The protection of the civilian population and NATO bombing on Yugoslavia: comments on a report to the prosecutor of the ICTY’, in *European Journal of International Law*, Vol. 12, No. 3, 2001, p. 534.

interpretation.⁸⁰ The criterion of nature is problematic because if applied to ‘dual-use’ objects it would categorically and automatically render these objects legitimate military targets irrespective of their actual use or purpose. Evidently, this would render redundant the very idea of ‘dual use’ because these objects would categorically amount to military objectives.⁸¹ Indeed, some authors argue that, for example, bridges and railway tracks should be considered military objectives by nature.⁸² In the same vein, the commentary to the recently released HPCR *Air and Missile Warfare Manual* refers to an opinion expressed during the deliberations of the *Manual* according to which military objectives are by nature to be divided into two subsets consisting of ‘military objectives by nature at all times’ and objects that become ‘military objectives by nature only in light of the circumstances ruling at the time’.⁸³ The ICRC strongly disagreed with this reading. It argued that the nature criterion by definition refers to intrinsic attributes that are permanent. Therefore, for the ICRC, there cannot be any subsets of temporary ‘military objectives by nature’.⁸⁴

The suggestion of such broadened interpretations of the definition of military objects is again reflective of attempts to remedy practical difficulties in identifying legitimate military targets through the expansion of the corresponding legal concepts. Evidently, the ‘nature criterion’ is far more categorical and abstract, whereas the criterion of an object’s actual use is more flexible and case-specific; that is, it takes into consideration how a given object is actually being used at the time of the attack. Conversely, the criterion of an object’s nature denotes the intrinsic characteristics of the object. The object by way of its design must have an inherent attribute that, *eo ipso* and irrespective of its actual use, makes an effective contribution to military action.⁸⁵ Thus, the conception of a category of ‘temporary military objectives by nature’ or, in other words, ‘military objectives by nature ... in light of the circumstances ruling at the time’ would seem irreconcilable with this common understanding of the ‘nature criterion’. Still, up until now, some ambiguity has remained as to which intrinsic characteristics would count in this regard. Traditionally, the category of objects that are considered to be military objectives by nature has been interpreted rather narrowly and was understood to encompass, for example, tanks, fixed military fortifications, weapon systems, military aircraft, and stockrooms for the storage of weapons and munitions. If bridges and railway tracks – that is, objects that commonly and overwhelmingly serve civilian purposes – were to be considered as having intrinsic characteristics

80 Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff, Geneva, 1987, para. 2022.

81 Program on Humanitarian Policy and Conflict Research (HPCR), Harvard University, *Manual on International Law Applicable to Air and Missile Warfare*, Commentary, 2009, p. 109, available at: <http://www.ihlresearch.org/amw/manual/> (last visited 22 March 2011).

82 Y. Dinstein, above note 79, p. 93.

83 HPCR, above note 81, p. 109.

84 *Ibid.*, p. 109, note 261.

85 Y. Dinstein, above note 79, p. 88.

that render them permanent military objectives by nature irrespective of their actual use, the remaining criteria of Article 52 paragraph 2 of Additional Protocol I – namely location, purpose, and use – would be largely redundant. Put simply, if a bridge was considered to have intrinsic military characteristics, basically any object could be defined as a military object by nature. This was neither the intention of the drafters of Article 52 paragraph 2 of Additional Protocol I nor does it correspond to the traditional interpretation of the ‘nature’ criterion, and ultimately such an interpretation would erode the principle of distinction. Instead, so-called ‘dual-use’ objects in particular, because they are not by their nature military, should only be attacked once they actually effectively contribute to the party’s military action.⁸⁶

It seems, therefore, that the law defining when objects constitute a legitimate military objective has not been directly challenged or changed,⁸⁷ perhaps because the relevant rule acknowledges that every civilian object may temporarily become a military objective under the circumstances described above.

The humanitarian proportionality principle⁸⁸

In view of the blurred lines of distinction in asymmetric armed conflicts, carefully assessing the proportionality of an attack is ever more important and often ever more difficult. In practice, the application of the humanitarian proportionality principle requires the following test. First, a factual assessment must be conducted in order to determine whether a planned attack on a military objective ‘may be expected to cause incidental loss of civilian life, injury to civilians, and damage to civilian objects’. Second, it has to be determined what ‘concrete and direct military advantage’ may be anticipated from the attack. If civilian casualties and/or damages may be expected, the military commander deciding upon the attack, in a third step, must determine the value of the anticipated military advantage, on the one hand, and the value attributed to the damage on the civilian side, on the other. In a final step, a balancing decision is required, where a judgement is made about which

86 With regard to dual-use objects the ICTY Prosecutor’s report emphasized that the criteria laid out in Article 52 of Additional Protocol I must be met in each individual case and that ‘[a] general label is insufficient’. ‘Final report to the prosecutor by the committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia’, 8 June 2000, pp. 47 and 55, available at: http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf (last visited 22 March 2011).

87 In the application of joint fires in Afghanistan, for instance, several factors need to be taken into account before an attack is permitted. This includes, *inter alia*, an assessment as to whether or not the target makes an effective contribution to the enemy military action and as to whether its destruction offers a definite military advantage (i.e. whether it is a military objective). Guidance for the Application of Joint Fires, Annex B to HQ ISAF SOP, Dated 06, extract presented at the Rules of Engagement Workshop, International Institute of Humanitarian Law, Sanremo, 13–17 September 2010. According to Joint Pub 3-09, *Doctrine for Joint Fire Support*, 12 May 1998, p. I-1, joint fires are ‘fires produced during the employment of forces from two or more components in coordinated action toward a common objective’.

88 For the application of the proportionality principle in non-international armed conflicts, see J.-M. Henckaerts and L. Doswald-Beck, above note 44, Rule 14, p. 48.

value takes precedence over the other.⁸⁹ Despite the fact that IHL pursues the overall aim of limiting civilian casualties and damages as far as possible, it does not prescribe any absolute limit in relation to ‘collateral damage’. Thus, a very considerable military advantage could potentially justify significant civilian damages and even casualties – that is, extensive as opposed to excessive ‘collateral damage’.⁹⁰

Factors to be considered within the proportionality assessment

The humanitarian proportionality principle’s deficiencies are well known. The main difficulty lies in the balancing of such unequal factors as civilian life and injury against an anticipated military advantage. Notwithstanding, there is still widespread agreement that in times of armed conflict a better, equally realistic alternative simply does not exist.⁹¹ While that may be true, it should also be clear that the details of the proportionality principle and its application in practice could still be worked out more concretely than they have been to date. In this regard, the ‘Final report to the prosecutor by the committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia’ raised an array of instructive questions relevant for the application of the humanitarian proportionality principle. The Report asked, *inter alia*: ‘a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants or the damage to civilian objects? b) What do you include or exclude in totaling your sums? [and] c) What is the standard of measurement in time or space?’⁹² The report was published on 13 June 2000 but even ten years later the questions it raised with regard to the proportionality principle remain as pertinent as they were at the time.

IHL’s answers to these questions are rather abstract. As noted above, the military commander deciding upon the attack must determine the relative value given to the military advantage against that attributed to the anticipated damage on the civilian side. Normative guidance regarding the margin of discretion in the identification of the military advantage and its relative value is rather frail. The adjectives ‘concrete’ and ‘direct’ in Article 51 paragraph 5(b) of Additional Protocol I limit the advantages to be considered to finite ones, in order to prevent the inclusion of abstract considerations such as the global aim of winning the war, which as the highest military aim would *per se* trump almost all civilian interests. But there seems to be widespread agreement that the military advantage need not necessarily or exclusively be derived from the destruction of the specific object of

89 Asbjørn Eide, ‘The laws of war and human rights: differences and convergences’, in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honor of Jean Pictet*, Martinus Nijhoff, Dordrecht, 1984, p. 681.

90 Note that the ICRC commentary rejects this argument because very high civilian losses and damages would be contrary to the fundamental rules of the Protocol. See Y. Sandoz *et al.*, above note 80, para. 1980.

91 Y. Dinstein, above note 79, p. 122.

92 ‘Final report to the prosecutor’, above note 86, para. 49.

the attack and that the assessment of the military advantage may be conducted by taking into consideration the larger operational picture.⁹³ On the basis of Article 8 paragraph 2(b)(iv) of the Rome Statute of the International Criminal Court, some authors argue in favour of the consideration of the overall military advantage anticipated from an attack as a matter of general law.⁹⁴ The overall military advantage would encapsulate military advantages derived from temporally and geographically distant occurrences. In this context it seems noteworthy that during the Rome Conference the ICRC stated that the insertion of the word 'overall' to the definition of the crime could not be interpreted as changing existing law.⁹⁵

A corollary to the debate about the scope of the military advantage is the question of how far indirect civilian damages resulting from an attack are to be taken into consideration. The spectrum of opinion is wide. Moderate positions do not exclude the consideration of indirect civilian damages but try to sketch out where to draw the line between indirect damages that may be considered and those that should not.⁹⁶ The wording of Article 51 paragraph 5(b) and Article 57 paragraph 2(b) of Additional Protocol I would seem to suggest that the concept of anticipated civilian casualties and damages is to be interpreted at least as broadly as the notion of the military advantage. Otherwise the proportionality assessment would be distorted from the outset in favour of military considerations. Moreover, these two articles explicitly require that the anticipated military advantage is 'concrete' and 'direct', whereas no such limiting qualifiers were added to the expected incidental civilian damages; the word 'incidental' is certainly broader than the adjectives 'concrete' and 'direct'. Similarly, it would seem that the conception of what 'may be expected' (incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof) from an attack is broader than what is actually 'anticipated' (military advantage). Thus, in line with the fundamental tenet that the civilian population enjoys general protection arising not only from attacks but from military operations in general, foreseeable long-term repercussions on the civilian population are to be taken into account in the context of the proportionality assessment.

In the context of the armed conflict in Afghanistan, the US in particular has apparently developed an intricate set of rules for pre-planned (deliberate)

93 Almost all NATO member states ratifying Additional Protocol I (and also other states when signing or ratifying the Protocol) made identical declarations according to which 'military advantage' is to be understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

94 Y. Dinstein, above note 79, p. 123; William J. Fenrick, 'The rule of proportionality and Protocol I in conventional warfare', in *Military Law Review*, Vol. 98, 1982, pp. 111–112; Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I*, Martinus Nijhoff, Leiden, 2009, p. 200 ('the assessment can include a military advantage that will not crystallize until sometime in the future').

95 'Document A/CONF.183/INF/10 – International Committee of the Red Cross: Statement of 8 July 1998 Relating to the Bureau Discussion Paper in Document A/CONF.183/C.1/L.53', in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998*, Official Records, Vol. III: Reports and other documents, p. 225, point 2.

96 I. Henderson, above note 94, p. 208.

targeting, taking into account counterinsurgency objectives.⁹⁷ Prior to an engagement, a target must be identified (positive identification, or PID)⁹⁸ and authorized for engagement in accordance with the rules of engagement in force.⁹⁹ The so-called CARVER (criticality, accessibility, recuperability, vulnerability, effects, and recognizability) tool sets out factors assisting in evaluating and selecting targets. The factors are given a numeric value, representing the desirability of attacking the target, which then are placed in a decision matrix.¹⁰⁰ Before the deliberate engagement of a target may be authorized, a collateral damage estimate (CDE) must be conducted.¹⁰¹ This consists of a sophisticated methodology including ‘computer-assisted modeling, intelligence analysis, weaponeering and human vetting to assess likely collateral damage and determine the level at which a preplanned strike must be approved’.¹⁰² Further Details of CDE methodology applied in Afghanistan remain classified. However, it appears that modern technologies make it possible to calculate the likely impact of an airstrike on buildings and other objects in the vicinity of the target. The effects can then be shown through an ellipse on a surveillance image and colour codes indicate the degree of damage expected.¹⁰³

The standard of a ‘reasonable military commander’

The value judgement inherent in the proportionality analysis is difficult to scrutinize. Controversy continues as to whether this judgement is to be evaluated on the basis of a subjective or of an objective standard. The ICTY ‘Final report to

97 For a detailed description of targeting in counterinsurgency in general and in Afghanistan in particular, see M. N. Schmitt, above note 60, pp. 309–326. See also a description of the Joint Targeting Cycle and Collateral Damage Estimation Methodology (CDM) attached to United States District Court for the District of Columbia, *Nasser Al-Aulaqi v. Barack H. Obama, et al.*, Declaration of Jonathan Manes, No. 10-cv-1469 (JDB), 8 October 2010.

98 Positive identification is ‘a *reasonable certainty* that the proposed target is a legitimate military target’. Center for Law and Military Operations, above note 54, p. 96.

99 *Ibid.*, p. 103. Note that, while the rules of engagement must remain within IHL limits, i.e. can only permit the targeting of military objectives, they may impose greater targeting restrictions for political or operational reasons.

100 The CARVER tool was initially developed as a target analysis methodology for US Special Operations Forces. It is used to assess mission validity and requirements throughout the targeting and mission planning cycle and assists in selecting the best targets. For a definition of the factors, see Joint Pub 3-05.5, *Joint Special Operations Targeting and Mission Planning Procedures*, 1993, p. II-8 and glossary. See also US Field Manual FM 34-36, *Special Operations Forces Intelligence and Electronic Warfare Operations*, Department of the Army, 1991, Appendix D, superseded by FM 3-05.102, *Army Special Operations Forces Intelligence*, Department of the Army, 2001, para. 2–68. An example of a modified CARVER tool was presented at the Rules of Engagement Workshop, International Institute of Humanitarian Law, Sanremo, 13–17 September 2010.

101 Extract of Joint Forces Command Brunssum OPLAN 30302, presented at the Rules of Engagement Workshop, International Institute of Humanitarian Law, Sanremo, 13–17 September 2010. The formal CDE methodology need not be conducted in self-defence situations. However, the principles of proportionality and necessity still have to be observed in such situations. See Center for Law and Military Operations, above note 54, p. 104.

102 M. N. Schmitt, above note 60, p. 311.

103 See, e.g., Public Prosecutor General of the Federal Court of Justice, Einstellungsvermerk, 3BJs 6/10-4, Karlsruhe, 16 April 2010, p. 22, available at: <http://www.generalbundesanwalt.de/docs/einstellungsvermerk20100416offen.pdf> (last visited 22 March 2011).

the prosecutor' emphasized that the assignment of relative values under the proportionality equation 'may differ depending on the background and values of the decision maker', that consequently a 'human rights lawyer and an experienced combat commander' or 'military commanders with different doctrinal backgrounds and differing degrees of combat experience' were unlikely to 'assign the same relative values to military advantage' and the anticipated damages.¹⁰⁴ It is in view of this value judgement and not – as one might suspect – in view of the fact that in operational theatres of conflict the environment may not lend itself to rigorous factual assessments that the report as well as the Trial Chamber in the Kupreškić case arrived at the conclusion that grey zones exist between 'indisputable legality and unlawfulness in which one may not yet determine that a violation of the principle of proportionality has indeed occurred'.¹⁰⁵

In the realm of international criminal law, footnote 36 of the elements of crime of Article 8 paragraph 2(b)(iv) of the Rome Statute explains that the 'military advantage' refers to the advantage foreseeable by the perpetrator, and footnote 37 requires that the perpetrator personally makes the required value judgement.¹⁰⁶ The 'Final report to the prosecutor' of the ICTY, however, rightly endorsed a more objectified standard. According to the Report, the decisive yardstick for such far-ranging decisions as the assignment of the relative value of a military advantage and the relative value of the anticipated civilian losses is that of a 'reasonable military commander'.¹⁰⁷ Indeed, operational requirements in an armed conflict neither demand nor justify a purely subjective decision-making standard. Of course, IHL must provide for fluctuating circumstances and the myriad uncertainties that are prevalent in an armed conflict, and it must – in order to be realistic – leave a margin of discretion to soldiers operating on the ground. However, the actual

104 'Final report to the prosecutor', above note 86, para. 50.

105 *Ibid.*, para. 52; ICTY, *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-T, Judgment of 14 January 2000, para. 526.

106 Footnote 37 of the elements of crime of Article 8 para. 2(b)(iv) of the Rome Statute contains an exception to the mental requirements laid out in paragraph 4 of the 'General Introduction', according to which, with respect to mental elements associated with elements involving value judgment, such as those using the terms 'inhuman' or 'severe', it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated. See Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2003, p. 161. Different views have been expressed on the interpretation of footnote 37. However, on the whole a rather subjective standard seems to be endorsed in this regard. There appears to be agreement between states that this footnote should not lead to the result of exonerating a reckless perpetrator who knows the anticipated military advantage and the expected incidental damage or injury but gives no thought to evaluating the possible excessiveness of the incidental injury or damages; *ibid.*, p. 165.

107 'Final report to the prosecutor', above note 86, para. 50, states: 'Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained'. In the Kupreškić case, the ICTY relied on the Martens Clause as a minimum reference and argued on this basis that the prescriptions – in this case the prescriptions of Articles 57 and 58 of Additional Protocol I – must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians; ICTY, *Prosecutor v. Zoran Kupreškić et al.*, above note 105, para. 525.

margin of discretion and the standard relevant for the evaluation of individual decision-making are to be distinguished. An objectified decision-making standard – the standard of the ‘reasonable military commander’ – does not curtail a soldier’s margin of discretion in the assessment of situational realities but simply forestalls arbitrariness in the exercise of this discretion.

Risk minimization for one’s own forces

In conflict scenarios such as Afghanistan, the question of risk minimization for one’s own forces is particularly pertinent to all parties involved. Indistinguishable enemies render ground operations particularly dangerous. Naturally, a party to an armed conflict will be inclined to minimize risks for its own forces as much as possible. Risk minimization for soldiers, however, may increase the risk of civilian casualties. This is particularly evident if a choice has to be made, for example, between the employment of aerial power or ground forces, or between low- and high-altitude aerial operations. Again, ten years ago the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia raised the issue of whether risk minimization can be taken into consideration as a relevant factor when conducting a proportionality assessment.

Generally speaking, the protection and preservation of one’s own forces is a legitimate consideration under IHL. Anything else would contradict the realities of armed conflict. It is for this reason that different modern military manuals define military necessity as requiring measures to defeat the enemy with the ‘least expenditure of time, means or personnel’ or a ‘minimum expenditure of life and resources’.¹⁰⁸ But this does not answer the question whether, and if so to what extent, the contemporary humanitarian legal framework leaves room to take into consideration the protection of one’s own forces in the context of a concrete proportionality assessment conducted prior to a specific attack.

IHL bars any attempts to take into account general considerations that could trump the protection of the civilian population or individual civilians *per se*. Article 51 paragraph 5(b) of Additional Protocol I shows that a balancing decision is required on a case-by-case basis and in view of each and every attack. Sweeping assumptions that any particular consideration – such as the security of one’s own forces – could *per se* override civilian interests are not allowed. In view of IHL’s general tenet to protect and in any event to minimize civilian casualties and damages, the protection of one’s own forces cannot be regarded or invoked as categorically overriding the protection of the civilian population or the lives of individual civilians. However, this does not exclude the consideration of risks as far

¹⁰⁸ United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, section 2.2; United States Department of the Navy, *The Commander’s Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP 5-12-1/COMDTPUB P5800.7A, July 2007, para. 5.3.1. It has been pointed out that the criterion of minimum expenditure of time, life, and physical resources should be understood to apply not only to the assailant but also to the party attacked; see Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), above note 80, para. 1397.

as the planning of a concrete attack and the determination of a concrete military advantage is concerned. In this regard, two issues must be distinguished: the security of one's own forces in general and the security of the attacking forces in particular. If 'A' is attacking the ground forces of 'B' and if 'B' therefore calls in aerial support to stop the attack and to protect its ground forces, the preservation of 'B's' ground forces is a military advantage that may be taken into consideration in addition to the military advantage derived from the destruction of 'A's' troops. The reason is that both advantages (the destruction of 'A's' troops and the preservation of 'B's' troops) will directly result from the attack; neither will materialize until after the attack has been carried out.

The enhanced security of the 'attacking forces', however, would not, strictly speaking, be a result of the attack. It materializes not from the actual attack but rather from the strategic decision (prior to the attack) to attack in one way (e.g. high-altitude) rather than in another way (e.g. ground forces). If in such a scenario the security of the attacking forces could be taken into consideration within the proportionality equation – *quid non* – the fact that a commander has chosen a very secure and therefore ostensibly 'militarily advantageous method' (e.g. aerial bombardment) would mean that, in view of the heightened military advantage of this particular form of attack, higher numbers of civilian casualties could be justified. Evidently, this is an extremely slippery slope. In the scenario provided, the consideration of the security of the attacking forces would distort the proportionality assessment in favour of military considerations and to the detriment of the civilian population it intends to protect. This does not mean that military commanders would be barred from taking into consideration the security of their attacking forces when planning an attack. Clearly, they may. But, whatever the outcome of their planning may be, each and every attack that they intend to carry out must be in accordance with humanitarian law. If an aerial bombardment would cause excessive civilian casualties it must not be carried out. In this case, a military commander may either decide not to attack at all, to resort to alternative means and methods of attack (for which he would again have to carry out a proportionality assessment), or to wait for circumstances on the ground to change. However, under no circumstances could a high-altitude aerial bombardment – in spite of an initial, negative proportionality assessment – be justified on the basis of arguing that it is 'safer' and therefore of a higher military advantage than hypothetical alternative forms of attack such as a low-altitude sortie or an attack with ground forces. It is widely accepted that hypothetical military advantages must not count in the proportionality calculus.¹⁰⁹

Precautions in attack

Modern armies have unprecedented surveillance possibilities. Surveillance drones, for example, can monitor any given area without interruption over significant

109 Y. Dinstein, above note 79, p. 93.

periods of time, and they can provide real-time visual footage to those who plan and decide upon the attack.¹¹⁰ These technological possibilities notwithstanding, blurred lines of distinction in asymmetric conflict situations often impede an accurate analysis of the target area, as well as reliable predictions of potential civilian damages. The detection and identification of legitimate targets, as well as the maintenance of such identification in realistic battlefield conditions, has been described as one of the most difficult problems facing modern armies involved in combat.¹¹¹ This section is limited to two specific precautions in attack, namely target verification and effective warnings. The analysis focuses particularly on the capabilities of the international military forces.

Target verification

What quantity and quality of information about a military objective is an attacker required to obtain before executing an attack? Is it sufficient to rely exclusively on aerial surveillance or is on-the-spot human intelligence required? IHL does not, and cannot, provide a clear-cut, generic answer to these questions. According to Article 57 paragraph 2(a)(i) of Additional Protocol I, those who plan or decide upon an attack are required to do everything feasible to verify that the objectives to be attacked are military objectives.¹¹² It follows that the answers to the questions raised above depend on what is ‘feasible’ under the given circumstances of a specific attack. For instance, as long as military personnel are not in imminent danger, the July 2009 ISAF Tactical Directive seems to require a ‘48-hour “pattern of life” analysis with on-the-ground or aerial surveillance, to ensure that civilians are not in a housing compound before ordering an airstrike’.¹¹³ During the drafting stages of Additional Protocol I the phrase ‘everything feasible’ was discussed at length.¹¹⁴ The initial draft put forward at the 1971 Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts had foreseen the word ‘ensure’, but ultimately did not succeed.¹¹⁵ The word ‘feasible’ was preferred over the term ‘reasonable’ and it was understood to denote ‘that which is practicable or

110 Jack M. Beard, ‘Law and war in the virtual era’, in *American Journal of International Law*, Vol. 103, No. 3, 2009, p. 433.

111 I. Henderson, above note 94, p. 164.

112 For the application of this rule in non-international armed conflicts, see J.-M. Henckaerts and L. Doswald-Beck, above note 44, Rule 16.

113 Rajiv Chandrasekaran, ‘Petraeus review directive meant to limit Afghan civilian deaths’, in *The Washington Post*, 9 July 2010. See also, ISAF, *Tactical Directive*, 6 July 2009, available at: http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (last visited 22 March 2011). A ‘pattern of life’ analysis including Predator coverage was also conducted in the targeting of a senior HiG commander in November 2006. Case study presented at the Rules of Engagement Workshop, International Institute of Humanitarian Law, Sanremo, 13–17 September 2010.

114 Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), above note 80, para. 2198.

115 ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Volume III: Protection of the Civilian Population Against Dangers of Hostilities*, 1971, p. 136.

practically possible'.¹¹⁶ To this some delegations added that, when assessing what was practicable or practically possible, 'all the circumstances at the time of the attack, including those relevant to the *success* of military operations' would have to be taken into account.¹¹⁷ Understood in this way, the feasibility requirement would seem to denote not only that which is objectively practicable or practically possible but also what is militarily sound from the perspective of the military commander. Such an extended reading of the feasibility requirement would add another rather subjective element to the assessment. A comparison with Article 57 paragraph 2(c) of Additional Protocol I, however, shows that, where such a far-reaching caveat was intended, it is expressed in explicit terms. This paragraph requires effective advance warnings 'unless circumstances do not permit'. No such explicit caveat was included within the obligation to verify the status of an anticipated target contained in Article 57 paragraph 2(a)(i) of the Protocol. The ICRC Commentary therefore rejects an interpretation of the feasibility criterion that would include 'all circumstances relevant to the *success* of military operations' as too broad and as a possible avenue to opt out of the precautionary obligation prescribed by Article 57 paragraph 2(a)(i) of the Protocol.¹¹⁸ This must be right. After all, target verification is a fundamental prerequisite for any application of the principle of distinction.

Irrespective of this particular debate, the formulation 'do everything feasible to verify' seems to imply that if everything practically possible has been done, but doubt remains as to the status of the envisaged target, a military commander, in spite of the remaining uncertainty, would be allowed to attack. The ICRC *Commentary* rejects such a lenient reading of the obligation to verify an object's status prior to an attack. According to the *Commentary*, a commander planning an attack must 'in case of doubt, even if there is only a slight doubt ... call for additional information and if need be give orders for further reconnaissance'.¹¹⁹ This standard, which requires the elimination of doubt about an object's status, has been criticized as too high.¹²⁰ However, allowing attacks in spite of remaining doubt about an object's status would significantly undermine the principle of distinction. For as long as doubt remains, IHL stipulates certain presumptions in favour of a protected status (Article 50 paragraph 1 and Article 52 paragraph 3 of Additional

116 ICRC, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1974–1977), Vol. 15, p. 285. A feasibility assessment is necessarily contextual and what is feasible also hinges on the reconnaissance resources available to the attacker. It is therefore generally accepted that, in practice, technologically advanced parties may be bound to a higher standard than those parties who lack similarly advanced reconnaissance means. See also Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Geneva, 10 October 1980, Article 3(4). Accordingly, '[f]easible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations'.

117 See, e.g., the statements made by the UK, Turkey, Germany, Canada, and the US, ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1974–1977), Vol. 6, pp. 211, 214, 224, 226, and 241 respectively.

118 Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), above note 80, para. 2918.

119 *Ibid.*, para. 2195. Moreover, the ICRC *Commentary* requires that the evaluation of the information obtained must include a serious check of its accuracy.

120 I. Henderson, above note 94, p. 163.

Protocol I).¹²¹ These presumptions would be rendered meaningless if attacks were to be allowed in cases of doubt.

This is even more important because the ‘no doubt’ criteria in itself cannot guarantee that only military objectives are targeted, as was demonstrated, for instance, by the Kunduz airstrike of 4 September 2009 on two fuel tankers captured by the armed opposition. The German Public Prosecutor General came to the conclusion that the accused Colonel was convinced (in accordance with the ‘reasonable military commander’ standard) that no civilians were present in the vicinity of the fuel tankers. He consulted multiple times, over several hours, the available videos from ISAF aircraft and information given by an informant whose credibility was not challenged. In addition, he ordered a PID by the aircraft crew for weapons. Since he did not expect any civilians to be present at the time of the airstrike (01:49 am), he declined a ‘show-of-force’ manoeuvre to disperse the people on the ground, all supposedly armed opposition fighters.¹²² It eventually turned out that a large proportion of the casualties were civilians.¹²³

Of course, it is true – and perhaps in asymmetric conflicts even more so – that targeting decisions often have to be made in the ‘fog of battle’ and that ‘clinical accuracy’ may not always be possible.¹²⁴ But the ‘fog of battle’ is risky not only for soldiers operating therein but also for the civilians who are often trapped in it. Nothing in the humanitarian legal framework indicates that factual uncertainties would require a lowering of civilian protection as a matter of law. Thus, while the ‘fog of battle’ may not always allow ‘clinical accuracy’ in decision-making, it may well be argued that it is precisely for the fog of battle, precisely because conflicts are highly dynamic and circumstances change rapidly, that IHL requires target verification and disallows attacks in case of doubt.

Effective warnings

According to Article 57 paragraph 2(c) of Additional Protocol I and customary law, effective advance warning shall be given of ‘attacks which *may affect the*

121 The presumptions entailed in Article 51 para. 1 and Article 52 para. 3 of Additional Protocol I have remained the subject of controversy, however. Particularly in the case of non-international armed conflicts, no clear rule regulates situations where the character of a person is in doubt. Nevertheless, it seems appropriate to demand the same careful and balanced approach in deciding upon the status of people as is required in international armed conflicts. See J.-M. Henckaerts and L. Doswald-Beck, above note 44, Rule 6, pp. 23–24.

122 Public Prosecutor General of the Federal Court of Justice, above note 103. Note that airstrikes seem to have been limited to troops-in-contact (TIC) situations. The German commander eventually classified the situation as an imminent threat, on the ground that he feared that the fuel tanks could be used against the Provincial Reconstruction Team (PRT) in Kunduz or be prepared for later attacks. *Ibid.*, p. 23.

123 See, e.g., *ibid.*, p. 36 et seq.; Christoph Reuter, ‘Entschädigung für die Kundus-Opfer steht’, in *Stern*, 5 August 2010, available at: <http://www.stern.de/politik/ausland/tanklaster-angriff-in-afghanistan-entschaedigung-fuer-die-kundus-opfer-steht-1590279.html> (last visited 22 March 2011); James Sturcke and David Batty, ‘Nato air strike in Afghanistan kills scores’, in *The Guardian*, 4 September 2009.

124 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 Convention of 1949*, Martinus Nijhoff, The Hague, 1982, p. 279.

civilian population, unless circumstances do not permit.¹²⁵ The obligation to warn, in view of increasingly blurred lines of distinction, is constantly growing in importance and humanitarian impact. Leaving aside the questions as to which kinds of warning amount to an 'effective' advance warning and how the caveat 'unless circumstances do not permit' is to be interpreted, the obligation prescribed by Article 57 paragraph 2(c) of Additional Protocol I stands and falls with the determination whether an attack 'may affect the civilian population'. In the context of the Kunduz incident of 4 September 2009, the Office of the German Federal Prosecutor did not consider the existence of an obligation to warn, on the premise that the attack had not been expected to affect any civilians.¹²⁶ Consequentially, the Federal Prosecutor did not have to deal with any of the questions laid out above, namely whether the circumstances would have permitted a warning or not. In the same vein, the US *Air Force Pamphlet* states that no warning is required if civilians are unlikely to be affected by the attack.¹²⁷ The UK *Military Manual*, arguably somewhat more narrowly, considers that no warning is required if no civilians are left in the area to be attacked.¹²⁸ But in view of the dynamics of modern asymmetric armed conflicts and in light of increasingly blurred lines of distinction, could one ever realistically exclude the possibility that an (aerial) attack 'may affect the civilian population'? Especially in the case of aerial attacks and bombardments, it seems that this could hardly ever be ruled out with any degree of certainty. The Kunduz incident, viewed from an *ex post* perspective, is testament to this reality. Certainly, the word 'may' in Article 57 paragraph 2(c) of the Protocol does not require any degree of certainty as to whether an attack will indeed affect civilians; the mere possibility suffices. Thus, the criterion of 'attacks which may affect the civilian population' should be interpreted broadly. Unless it can be ruled out that an attack will affect the civilian population, the obligation to warn is triggered. This can hardly be perceived as an overly onerous standard. After all, Article 57 paragraph 2(c) of the Protocol still explicitly allows for the consideration of situational circumstances including military considerations.¹²⁹ Thus, even on the basis of a broadened understanding of when an attack 'may affect the civilian population', this Article would not categorically require a warning prior to each and every attack. Military commanders would still be granted a considerable margin of discretion in determining whether the circumstances actually permit a warning or not.

125 J.-M. Henckaerts and L. Doswald-Beck, above note 44, Rule 20, p. 62, emphasis added.

126 See Statement of the Office of the Federal Prosecutor of 19 April 2010, para. 2, available at: <http://www.generalbundesanwalt.de/de/showpress.php?searchstring=Klein&newsid=360> (last visited 22 March 2011).

127 United States, *Air Force Pamphlet* (1976), para. 5–3(c)(2)(d).

128 United Kingdom, *Military Manual* (1958), para. 291.

129 The ICRC *Commentary* provides that giving a warning may be inconvenient when the element of surprise in the attack is a condition of its success: see Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), above note 80, para. 2223.

The different paradigms of law enforcement and the conduct of hostilities: vehicle checkpoints in Afghanistan as a case in point

In contemporary armed conflicts (and Afghanistan is a particular case in point), it often seems difficult to assess whether certain operations are governed by the ‘paradigm of law enforcement’ or ‘the paradigm of hostilities’.¹³⁰ The distinction is especially relevant because the constraint on the use of force may differ significantly. Whereas the paradigm of hostilities is primarily governed by the specific rules relative to the conduct of hostilities, the paradigm of law enforcement is primarily governed by human rights standards, provided that the application of human rights norms is established under the specific circumstances.¹³¹ In the context of an armed conflict, IHL may prevail over or influence the interpretation of these standards.¹³²

One conspicuous example in the context of Afghanistan where the two paradigms potentially overlap is provided by (vehicle) checkpoints. These are an important security measure in Afghanistan: ISAF, OEF, and Afghan forces all use them as a method to control people, to seize weapons and drugs, and to arrest suspected members of the armed opposition.¹³³ At the same time, checkpoints can also be regarded as a means to impede enemy movement and they may become the

¹³⁰ For this terminology and definition of these paradigms, see Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, in particular pp. 85–90 and 269–298 respectively.

¹³¹ Considerable debate exists regarding the extraterritorial application of human rights. See, *inter alia*, Jann K. Kleffner, ‘Human rights and international humanitarian law: general issues’, in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, Oxford University Press, Oxford, 2010, p. 69 onwards; and N. Lubell, above note 59, pp. 193–235. For instance, according to Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the rights and freedoms of the convention must be secured ‘to everyone within their [the High Contracting Parties’] jurisdiction’. In its case law, the European Court of Human Rights (ECtHR) particularly relies on the criterion of ‘effective control’ in order to affirm the extraterritorial applicability of human rights. See, ECtHR, *Loizidou v. Turkey*, Preliminary Objections (Grand Chamber), 23 February 1995, paras. 61–64; ECtHR, *Ocalan v. Turkey*, Judgment (Grand Chamber), 12 May 2005, para. 91; ECtHR, *Al-Saadoon and Mufdhi v. UK*, Admissibility Decision, 30 June 2009, paras. 87–88. Contrary to the ECHR, the wording of the International Covenant on Civil and Political Rights (ICCPR) is more ambiguous, as its Article 2(1) requires a state party to ‘respect and ensure to all individuals within its territory and subject to its jurisdiction the rights’ set out in the convention. However, the Human Rights Committee (HRC) has affirmed the possible extraterritorial application in several instances. See, most prominently, HRC, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10; HRC, *Concluding Observations: United States of America*, 2006, UN Doc. CCPR/C/USA/CO/3, para. 10; HRC, *Lopez Burgos v. Uruguay* (Communication No. 52/1979), 29 July 1981, UN Doc. CCPR/C/13/D/52/1979, para. 12. Finally, the rights and freedoms in the American Convention on Human Rights must be respected and ensured ‘to all persons subject to their [the state parties’] jurisdiction’ (Article 1). See, e.g., Inter-American Commission on Human Rights, *Armando Alejandro, Jr., et al. v. Republic of Cuba*, Case Report No. 86/99, 29 September 1999, para. 23.

¹³² International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136, para. 106. See also Orna Ben-Naftali and Yuval Shany, ‘Living in denial: the application of human rights in the Occupied Territories’, in *Israel Law Review*, Vol. 37, No. 1, 2003–2004, pp. 103–105.

¹³³ Brian Hutchinson, ‘Assignment Kandahar: checkpoint 5-1’, in *National Post*, 10 August 2010; Mandy Clark, ‘Afghan checkpoints key in battle for Kandahar’, in *CBS News*, 3 August 2010.

actual target of enemy attacks.¹³⁴ This raises the question whether the use of force at vehicle checkpoints is governed by the paradigm of hostilities, or, given that they at least partially if not primarily also amount to security measures, by the paradigm of law enforcement, or both. A similar ambiguity may be present in the cases of convoys or patrols and house searches.

In Afghanistan, as mentioned before, IHL applies in the entire territory, irrespective of where fighting is taking place.¹³⁵ Thus it potentially also applies to and regulates checkpoints. Although IHL makes no explicit mention of checkpoints there is no doubt that parties to an armed conflict are allowed to set up checkpoints and to carry out similar security measures such as house searches under that law. Some rules of IHL implicitly include the establishment of checkpoints as security measures. In international armed conflicts, for instance, IHL allows for security and control measures with regard to protected persons¹³⁶ and, in the case of occupation, requires an occupying power to take measures to restore and ensure public order and safety.¹³⁷ In non-international armed conflicts, the possible legal basis for checkpoints will mostly stem from domestic law. What is more, in the particular context of Afghanistan, the resolutions of the UN Security Council permit the use of 'all necessary measures' to address, *inter alia*, the security concerns in Afghanistan.¹³⁸

Moreover, in accordance with the principle of distinction, military operations related to the conduct of hostilities shall only be directed against legitimate military objectives and consequently attacks shall not be directed at civilians or civilian objects.¹³⁹ At the same time, it is accepted that hostilities and related military operations may affect civilians, which is why the latter 'shall enjoy general protection against dangers arising from military operations'.¹⁴⁰ From this it would follow, *a maiore ad minus*, that, since IHL permits security measures in certain situations and even military operations related to hostilities that may affect civilians, under IHL it must also be possible to set up checkpoints affecting civilians, as long as they do not constitute a direct attack against them and comply with other humanitarian rules.

134 See, e.g., 'Rebuilding an Afghan military checkpoint', in *OUT On The Porch*, 29 November 2010, available at: <http://outontheporch.org/2010/11/29/rebuilding-an-afghan-military-checkpoint/> (last visited 22 March 2011).

135 See ICTY, *Prosecutor v. Dusko Tadić*, above note 7, paras. 68 and 69; ICTR, *The Prosecutor v. Jean-Paul Akayesu*, above note 27, para. 635.

136 See Article 27(4) of the Fourth Geneva Convention.

137 See Article 43 of the Hague Regulations of 1907.

138 See, in particular, UN Security Council resolution 1943 of 13 October 2010, and UN Security Council resolution 1890 of 8 October 2009. For the mandate of ISAF, see UN Security Council resolution 1386 of 20 December 2001 and UN Security Council resolution 1510 of 13 October 2003.

139 See Articles 48, 51(2), and 52(2) of Additional Protocol I; and Article 13(2) of Additional Protocol II. See also J.-M. Henckaerts and L. Doswald-Beck, above note 44, Rules 1 and 7. For a commentary on attacks, see Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), above note 80, paras. 4783 and 1882, defining attacks as simply referring to 'the use of armed force to carry out a military operation'.

140 See Article 51(1) of Additional Protocol I and Article 13(1) of Additional Protocol II. See also Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), above note 80, paras. 1935–1936 and 4761–4771.

The decision whether the use of force at (vehicle) checkpoints is governed by the standards of the law enforcement paradigm or by those of the paradigm of hostilities should be made by relying on the principle of *lex specialis*, according to which the rules offering a more detailed and specific regulation should take precedence.¹⁴¹ Consequently, if it is clear that fighters with a continuous combat function or civilians who are directly participating in hostilities are approaching a checkpoint or a convoy, they are legitimate military objectives and hence may be targeted in accordance with the special rules relative to the conduct of hostilities.¹⁴² However, outside the conduct of hostilities – for instance, when the Afghan, ISAF, or OEF forces exercise authority or power over persons protected against direct attacks at checkpoints or during house searches, or act in individual self-defence, or when the status of the person in question is doubtful – the use of force is governed by the law enforcement paradigm, that is, human rights law and also IHL.¹⁴³ IHL governing non-international armed conflicts prohibits the killing of persons not directly participating in hostilities and those *hors de combat*.¹⁴⁴ Outside the conduct of hostilities, however, IHL and its general principles do not provide sufficient guidelines regarding the legitimate use of force in security operations related to a non-international armed conflict. Recourse to human rights law in order to describe the modalities of the use of force may thus be justified.¹⁴⁵

While the distinction in accordance with the *lex specialis* principle seems straightforward from a legal perspective, in practice there may be situations where it is admittedly much harder to evaluate which paradigm takes precedence. In the case of an approaching car failing to slow down, or even accelerating towards a (vehicle) checkpoint, it will be very difficult – if not altogether unrealistic – to assess whether the driver is a fighter, a civilian directly participating in hostilities, or a civilian protected against direct attack, and thus whether the rules on the conduct of hostility or the more restrictive law enforcement standards apply. The decision to resort to potentially lethal force has to be made within a few seconds only. If, for instance, the first sign (to stop) is 200 metres away from the checkpoint and a car arrives at approximately 90 km/h, a soldier has only instants to go through escalation of force procedures and to decide whether or not to resort to potentially

141 Nils Melzer, 'Law enforcement and the conduct of hostilities', in T. D. Gill and D. Fleck, above note 131, p. 42.

142 *Ibid.*, pp. 43 and 44.

143 N. Melzer, above note 130, pp. 174–175 and 277. For an argument that checkpoints in occupied territory are governed by domestic law and human rights law, see Marco Sassòli, 'Legislation and maintenance of public order and civil life by occupying powers', in *European Journal of International Law*, Vol. 16, No. 4, 2005, pp. 665–666. Afghanistan ratified the ICCPR of 23 March 1976 on 24 April 1983 and it is thus binding for all Afghan forces maintaining a checkpoint. For Coalition forces, the applicable human rights obligations will depend on the treaties that they have ratified, which raises the question whether and to what degree these human rights instruments are applicable extraterritorially. In addition, status and rights of ISAF are detailed in the 'Military technical agreement: between the International Security Force (ISAF) and the interim administration of Afghanistan ("Interim Administration")' of 4 January 2002, in *International Legal Materials*, Vol. 41, No. 5, 2002, p. 1032.

144 See Common Article 3; Article 4(2)(a) of Additional Protocol II; J.-M. Henckaerts and L. Doswald-Beck, above note 44, Rule 89.

145 See O. Ben-Naftali and Y. Shany, above note 132, pp. 104–105.

lethal force. However, it seems questionable whether in such a scenario the standards of human rights law and IHL really differ that much.

As described above, IHL requires that everything feasible must be done to verify that the targets are fighters or civilians directly participating in hostilities (i.e. military objectives). Only if a careful assessment leaves no doubt about the status of the person as a legitimate military objective may they be directly targeted in accordance with the rules relative to the conduct of hostilities. If doubt remains, or if it is concluded that an approaching car and/or its occupants are not a military objective, the use of potentially lethal force is governed by law enforcement standards. In accordance with human rights law – provided it applies¹⁴⁶ – potentially lethal force against an approaching car can only be used if it presents an imminent threat under the circumstances of the given situation. The use of force must then be strictly necessary to protect troops (of a convoy or manning a checkpoint) or any other person from serious injury or death, or to arrest or to prevent the escape of a person suspected of having committed a serious crime.¹⁴⁷ In addition to the criterion that the use of force must be proportionate to the acute threat posed, a deprivation of life is also considered ‘arbitrary’ if reasonable precautionary measures could have avoided or minimized the use of force.¹⁴⁸ These precautions include, *inter alia*, warnings and giving the opportunity to surrender,¹⁴⁹ adequate equipment,¹⁵⁰ and training.¹⁵¹

Escalation of force procedures, which seemingly already contain a vast array of non-lethal precautionary measures,¹⁵² are thus very important, and are

146 See above note 131.

147 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/ser.L/V/II.116, Doc. 5 rev 1 corr., 22 October 2002, paras. 86–92; *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, above note 64, para. 32; HRC, *Suarez de Guerrero v. Colombia*, No. 45/1979, 31 March 1982, CCPR/C/15/D/45/1997, para. 13.2.

148 See, e.g., HRC, *Suarez de Guerrero v. Colombia*, above note 147, paras. 13.2–3. While similar, the ECHR has set out a slightly different system. Article 2(2) of the ECHR is violated if a deprivation of life is not ‘absolutely necessary’ to achieve one of the listed justification purposes. Like the other human rights systems, the ECHR also requires that the use of force is proportionate and that precautions be taken in order to ‘avoid or minimise, to the greatest extent possible’ any risk to life or the recourse to lethal force. See, e.g., ECtHR, *Case of Ergi v. Turkey*, No. 66/1997/850/1057, 28 July 1998, paras. 79–81, stating that government forces setting up an ambush in the vicinity of a village, and thus exposing the villagers to the risk of crossfire, should have taken adequate precautions. For the requirements on the organization and control of an anti-terrorist operation, see ECtHR, *McCann and others v. The United Kingdom*, No. 17/1994/464/545, 27 September 1995, paras. 194 and 202–213.

149 HRC, *Suarez de Guerrero v. Colombia*, above note 147, para. 13.2.

150 ECtHR, *Case of Güleç v. Turkey*, No. 54/1997/838/1044, 27 July 1998, para. 71.

151 ECtHR, *McCann and others v. The United Kingdom*, above note 148, paras. 211–212.

152 Escalation of force (EoF) procedures seem to include, *inter alia*, standardized warning signs, speed bumps, spike/tyre-shredder strips, pen flares, traffic cones, and bull horns. See, e.g., John Stevens, ‘A vignette: Coalition casualties, vehicle control points/cordons & CIVCAS’, in *COIN Common Sense*, Vol. 1, No. 1, February 2010, ISAF-Afghanistan, p. 6. See also Center for Army Lessons Learned (CALL), *Escalation of Force Handbook: Tactics, Techniques, and Procedures*, 07–21, July 2007. The need for more non-lethal weapons in the context of Afghanistan has recently been acknowledged by a senior US Marine commander. See Dan Lamothe, ‘2-star supports more use of nonlethal weapons’, in *Marine Corps Times*, 2 February 2011, available at: <http://www.marinecorpstimes.com/news/2011/02/marine-corps-afghanistan-tasers-nonlethal-weapons-020110/> (last visited 22 March 2011). For a compilation of available and future non-lethal weapons, see DoD Non-Lethal Weapons Program, *Non-Lethal Weapons*

feasible precautions that help to assess whether or not an approaching car represents a threat that may be answered with potentially lethal force.

New technologies on the battlefield: the use of drones in Afghanistan

The use of drones in Afghanistan – most significantly combat drones that are able to launch attacks in remote areas – has received much media attention.¹⁵³ Unmanned aerial vehicles are a means of decreasing the risk to one's own forces and of reaching even the most remote locations in the mountainous area of Afghanistan. Their increased use, often associated with incidental civilian casualties, has triggered debate, mostly related to the legality of how they are being used.¹⁵⁴

Drones, which are usually operated hundreds or thousands of miles away from their actual operative location,¹⁵⁵ can remain in the air for around twenty hours and provide live videos (including infrared and synthetic aperture radar).¹⁵⁶ Initially designed for surveillance purposes, the combat models currently used (the MQ-1 Predator and the MQ-9 Reaper) may be equipped with 100-pound Hellfire missiles and, in the case of the Reaper, even with 500-pound bombs.¹⁵⁷ Currently, the decision to launch an attack remains with the 'pilot', who reportedly needs to go through up to seventeen steps of approval before being allowed to fire a missile.¹⁵⁸ However, new challenges could arise if more automated programs are introduced, potentially no longer requiring a human being to make the decision.

Considering the weaponry of the MQ-1 Predator and MQ-9 Reaper drones, it is difficult to imagine their utility as law enforcement tools outside

for Today's Operations, 2011, available at: <https://www.jnlwp.usmc.mil/misc/publications/AR2011.PDF> (last visited 22 March 2011).

153 See, e.g., Jane Mayer, 'The predator war: what are the risks of the C.I.A.'s covert drone program?', in *The New Yorker*, 26 October 2009, available at: http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer (last visited 22 March 2011).

154 Note that drones are not outlawed as a weapons platform. It is mainly their use for targeted killings that has been the subject of debate. See, e.g., *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, above note 66, p. 24. For a discussion of their legality under international law see, e.g., Chatham House, *International Law and the Use of Drones: Summary of the International Law Discussion Group Meeting Held at Chatham House on Thursday, 21 October 2010*, Mary Ellen O'Connell and Michael N. Schmitt (speakers), and Elizabeth Wilmshurst (chair).

155 Christopher Drew, 'Drones are weapons of choice in fighting Qaeda', in *The New York Times*, 16 March 2009.

156 Michael N. Schmitt, 'Precision attack and international humanitarian law', in *International Review of the Red Cross*, Vol. 87, No. 859, 2005, p. 448.

157 See US Air Force, *MQ-1B Predator*, Factsheet, 20 July 2010, available at: <http://www.af.mil/information/factsheets/factsheet.asp?fsID=122>; and US Air Force, *MQ-9 Reaper*, Factsheet, 18 August 2010, available at: <http://www.af.mil/information/factsheets/factsheet.asp?fsID=6405> (both last visited 22 March 2011); Mary Ellen O'Connell, 'The international law of drones', in *The American Society of International Law Insights*, Vol. 14, No. 36, 12 November 2010; Matthias Gebauer *et al.*, 'Accident-prone wonder weapons: Afghanistan war logs reveal shortcomings of US drones', in *Der Spiegel*, 27 July 2010.

158 C. Drew, above note 155.

situations of armed conflict.¹⁵⁹ If drones are used on the ‘battlefield’, attacks must comply with the pertinent rules of IHL as outlined in the present article (i.e. distinction, proportionality, and precautions), just as any other battlefield delivery system not explicitly outlawed by IHL.

While the drones’ technology may permit enhanced aerial surveillance and precise attacks, thus potentially enhancing compliance with the principles of precautions in attack and proportionality, the question remains how the distinction between civilian and military objectives is to be achieved in a context in which it may be very challenging to gather reliable intelligence. This becomes particularly worrying when drones are used to target persons figuring on a targeting list¹⁶⁰ or to identify people as directly participating in hostilities. For instance, can a person digging in the vicinity of a road really be distinguished as a person planting an IED solely based on a video analysis?

The oft-criticized fact that the person controlling the UAV is far away from the battlefield eventually does not constitute a challenge for IHL.¹⁶¹ However, some authors caution that the use of drones may lead to a “Playstation” mentality’ if operators are untrained in IHL and uninformed by the ‘risks and rigors of battle’, and that the greater security of the attacking forces could lead to a more ‘light-hearted’ resort to lethal force.¹⁶²

Conclusion

The prolonged conflict in Afghanistan has not led to a visible change in IHL. Initial calls for a new or reformed legal framework have faded but significant challenges remain. As far as the humanitarian rules relating to the conduct of hostilities are concerned, currently the greatest challenge derives from the blurred lines of distinction that are so characteristic of asymmetric conflict scenarios. Notwithstanding, thus far the fundamental precepts of the humanitarian legal order have not been put into question. Despite all discussion about IHL’s potential

159 Operations and cross-border attacks in Pakistan present manifold challenging questions not only from a human rights or IHL angle but also from a *jus ad bellum* perspective that are beyond the scope of this article. See, e.g., *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, above note 66, pp. 10–15 and 25.

160 See Chatham House, above note 154, p. 5, where O’Connell notes that there are about six to seven casualties per attack, out of which usually only one person was on the hit list. This also raises concern about how those planning or deciding upon an attack carry out proportionality assessments. For an argument that the advanced technological capabilities of UAVs allowing for virtual ‘persistent surveillance’ (and thus making more relevant information available) lead to stricter requirements for targeting decisions, proportionality, and precautions, see J. M. Beard, above note 110, especially pp. 420, 428–442, and 444.

161 In cases where the drone is operated, in the context of an armed conflict, by a civilian contractor or by intelligence agencies (e.g. the CIA), the pilot would participate directly in hostilities and could potentially be targeted. In addition, the pilot’s participation could raise issues regarding criminal liability and detention status.

162 See most prominently *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, above note 66, pp. 24–25.

need of reform, almost ten years after the beginning of Operation Enduring Freedom in Afghanistan in October 2001 no compelling reform proposal for the rules relating to the conduct of hostilities has yet been made. On the contrary, especially during the second phase of the conflict the strategy of the international military forces in Afghanistan was focused on a strict adherence to existing rules, in order to achieve the overall strategic priority of winning the ‘hearts and minds’ of the Afghan population.

Nevertheless, controversy has increasingly arisen over the interpretation of existing rules. As conflict structures become more and more diffuse, legal certainty and clarity of humanitarian law prescriptions become ever more important. It is no coincidence that a number of so-called expert clarification processes with regard to the notion of direct participation in hostilities or air and missile warfare have been organized in recent years. All of these processes have touched upon important conduct of hostilities issues. At the same time, a number of long-standing questions and ambiguities, inherent for example in the proportionality principle or the definition of military objectives, remain unresolved and insufficiently discussed. Of course, some of these issues are difficult and, it seems, eternally disputed. Unsurprisingly, these controversies have been part and parcel of the modern humanitarian legal framework almost since its birth. Many can be traced back to the negotiations leading to the adoption of Additional Protocol I in 1977. Increasingly asymmetric conflict structures have not made their solution any easier in 2011, but the need for legal clarity in relation to the conduct of hostilities is clearly increasing.

International law and armed non-state actors in Afghanistan

**Annyssa Bellal, Gilles Giacca,
and Stuart Casey-Maslen***

Dr Annyssa Bellal, Gilles Giacca, and Dr Stuart Casey-Maslen are researchers at the Geneva Academy of International Humanitarian Law and Human Rights.

Abstract

An effective legal regime governing the actions of armed non-state actors in Afghanistan should encompass not only international humanitarian law but also international human rights law. While the applicability of Common Article 3 of the 1949 Geneva Conventions to the conflict is not controversial, how and to what extent Additional Protocol II applies is more difficult to assess, in particular in relation to the various armed actors operating in the country. The applicability of international human rights law to armed non-state actors – considered by the authors as important, particularly in Afghanistan – remains highly controversial. Nevertheless, its applicability to such actors exercising control over a population is slowly becoming more accepted. In addition, violations of peremptory norms of international law can also directly engage the legal responsibility of such groups.

.....

The conflict in Afghanistan is one of the longest contemporary conflicts involving an international coalition of military forces. In October 2001, the United States of America initiated air strikes on Afghanistan, followed by a ground offensive called Operation Enduring Freedom, to topple the Taliban government and drive out Al Qaeda forces hosted in Afghanistan following the 11 September 2001 terrorist

* The views expressed in this article are those of the authors and do not necessarily reflect those of the Geneva Academy. The authors wish to thank Professors Andrew Clapham and Marco Sassòli for their useful comments and insights on a draft of this article.

attacks on the United States. Since then, armed conflict has covered many parts of the country. The intensity of the conflict has been growing significantly, with a resurgent Taliban¹ and a number of other non-state armed groups pitted against Afghan government forces and an international coalition of some 150,000 military personnel² serving in the International Security Assistance Force (ISAF)³ and Operation Enduring Freedom.

This article looks at the application and implementation of international law by armed non-state actors (ANSAs) in Afghanistan.⁴ We approach these issues by investigating the application to these actors of both international humanitarian law (IHL) and international human rights law frameworks. In the first part of this article, the regimes under Common Article 3 and Additional Protocol II and their relevance for ANSAs operating in Afghanistan will be analysed in detail. A brief enquiry into customary IHL will also provide an insight into other applicable rules. While the applicability of human rights law to the behaviour of ANSAs remains highly controversial, the practice of international organizations is pointing towards increased accountability of those actors for human rights violations, at least at the political level. From a legal point of view, such accountability seems to be more accepted when ANSAs exercise control over territory or a segment of the population, or when core human rights norms are at stake. Finally, the article assesses efforts to implement the applicable law in Afghanistan and considers what more could be done to improve respect by ANSAs, particularly the Taliban.⁵

1 For a summary of the defeat of the Taliban and their subsequent resurgence as a major fighting force, see, e.g., Ahmed Rashid, *Taliban*, I. B. Tauris, London/New York, 2010, especially Chapter 17, 'The Taliban resurgent, 2000–2009', pp. 217–246.

2 See, e.g., Jonathon Burch, 'Foreign troop deaths in Afghanistan near 600 for 2010', in *Reuters*, 24 October 2010, available at: <http://www.reuters.com/article/idUSTRE69N0ZN20101024> (last visited 18 January 2011).

3 Since 2003, the ISAF has been a North Atlantic Treaty Organization (NATO) operation, whose mission today is, 'in support of the Government of the Islamic Republic of Afghanistan, [to] conduct ... operations in Afghanistan to reduce the capability and will of the insurgency'. ISAF, 'Mission', available at: <http://www.isaf.nato.int/mission.html> (last visited 18 January 2011).

4 For the purpose of this article we use the following working definition of an armed non-state actor: *any armed group, distinct from and not operating under the control of, the state or states in which it carries out military operations, and which has political, religious, and/or military objectives*. Thus, it does not ordinarily cover private military companies or criminal gangs, although a controversial study by the US Senate Armed Services Committee 'uncovered evidence of private security contractors funneling U.S. taxpayers dollars to Afghan warlords and strongmen linked to murder, kidnapping, bribery as well as Taliban and other anti-Coalition activities'. See Committee on Armed Services, 'Inquiry into the role and oversight of private security contractors in Afghanistan', Report together with additional views, US Senate, 28 September 2010, p. i, available at: <http://armed-services.senate.gov/Publications/SASC%20PSC%20Report%2010-07-10.pdf> (last visited 18 January 2011).

5 According to Ahmed Rashid, a Pakistani journalist and author, 'A *talib* is an Islamic student, one who seeks knowledge compared to the mullah who is one who gives knowledge. By choosing such a name the Taliban (plural of *Talib*) distanced themselves from the party politics of the Mujaheddin and signalled that they were a movement for cleansing society rather than a party trying to grab power'. A. Rashid, above note 1, pp. 22–23.

Armed non-state actors in Afghanistan

There is no consensus among commentators as to the size and structure of ANSAs in Afghanistan, or as to the nature of the relationships between them. The Taliban emerged in the early 1990s in northern Pakistan amid the violence that followed the withdrawal of Soviet troops from Afghanistan.⁶ From their initial sphere of influence in south-western Afghanistan, they quickly extended their control over the rest of the country. In September 1996, they captured the Afghan capital, Kabul;⁷ by 1998, they were in control of almost 90% of Afghanistan. Pakistan, Saudi Arabia, and the United Arab Emirates were the only three states that recognized the Taliban as the legitimate government in Afghanistan when they were in power until their military defeat by the US-led coalition in 2001.⁸

Since that defeat, an insurgency has emerged against the government elected in 2002, which has grown in intensity each year.⁹ In describing the insurgency, the UN Assistance Mission in Afghanistan (UNAMA) uses the term 'anti-government elements', which 'encompass individuals and armed groups of diverse backgrounds, motivations and command structures, including those characterized as the Taliban, the Haqqani network,¹⁰ Hezb-e-Islami¹¹ and

6 See, e.g., James Fergusson, *Taliban: The True Story of the World's Most Feared Fighting Force*, Bantam Press, London, 2010, p. 15.

7 See, e.g., BBC, 'Who are the Taliban?', 1 October 2010, available at: <http://www.bbc.co.uk/news/world-south-asia-11451718> (last visited 18 January 2011).

8 International Crisis Group, 'Taliban propaganda: winning the war of words?', available at: <http://www.crisisgroup.org/en/regions/asia/south-asia/afghanistan/158-taliban-propaganda-winning-the-war-of-words.aspx> (last visited 18 January 2011).

9 This growing intensity can be seen both on a military and a civilian level. The non-governmental 'Icasualty' website has recorded military casualties among the international coalition rising from 12 in 2001, to 191 in 2006, to 521 in 2009, and 711 in 2010, available at: <http://icasualties.org/OEF/Index.aspx> (last visited 18 January 2011).

10 'Named after its leader Jalaluddin Haqqani, the Haqqani Network is a group within the insurgency in Afghanistan that is based out of North Waziristan in the Pakistani Federally Administered Tribal Areas (FATA). The group has been active mainly in the east of Afghanistan – in Paktia, Paktika, Khost, Ghazni Wardak and even Kabul provinces'. Institute for the Study of War, 'Haqqani network', available at: <http://www.understandingwar.org/themenode/haqqani-network>; and see also GlobalSecurity.org, 'Haqqani Network', available at: <http://www.globalsecurity.org/military/world/para/haqqani.htm> (both last visited 18 January 2011). Haqqani was the former Taliban Minister of Tribal Affairs. See A. Rashid, above note 1, p. 224. James Fergusson suggests that Haqqani was always much closer ideologically to Al Qaeda than the Taliban. He cites a report in the *New York Times* that suggests that the Haqqani Network forces numbered 'perhaps 12,000 in late 2009'. J. Fergusson, above note 6, p. 130, citing Jane Perlez, 'Rebuffing US, Pakistan balks at crackdown', in *New York Times*, 14 December 2009, available at: <http://www.nytimes.com/2009/12/15/world/asia/15haqqani.html> (last visited 25 January 2011).

11 According to GlobalSecurity.org, 'Hizb-I Islami Gulbuddin often operates like both a crime family and an apostle of al Qaeda ... In the early 1990s, Gulbuddin Hekmatyar served as prime minister of Afghanistan. He was the man most responsible for the fighting that left Kabul in ruins. Hekmatyar's Hizb-e-Islami was a key ally and favorite of Pakistan's Inter Service Intelligence (ISI). Hekmatyar's faction was abandoned by its Pakistani backers as the Omar faction grew in power in the late 1990s. Since the events of September 11, 2001 Hekmatyar, an ethnic Pashtun, formed an anti-coalition alliance with Taliban leader Muhammad Omar and the remnants of the al Qaeda group in the country. Hekmatyar's base of support was always in the Khyber Pass Jalalabad area, east of Kabul, but he still has supporters throughout Afghanistan'. GlobalSecurity.org, 'Hizb-I Islami', available

others'.¹² The precise nature of the relationships between the different armed groups within Afghanistan and in neighbouring Pakistan is not known.¹³ The size of Taliban forces in Afghanistan is estimated by the US to be around 25,000, although the reliability of this figure is contested.¹⁴ By 2010, the Taliban were said to be holding sway in the south and east of the country, as well as in pockets of the west and north, and 'in 2009 started launching increasingly brazen attacks in urban areas'.¹⁵ The Taliban in Afghanistan are still believed to be led by Mullah Omar, a village clergyman who headed the group from the outset, including when they were in power.¹⁶ Reports suggest that Al Qaeda was weak in numbers in Afghanistan, perhaps with as few as fifty men in late 2010.¹⁷ The nature of the relationship between Al Qaeda and the Taliban in Afghanistan today is also unclear.¹⁸

A high price is being paid by the civilian population for the ongoing conflict in Afghanistan.¹⁹ The forces said to be the main cause of their suffering are

at: <http://www.globalsecurity.org/military/world/para/hizbi-islami.htm> (last visited 18 January 2011). See also J. Fergusson, above note 6, Chapter 12.

- 12 UNAMA, 'Afghanistan: mid year report 2010: protection of civilians in armed conflict', August 2010, p. 6, available at: http://unama.unmissions.org/Portals/UNAMA/Publication/August102010_MID-YEAR%20REPORT%202010_Protection%20of%20Civilians%20in%20Armed%20Conflict.pdf (last visited 18 January 2011).
- 13 The Taliban has re-emerged in Afghanistan as the largest ANSA in the country, also becoming stronger as a distinct but related entity in neighbouring Pakistan. The Tehrik-i-Taliban Pakistan, the umbrella movement of the Pakistani Taliban, was founded in 2002: see J. Fergusson, above note 6, p. 35. There is said to be 'loose coordination' between different Taliban factions and militant groups: BBC, 'Who are the Taliban?', above note 9. Since 1 September 2010, 'Tehrik-e Taliban Pakistan' has been listed by the US Department of State as a 'foreign terrorist organization' but the Taliban in Afghanistan is not: Office of the Coordinator for Counterterrorism, US Department of State, 'Foreign terrorist organizations', 15 October 2010, available at: <http://www.state.gov/s/ct/rls/other/des/123085.htm> (last visited 18 January 2011).
- 14 See, e.g., Gilles Dorronsoro, 'Who are the Taliban?', in *The Huffington Post*, 27 October 2009, available at: http://www.huffingtonpost.com/gilles-dorronsoro/who-are-the-taliban_b_335592.html (last visited 18 January 2011).
- 15 International Crisis Group, 'Afghanistan conflict history', updated January 2010, available at: <http://www.crisisgroup.org/en/key-issues/research-resources/conflict-histories/afghanistan.aspx> (last visited 18 January 2011).
- 16 Although the Taliban have not been listed as a foreign terrorist organization by the USA, Mullah Omar and other leading figures of the Taliban are part of 'the Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them', available at: <http://www.un.org/sc/committees/1267/consolist.shtml> (last visited 18 January 2011).
- 17 In June 2010, the head of the US Central Intelligence Agency claimed that the figure was between fifty and one hundred fighters. 'La lutte contre al-Qaïda en Afghanistan finira par porter ses fruits selon le patron de la CIA', in *RFI*, available at: <http://www.rfi.fr/ameriques/20100628-lutte-contre-al-qaïda-afghanistan-finira-porter-fruits-selon-le-patron-cia> (last visited 18 January 2011). According to James Fergusson, 'There has, of course, been no significant al-Qaida presence in Afghanistan since 2002'. J. Fergusson, above note 6, p. 90.
- 18 According to claims reported by James Fergusson, Mullah Omar has not been in contact with Osama Bin Laden since the end of 2001. An email from Omar to a journalist in January 2007 had stated that: 'We have never felt the need for a permanent relationship in the present circumstances ... They have set jihad as their goal, whereas we have set the expulsion of American troops from Afghanistan as our target'. J. Fergusson, above note 6, pp. 92–93.
- 19 See, e.g., Afghanistan Independent Human Rights Commission, 'Civilian casualty figure; first seven months of 2010 (1st January–31st July)', Kabul, 8 August 2010, available at: <http://www.aihrc.org.af/>

the non-state armed groups. According to Amnesty International, for example: 'The Taliban and related insurgent groups in Afghanistan show little regard for human rights and the laws of war and systematically and deliberately target civilians, aid workers, and civilian facilities like schools (particularly girls' schools)'.²⁰

Applicable international humanitarian law

We believe that the armed conflict in Afghanistan is currently governed by the customary and treaty rules applicable to armed conflicts of a non-international character.²¹ Prior to the current armed conflict, the violence in Afghanistan has moved through at least three phases since 2001. The first of these phases covers the situation leading up to the US-led invasion of Afghanistan in October 2001; the violence between the Taliban government and the Northern Alliance forces at that time constituted an armed conflict of a non-international character. The second phase began with the US-led attacks against the Taliban on 6 October 2001, which constituted an international armed conflict governed by applicable customary and treaty rules.²² The question of whether operations against Al Qaeda during that

2010_eng/Eng_pages/Reports/Thematic/Civilian_Casualties_Jan_Jul31_2010.pdf (last visited 18 January 2011); and UNAMA, above note 12.

- 20 Amnesty International, 'Afghanistan conference raises fears of sacrificing rights for short-term peace', 19 July 2010, available at: <http://www.amnesty.org/en/news-and-updates/afghanistan-conference-raises-fears-sacrificing-rights-short-term-peace-2010-07-19> (last visited 18 January 2011).
- 21 This point of view is widely shared. Thus, the UK regards the ongoing hostilities as a non-international armed conflict. See, e.g., David Turns, 'Jus ad pacem in bello? Afghanistan, stability operations and international law relating to armed conflict', in *Israel Yearbook on Human Rights*, Vol. 39, 2009, p. 236. Germany similarly qualifies the conflict as being non-international in character. See Christian Schaller, 'Military operations in Afghanistan and international humanitarian law', German Institute for International and Security Affairs, SWP Comments, No. 7, March 2010, p. 2. See also *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Philip Alston, Mission to Afghanistan, A/HRC/11/2/Add.4, para. 1: 'Afghanistan is experiencing armed conflict across a broad swath of its territory. In legal terms, this is a non-international armed conflict between the Government, supported by international military forces (IMF), and various armed groups'. This position does not, however, enjoy consensus among international lawyers. Yoram Dinstein argues that the continuing armed hostilities between international forces and the insurgency might be considered as a prolongation of the international armed conflict that started in October 2001 with the US-led military intervention against the former Taliban government. This conflict would remain international until the Taliban are defeated, alongside a separate armed conflict of a non-international character between the Taliban and the government that replaced them. See Yoram Dinstein, 'Concluding remarks on terrorism and Afghanistan', in *Israel Yearbook on Human Rights*, 2009, p. 325. For a similar position on that issue, see Eric David, *Principes de droit des conflits armés*, 4th edition, Bruylant, Brussels, 2008, p. 175.
- 22 According to Stéphane Ojeda, for example, the Taliban 'were controlling and ruling over about 95 percent of the Afghan territory in October 2001'. Stéphane Ojeda, 'US detention of Taliban fighters: some legal considerations', in Michael N. Schmitt (ed.), *The War in Afghanistan: A Legal Analysis*, International Law Studies, Vol. 85, US Naval War College International Studies, Naval War College Press, 2009, pp. 358–359. See also Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 29, para. 72. For a contrary assessment of the status of the conflict, see W. Hays Parks, 'Combatants', in Schmitt, *The War in Afghanistan*, p. 258: 'The facts on the ground and international law do not support a conclusion that the Taliban was the de facto, much less the de jure, government of Afghanistan The civil war did not end

conflict could be considered as part of this international armed conflict or whether they represented a separate non-international armed conflict is moot.²³ The third phase is the occupation of Afghanistan by US and other foreign forces. This occupation is also considered an international armed conflict by Article 2 common to the four Geneva Conventions (Common Article 2). There is no consensus among legal authorities as to when exactly this occupation ended.²⁴

Nonetheless, subsequently the armed violence in Afghanistan was certainly of a sufficient intensity to constitute an armed conflict of a non-international character. The two sets of treaty rules generally applicable to such conflicts are Article 3 common to the four Geneva Conventions (Common Article 3) and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II).²⁵ Afghanistan ratified the four Geneva Conventions in 1956 and

with the Taliban as a clear victor occupying, much less controlling, Afghanistan. At the time of commencement of US and coalition operations on October 20, 2001, the civil war continued, and Taliban power had eroded significantly'. As noted above, only three states had recognized the Taliban as the legitimate government of Afghanistan; however, this would not necessarily *per se* preclude the conflict being an international one on the basis of Additional Protocol I, Art. 43, para. 1, which states that: 'The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party'. This begs the question, of course, as to whether this provision has become a customary rule, as neither Afghanistan nor the US was a party to Additional Protocol I at that time. Also relevant to the specific issue of prisoners of war (POWs) is Geneva Convention III, Article 4(3), which lays down the obligation to recognize as POWs 'Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power'.

- 23 The decision by the US Supreme Court in *Hamdan v. Rumsfeld* suggests that it could be the latter. US Supreme Court, *Hamdan v. Rumsfeld, Secretary of Defense et al.*, 29 June 2006, p. 6, esp. (d) (ii), available at: <http://www.supremecourt.gov/opinions/05pdf/05-184.pdf> (last visited 18 January 2011). For a criticism of the decision in *Hamdan*, see Y. Dinstein, above note 22, pp. 56–57, paras. 129–130. For a general review of the application of international humanitarian law to Al Qaeda, see Marco Sassòli, 'Transnational armed groups and international humanitarian law', Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, No. 6, Winter 2006.
- 24 There are at least five possible dates. The first of these is the establishment of an Interim Authority in December 2001 by the Bonn Agreement (Establishment of the Afghan Interim Authority on 22 December 2001 headed by Hamid Karzai. See the Agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions (the Bonn Agreement), S/2001/1154, 5 December 2001, Art. 1(2)). The second possibility is the appointment of Karzai by the *Loya Jirga* (grand assembly) in June 2002 as President of the Transitional Authority. The third possibility is the adoption of the new constitution in January 2004. The fourth possibility is the presidential election of Karzai in October 2004. The fifth possibility is the parliamentary election in 2005. The International Committee of the Red Cross (ICRC), for example, implies that the appointment of Karzai in June 2002 as the President of the Transitional Authority changed the legal nature of the conflict into a non-international one. See ICRC, *International Humanitarian Law and Terrorism: Questions and Answers*, May 2004, available at: <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-faq-050504> (last visited 18 January 2011).
- 25 As discussed further below, there is a difference in the scope of application between Common Article 3, which has a relatively low threshold of application but which provides for limited protection, and Additional Protocol II, which has a more restrictive scope of application but which offers broader and more detailed protection. Both Common Article 3 and Additional Protocol II, however, only apply to an armed conflict and therefore not 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'. See Additional Protocol II, Art. 1(2). This threshold is also believed to be valid for situations covered by

adhered to the two Additional Protocols in June 2009, with Additional Protocol II coming into force for that country on 24 December 2009.

This section assesses the application first of Common Article 3 and then of Additional Protocol II to the armed conflict in Afghanistan. A distinct but related issue is the direct application of each of these sets of legal obligations to all ANSAs involved as parties to that conflict.

Application of Common Article 3

The extent to which Common Article 3, whose rules are part of customary international law,²⁶ regulates the conduct of hostilities is debated. For some commentators, the provisions only afford protection to persons falling *under the direct control* of a party to the conflict and therefore the article has no direct relevance for the conduct of hostilities.²⁷ For others, the reference to ‘violence to life and person’ would cover acts committed in the course of military operations. Thus, for example, Rogers affirms that:

Common Article 3 does not deal directly with the conduct of hostilities. It seems, at first sight, only to protect the victims of such conflicts. ... However, a close reading of the text of the article leads to the conclusion that it does more than that. For example, the principle of civilian immunity can be inferred from paragraph 1, which prohibits violence to the life of persons taking no active part in hostilities.²⁸

Common Article 3. See, e.g., Sylvain Vité, ‘Typology of armed conflicts in international humanitarian law: legal concepts and actual situations’, in *International Review of the Red Cross*, Vol. 91, No. 873, March 2009, p. 76; and UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2005, paras. 15.2 and 15.3.

26 See, International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, ICJ Reports 1986, para. 218. Similar remarks were made by the Court in the 1996 Nuclear Weapons Advisory Opinion of 8 July 1996, ICJ Reports 1996, para. 79. Statements on the customary nature of Common Article 3 have also been made by the ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda. See notably, International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 98; International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 608.

27 See, e.g., Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2002, p. 83; G. I. A. D. Draper, ‘Wars of national liberation and war criminality’, in Michael Howard (ed.), *Restraints on War: Studies in the Limitation of Armed Conflict*, Oxford University Press, Oxford, 1979, p. 183; Georges Abi-Saab, ‘Non-international armed conflicts’, in *International Dimensions of Humanitarian Law*, UNESCO and Martinus Nijhoff, Dordrecht, 1988, p. 235. The Rome Statute of the International Criminal Court also appears to distinguish between acts prohibited under Common Article 3 and other violations committed during the conduct of hostilities. See Rome Statute, Art. 8(2)(c) and Art. 8(2)(e).

28 A. P. V. Rogers, *Law on the Battlefield*, 2nd edition, Manchester University Press, Manchester, 2004, p. 221. See also Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, pp. 58–61.

For Common Article 3 to apply, there must be an ‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’. Based on the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY), this demands that two criteria be satisfied: there must be a state of ‘protracted’²⁹ armed violence, and any ANSA must possess a certain level of organization in order to be considered party to the conflict under international law.³⁰

Afghanistan, as noted above, is a state party to the Geneva Conventions, and for most of the last decade the violence between the Afghan government and international military forces and organized armed groups (particularly, but not only, the Taliban) has been of such intensity that an armed conflict has been taking place. It is further asserted that regarding the requisite level of organization of an ANSA to be considered a party to the conflict, the four main groups – the Taliban, the Haqqani network, Hezb-e-Islami, and Al Qaeda (in Afghanistan) – have each demonstrated sufficient organization to be bound directly by international humanitarian law.³¹ In the case of the Taliban, the issuance of what is in effect a military code of conduct is evidence of the existence of command structure and disciplinary rules and mechanisms within the group.³²

29 ICTY, *Prosecutor v. Tadic*, above note 26, para. 70. By ‘protracted’ is meant particularly the intensity of the armed violence and not merely its duration, the ordinary meaning of the word notwithstanding. ICTY, *Prosecutor v. Haradinaj*, Case No. IT-04-84-84-T, Judgment (Trial Chamber), 3 April 2008, para. 49. See also, e.g., S. Vité, above note 25, pp. 76–77.

30 Regarding the level of organization of the ANSAs, international tribunals and legal scholars have developed a variety of indicative elements or ‘useful’ guidelines that may be taken into account to establish the necessary degree of organization of the group, none of which is, on its own, essential to establish whether the organizational requirement is fulfilled. See Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary: First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, pp. 49–50, available at: <http://www.icrc.org/ihl.nsf/COM/365-570006?OpenDocument> (last visited 19 January 2011); ICTY, *Prosecutor v. Tadic*, above note 26, para. 70; ICTY, *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, 16 November, 1998, para. 184; ICTY, *Prosecutor v. Haradinaj*, above note 29, para. 60; ICTY, *Prosecutor v. Boskoski*, Case No. IT-04-82, Judgment (Trial Chamber), 10 July 2008, paras. 199–203; and ICTR, *Prosecutor v. Akayesu*, above note 26, para. 619; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgment (Trial Chamber I), 6 December 1999, para. 93. See also the International Commission of Inquiry on Darfur, ‘Report Pursuant to Security Council Resolution 1564 of 18 September 2004’, 25 January 2005, paras. 74–76; International Law Association, Use of Force Committee, ‘Final report on the meaning of armed conflict in international law’, 2010, pp. 28–33, available at: <http://www.ila-hq.org/en/committees/draft-committee-reports-the-hague-2010.cfm> (last visited 18 January 2011).

31 For instance, the US Department of State recognizes the existence of an ‘armed conflict with al-Qaeda, the Taliban and associated forces’. Harold Hongju Koh, *The Obama Administration and International Law*, paper delivered at the Annual Meeting of the American Society of International Law, Washington, DC, 25 March 2010, available at: <http://www.state.gov/s/l/releases/remarks/139119.htm> (last visited 18 January 2011).

32 On ‘The Islamic Emirate of Afghanistan rules for mujahideen’, see: ‘Taliban issues code of conduct’, in *al-Jazeera*, 28 July 2009, available at: <http://english.aljazeera.net/news/asia/2009/07/20097278348124813.html> (last visited 18 January 2011). More generally, see Program for Cultural and Conflict Studies, ‘Understanding Afghan culture: analyzing the Taliban code of conduct: reinventing the *Layeha*’, Department of National Security Affairs, Naval Postgraduate School, August 2010, p. 3, available at: <http://info.publicintelligence.net/Layeha.pdf> (last visited 18 January 2011).

To what extent Common Article 3 directly addresses ANSAs has been debated. The article states that ‘each Party to the conflict shall be bound to apply, as a minimum’ its provisions. It has sometimes been claimed that the term ‘each Party’ does not apply to ANSAs, even though they may meet the criteria for being a party to the conflict, but only to government armed forces.³³ State practice, international case law, and scholarship, have, however, confirmed that Common Article 3 applies to such ANSAs directly.³⁴

Despite this apparent certitude, the precise legal means by which such non-state actors are bound by international humanitarian law is more controversial.³⁵ Several legal arguments have been advanced to explain why (or how) ANSAs are bound by certain international norms. The first – and, in the view of many commentators, the most persuasive – holds that ANSAs are bound by customary international humanitarian law.³⁶ Thus, it is asserted that, at least in the case of Common Article 3, this provision is declaratory of customary international law and thereby applicable to each party to a conflict without formal ratification.³⁷ A second approach, known as the doctrine of legislative jurisdiction, asserts that the rules of international humanitarian law bind any private individuals, including ANSAs, through domestic law, via implementation of these rules into national legislation or direct applicability of self-executing norms.³⁸ This theory is

33 One of the arguments put forward has been that ‘Party’ (with a capital ‘p’) meant ‘High Contracting Party’, i.e. states, and that it was used in a contracted form merely to avoid repetition. See, e.g., Svetlana Zašova, ‘L’applicabilité du droit international humanitaire aux groupes armés organisés’, in J. M. Sorel and Corneliu-Liviu Popescu (eds), *La protection des personnes vulnérables en temps de conflits armés*, Bruylant, Brussels, 2010, p. 58; and L. Zegveld, above note 27, p. 61.

34 In *Nicaragua v. United States of America*, for example, the ICJ confirmed that Common Article 3 was applicable to the Contras, the non-state armed group fighting the government: ‘The conflict between the contras’ forces and those of the Government of Nicaragua is an armed conflict which is “not of an international character”. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character’. ICJ, *Nicaragua v. United States of America*, above note 26, para. 219. See also Marco Sassòli, ‘Taking armed groups seriously: ways to improve their compliance with international humanitarian law’, in *Journal of International Humanitarian Legal Studies*, Vol. 1, 2010, p. 12.

35 For example, in 2004, rather dodging the issue, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) simply held that ‘it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties’. SCSL, *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E)), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Decision of 31 May 2004, para. 22.

36 See, e.g., Daniel Bethlehem, ‘The methodological framework of the study’, in Elizabeth Wilmshurst and Susan Breua (ed.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, p. 8.

37 Thus, e.g., it has been asserted that: ‘[T]here is now no doubt that this article [Common Article 3] is binding on states and insurgents alike, and that insurgents are subject to international humanitarian law ... [a] convincing theory is that [insurgents] are bound as a matter of customary international law to observe the obligations declared by Common Article 3 which is aimed at the protection of humanity’. SCSL, *Prosecutor v. Morris Kallon and Brima Buzzy Kamara*, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, 13 March 2004, paras. 45–47. See also L. Moir, above note 28, pp. 56–58.

38 Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (hereafter *ICRC Commentary*),

problematic, since what is at stake is not the fact that ANSAs are subjects of domestic law but the direct regulation of the acts of such groups under international law.³⁹ A third approach is based on the general principles governing the binding nature of treaties on third parties under the 1969 Vienna Convention on the Law of Treaties.⁴⁰ This would entail enquiry into the intention of the contracting states to impose duties on third parties and that the parties accept to be bound.⁴¹ However, this approach can easily be challenged on the ground that the Convention only addresses treaties between states creating obligations for other (third) states. Fourth, one can consider that, when ANSAs exercise any effective power over persons or territory of a state, they are bound by that state's obligations.⁴² This claim is unpersuasive, though, as Common Article 3 – in contrast to Additional Protocol II – does not require territorial control for applicability and, as Moir points out, not every group seeks to replace the state.⁴³

Further discussion on the relative validity of the different theories is beyond the scope of this article. Suffice to acknowledge that, although the legal reasoning to sustain this conclusion remains unsettled, it has now become uncontroversial, even 'commonplace',⁴⁴ that ANSAs are bound by international humanitarian law.

Application of Additional Protocol II

The entry into force of Additional Protocol II to the Geneva Conventions for Afghanistan in December 2009 raises the question of its applicability to the ongoing armed conflict. According to Article 1, paragraph 1, the Protocol applies

to all armed conflicts ... which take place in 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

ICRC, Geneva/Martinus Nijhoff Publishers, Dordrecht, 1987, p. 1345; Sandesh Sivakumaran, 'Binding armed opposition groups', in *International and Comparative Law Quarterly*, Vol. 55, 2006, p. 381.

39 See, in this regard, Antonio Cassese, 'The status of rebels under the 1977 Geneva Protocol on Non-international Armed Conflicts', in *International and Comparative Law Quarterly*, Vol. 30, No. 2, April 1981, p. 429.

40 1969 Vienna Convention on the Law of Treaties, Art. 35; see A. Cassese, above note 39, pp. 424–429.

41 Some argue that this theory results in an application of IHL norms on ANSAs only on a case-by-case basis, depending on each armed group's willingness to apply the law. This represents a significant drawback to such an approach. In addition, as Zegveld observes, requiring the consent of an ANSA would put the group 'on an equal footing with the state. This consequence has clearly been unacceptable for states and international bodies'. L. Zegveld, above note 27, p. 18.

42 According to the ICRC, 'The obligation resting on the Party to the conflict which represents established authority is not open to question. ...[I]f the responsible authority at their head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country'. Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva, ICRC, 1958, p. 37; see also M. Sassòli, above note 34, pp. 5–51.

43 L. Moir, above note 28, pp. 55–56.

44 Andrew Clapham, *The Rights and Responsibilities of Armed Non-state Actors: The Legal Landscape & Issues Surrounding Engagement*, 1 February 2010, p. 6, available at: ssrn.com/abstract=1569636 (last visited 18 January 2011).

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.⁴⁵

Additional Protocol II introduces a higher threshold of application than Common Article 3. In addition to the existence of an armed conflict between the insurgency and the government taking place in the territory of a High Contracting Party,⁴⁶ there are three cumulative material conditions under Article 1, paragraph 1: the organized armed group(s) must be under responsible command; they must exercise such control over a part of the national territory as to enable them to carry out sustained and concerted military operations, and the territorial control must be such as to enable them to be able to implement the Protocol. Where these cumulative criteria for application of Additional Protocol II are objectively met, the Protocol becomes ‘immediately and automatically applicable’, irrespective of the views of the parties to that conflict.⁴⁷

Responsible command

What is required is that the group possesses organs and has ‘a system for allocating authority and responsibility’.⁴⁸ The Taliban’s ‘Code of Conduct’ is evidence of such a system and it can be asserted that the Taliban meets this organizational criterion, although at least one commentator has questioned this.⁴⁹

Control over a part of the territory

There are differing accounts about the Taliban’s actual territorial control of Afghanistan. For instance, in December 2008 the Taliban was said to have expanded its sphere of influence to 72% of the country, ‘confident in their expansion beyond the rural south’, and it was claimed that ‘the Taliban is at the gates of the capital and infiltrating the city at will’.⁵⁰ It has also been claimed that the Taliban are not in control of a single large section of territory, but rather of areas intermingled with those under government control.⁵¹

45 Thus, as Moir has noted, the conditions set by Article 1 of the Protocol imply that it governs only ‘the most intense and large scale conflicts’. L. Moir, above note 28, p. 101.

46 In contrast to Additional Protocol II, Common Article 3 also regulates armed conflict that takes place only between ANSAs, for example in a failed state.

47 ICRC Commentary, above note 38, p. 1353; ICTR, *Prosecutor v. Akayesu*, above note 26, para. 624.

48 Michael Bothe, Karl J. 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, The Hague, 1982, p. 626. See generally ICRC Commentary, above note 38, p. 1352. See also ICTR, *Prosecutor v. Akayesu*, above note 26, para. 626.

49 D. Turns, above note 21, p. 230.

50 International Council on Security and Development, *Struggle For Kabul: The Taliban Advance*, December 2008, available at: http://www.icosgroup.net/modules/reports/struggle_for_kabul (last visited 18 January 2011).

51 Yaroslav Trofimov, ‘U.S. rebuilds power plant, Taliban reap a windfall’, in *Wall Street Journal*, 13 July 2010, available at: <http://online.wsj.com/article/SB10001424052748704545004575352994242747012.html> (last visited 18 January 2011).

The requirement of territorial control is, however, purely functional. It must be sufficient to enable the Taliban to conduct sustained and concerted military operations and to implement the Protocol, both of which are discussed below. For this reason, the criterion is not based on the number or duration of the presence of members of the armed group.⁵²

Sustained and concerted military operations against governmental armed forces

‘Sustained’ military operations against governmental armed forces refers to continuous operations, while ‘concerted’ indicates operations that are ‘agreed upon, planned and contrived, done in agreement according to a plan’.⁵³ Given the intensity of combat in Afghanistan and the level of casualties suffered by the forces ranged against the Taliban (see introduction above), this criterion has clearly been met.

Implementation of the Protocol

The ability to implement the Protocol is considered as the ‘fundamental criterion’ that justifies the other elements of the definition of Article 1 of Additional Protocol II.⁵⁴ It has even been said that the condition that ANSAs have the capacity to apply the substantive obligations of the Protocol is the basis for their ‘obligation to do so’.⁵⁵ It thus appears sufficient to establish that the Taliban could realistically apply the provisions of the Protocol should they be so minded, not that they actually do so. If it were otherwise, the level of requisite respect would thus become an issue and it could even be argued that the Protocol would only apply to armed groups that were already respecting its provisions in full.⁵⁶

This inquiry leads us to conclude that Additional Protocol II is indeed applicable to the conflict in Afghanistan, at the very least to the hostilities between the armed forces of the Government of Afghanistan and the Taliban, given that all the requisite criteria appeared to be met as of early 2011.

52 See M. Bothe, K. J. Partsch, and W. A. Solf, above note 48, p. 627.

53 ICRC Commentary, above note 38, p. 1353.

54 *Ibid.*

55 Frits Kalshoven, *Constraints on the Waging of War*, ICRC, Geneva/Martinus Nijhoff, Dordrecht, 1987, p. 139.

56 See, e.g., L. Moir, above note 28, pp. 97–98. But, for less certainty as to this position, see, e.g., UK Ministry of Defence, above note 25, p. 32; Françoise Hampson, ‘Winning by the rules: law and warfare in the 1980s’, in *Third World Quarterly*, 1989, p. 44; and Adam Roberts and Richard Guelff, *Documents on the Laws of War*, Oxford University Press, 3rd edition, 2000, p. 482. According to Cassese, determining whether a group is capable of implementing IHL rules might require a certain level of willingness. A. Cassese, above note 39, p. 428.

Content of Additional Protocol II

As to the obligations set by Additional Protocol II, the instrument contains a set of eighteen substantive provisions that ‘supplements and develops’ the contents of Common Article 3.⁵⁷ It places more detailed obligations on states and ANSAs that are party to the conflict, extending the protection afforded to civilians, detainees and medical personnel, and adding important provisions on the conduct of hostilities, including by:

- strengthening the fundamental guarantees enjoyed by all persons not, or no longer, taking part in the hostilities, including care of children, such as their education;⁵⁸
- laying down rights for persons deprived of their liberty and providing judicial guarantees for those prosecuted in connection with an armed conflict;⁵⁹
- prohibiting attacks on the civilian population and individual civilians, objects indispensable to the survival of the civilian population, works and installations containing dangerous forces, and cultural objects and places of worship;⁶⁰
- regulating the forced movement of civilians;⁶¹ and
- protecting religious personnel and all medical personnel, units and means of transport, whether civilian or military.⁶²

That being said, the law applicable in non-international armed conflict has comparatively few rules, as is clear from a comparison of the limited number of provisions of Additional Protocol II with the extensive set of rules enshrined in the four Geneva Conventions and Additional Protocol I applicable to international armed conflicts.⁶³

Application of the Protocol to armed actors in Afghanistan

A thornier issue than the application of Additional Protocol II to the conflict in Afghanistan, however, is that of determining exactly to which parties to the conflict

57 *ICRC Commentary*, above note 38, p. 1350.

58 Additional Protocol II, Art. 4.

59 *Ibid.*, Arts. 5–6.

60 *Ibid.*, Arts. 13–16.

61 *Ibid.*, Art. 17.

62 *Ibid.*, Arts. 9–11. Article 19 of the Protocol also requires that its provisions be disseminated ‘as widely as possible’.

63 Unlike Additional Protocol I, the following rules are not included in Additional Protocol II: definition of civilians and fighters, prohibition to attack civilian objects, definition of civilian objects and military objectives, prohibition of indiscriminate attacks, definition of indiscriminate attacks, prohibition of disproportionate attack, definition of disproportionate attacks, obligation to take precautionary measures in attack, obligation to take precautionary measures against the effects of attack. Jean-Marie 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*, 25–26 October 2002, Vol. 27, Colloquium No. 123, Spring 2003, p. 131.

its provisions apply. It is clear that the Protocol applies to all of Afghanistan's armed and other security forces in their operations against the Taliban, but the extent to which ANSAs are also directly bound by the Protocol could be questioned. Indeed, contrary to Common Article 3, the Protocol does not expressly apply its provisions to any party (or 'Party') to the conflict. Nevertheless, the applicability of the Protocol to ANSAs should be inferred where they meet the criteria of 'organized armed groups' referred to in Article 1(1) of Additional Protocol II. This clearly includes the Taliban, based on our analysis.⁶⁴

The second question is whether Additional Protocol II governs the conflict between the Taliban and the multinational forces. A narrow reading of Article 1 would apply the Protocol's provisions only to the Afghan government, as the scope of the Protocol is limited to any conflict 'which takes place *in the territory* of a High Contracting Party between *its* armed forces and dissident armed forces or other organized armed groups'.⁶⁵ On the basis of this wording, the foreign forces are not those of the territorial state (Afghanistan) in which the conflict is taking place, unless it can be proved that the intervening states are agents of the state of Afghanistan. This would imply that the foreign forces are 'placed at the disposal' of the host state, but this does not appear to be the case in Afghanistan.⁶⁶

A broader interpretation – one that, in the view of the present authors, better fits with the language employed, as well as with basic logic – is that the Protocol applies to each and every party to any armed conflict that meets the criteria of Article 1(1).⁶⁷ Interpreting the material scope of application in line with the object and purpose of humanitarian law would brush away the purported territorial requirement referred to above. Thus, instead being read restrictively so as to apply only to the territorial state and its rebels, Article 1(1) should encompass the conduct of any contracting party to Additional Protocol II intervening in support of the territorial state by the mere fact of participating in a conflict that

64 Note the plural of dissident armed forces or other organized armed groups, suggesting that the Protocol could potentially be not merely applicable to the Taliban but also to other 'anti-government elements' that meet the three criteria discussed above.

65 Additional Protocol II, Art. 1(1) (emphasis added). See also D. Turns, above note 21, p. 239; and Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, p. 257.

66 Article 6 (Conduct of organs placed at the disposal of a state by another state), International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, in *Yearbook of the International Law Commission, 2001*, Vol. 2, Part Two. To establish attribution, the multinational forces would have to attain the status of state agents of Afghanistan for the purpose of international humanitarian law. One would have to assert that the foreign troops in Afghan territory are not only acting with the 'consent', 'under the authority of', and 'for the purpose of the receiving state', but more importantly 'under its exclusive direction and control', for them to fall under the responsibility regime that flows from Afghanistan's adherence to the Protocol. See Commentary on Article 6, p. 44.

67 Among commentators, only Jelena Pejic appears to imply that Additional Protocol II applies to all parties to the conflict, including foreign military forces, once the criteria and threshold of application for the Protocol have been met, but it is not certain that this is what she intended (and this position is not, as she suggests, generally accepted). Jelena Pejic, 'Status of armed conflicts', in E. Wilmshurst and S. Breau, above note 36, p. 92.

takes place in 'the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups'.

Typically, commentators simply dismiss the possibility of any foreign military forces being expressly bound by the provisions of the Protocol in their operations in Afghanistan, without any attempt to argue their case (and without any express exclusion being included in the text of the Protocol – its application is limited to the armed conflict that meets certain criteria and not merely the parties included in those criteria).⁶⁸ Let us assume for a moment that they are correct. In the absence of agreement on the content of customary law, what treaty law would apply in the event that Afghan forces are fighting side by side with foreign military personnel? Do the Afghan forces apply Additional Protocol II but not the foreign military? What are the Taliban supposed to do? Try to distinguish between Afghan forces and foreign military forces in their conduct of hostilities and adapt their methods of warfare accordingly? Are they relieved of their Additional Protocol II obligations when fighting foreign military forces?

At the very least, the forces of states that are also party to Additional Protocol II should be considered formally bound by its provisions in their military operations in Afghanistan, as they are engaged in the armed conflict that pits Afghanistan government forces against at least one armed group meeting the Protocol's criteria for application. Otherwise this could lead to interoperability concerns, as well as a possible lack of clarity in operations between the different parties to the conflict.

Only a few such states are not party to the Protocol, including the largest troop contributor, namely the US.⁶⁹ But there is even an argument that, since all foreign states are ostensibly present to support the Government of Afghanistan – at the very least as a matter of policy, if not law⁷⁰ – they should also expressly apply all of the provisions of the Protocol.⁷¹ Indeed, in the existing agreement between ISAF and the Afghan authorities it is stipulated that, 'ISAF Forces *will respect the laws and culture of Afghanistan*'.⁷² For its part, the US 'long has stated that it will apply the rules in its manuals whether the conflict is characterized as international or non-international, but this clearly is not intended to indicate that it is bound to do so as a matter of law in non-international conflicts'.⁷³

68 See, e.g., D. Turns, above note 21, p. 239.

69 States not party to Additional Protocol II and whose military personnel were operating in Afghanistan as of the end of 2010 were the following: Azerbaijan (90 troops), Malaysia (40), Singapore (36), Turkey (1,790), and the US (est. 97,000).

70 Regrettably, and in contrast to Additional Protocol I, Additional Protocol II does not explicitly require that states parties 'respect and ensure respect' its provisions, as stipulated in all four Geneva Conventions.

71 If not, this could be considered an incentive for a territorial state to invite foreign forces that do not bear the same international obligations to conduct operations in its territory.

72 Military Technical Agreement, Afghanistan–ISAF, 4 January 2002, Annex 1, Point 4.

73 John B. Bellinger III and William J. Haynes II, 'A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*', in *International Review of the Red Cross*, Vol. 89, No. 866, p. 447.

Customary international humanitarian law applicable to armed non-state actors

Whether or not Additional Protocol II is applicable to some or all of the parties to the conflict in Afghanistan, it is not contested that customary international humanitarian law is applicable to government and international armed forces, as well as to all armed non-state actors that meet the necessary criteria.⁷⁴ That being said, perhaps the main problem of customary international humanitarian law is that it does not sufficiently take into account the practice and *opinio juris* of ANSAs but only those of states for its formation.⁷⁵

The International Committee of the Red Cross (ICRC)'s study of customary international humanitarian law adduced a series of rules (141 in total) applicable to any armed conflict of a non-international character.⁷⁶ Somewhat controversially, these rules are said not to be dependent on any specific characterization of the conflict beyond the fact that it does indeed constitute a conflict of a non-international character.⁷⁷ Controversies surrounding certain findings of the ICRC study remain, especially as presented by certain states, including the US. In particular, uncertainties persist with regard to the universal recognition and implementation of all of these rules. Indeed, if states themselves are reluctant to develop customary rules and obligations with respect to their own behaviour, that 'makes it hard to argue that the rules have become customary and creating new binding obligations on the armed non-state actors'.⁷⁸

Despite these uncertainties, one can safely assert that, in addition to the customary law provisions of Common Article 3, the rules regulating the conduct of hostilities such as the principles of distinction and proportionality, and the prohibition of perfidy or precaution in attack are also part of customary international

74 See, e.g., ICTY, *Prosecutor v. Haradinaj*, above note 29, para. 60.

75 Article 38 of the Statute of the International Court of Justice. See also J. M. Henckaerts, above note 63; S. Sivakumaran, above note 38; M. Sassòli, above note 23, p. 40.

76 For a list of customary international law applicable in non-international armed conflicts, see the ICRC database available at: <http://www.icrc.org/customary-ihl/eng/docs/home> (last visited 18 January 2011). This section only addresses certain key rules. For a consolidated list of the ICRC's assessment of the rules applicable in armed conflicts of a non-international character, see, e.g., the applicable international law section of the Afghanistan profile on the Rule of Law in Armed Conflicts project database, available at: http://www.adh-geneva.ch/RULAC/applicable_international_law.php?id_state=1 (last visited 18 January 2011).

77 I.e., that it is not merely a situation 'of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'. Jelena Pejic has stated that 'the Study does not distinguish between the different thresholds of non-international armed conflict (under common Article 3 and Additional Protocol II), because it was found that in general States did not make this distinction in practice'. J. Pejic, above note 67, p. 88. The decision not to make any distinction between the different types of non-international armed conflict is regretted by one commentator who argues that it risks at least lessening, if not undermining, the protection afforded by human rights law. See, e.g., remarks by Françoise Hampson, in *Proceedings of the Bruges Colloquium: Armed Conflicts and Parties to Armed Conflicts under IHL: Confronting Legal Categories to Contemporary Realities*, 10th Bruges Colloquium, 22–23 October 2009, No. 40, Autumn 2010, p. 117, available at: <http://www.coleurop.be/file/content/publications/pdf/Collegium40.pdf> (last visited 18 January 2011).

78 A. Clapham, above note 44, p. 12.

law applicable to non-international armed conflicts and are then also applicable to the non-state armed groups operating in Afghanistan.⁷⁹

International human rights law

International humanitarian law, through treaty and customary rules, potentially affords a significant level of protection, especially to civilians. Nevertheless, as its ambit is limited to those acts with the necessary nexus to the armed conflict, IHL only partly addresses the harmful actions perpetrated by ANSAs against the civilian population.⁸⁰ In Afghanistan, these include interference by ANSAs with the right to freedom of expression, freedom of assembly, work, food, health, and education, and systematic gender-based violence.⁸¹ It is thus critical to assess if, how, and to what extent ANSAs operating in Afghanistan are bound to respect human rights.

Before embarking on an analysis of this question, it is necessary to reiterate that international human rights law also applies in situations of armed conflicts, whether international or of a non-international character. This has been formally confirmed on several occasions by the International Court of Justice.⁸² At the same

79 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law – Volume 1: Rules*, Cambridge University Press, Cambridge, 2005, Rules 1, 2, and 5–24; Antonio Cassese, *International Law*, 2nd edition, Oxford University Press, Oxford, 2005, pp. 415–420. The International Commission of Inquiry on Darfur gave a list of norms binding on rebels such as ‘(i) the distinction between combatants and civilians; ... (ii) the prohibition on deliberate attacks on civilians; ... (iv) the prohibition on attacks aimed at terrorizing civilians; ... (xiv) the prohibition of torture and any inhuman or cruel treatment or punishment; ... (xvii) the prohibition on ill-treatment of enemy combatants *hors de combat* and the obligation to treat captured enemy combatants humanely’. International Commission of Inquiry on Darfur, above note 30, para. 166.

80 The scope of IHL extends throughout the territory of Afghanistan where hostilities are taking place (*ratione loci*) and must involve a person protected by the instruments (*ratione personae*). ICTY, *Prosecutor v. Tadic*, above note 26, paras. 69–70; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment and Sentence, 21 May 1999, para. 189. International tribunals have, however, developed slightly different tests to determine the requisite nexus between alleged crimes and the conflict. According to the judgment in the Tadic case: ‘It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict’. ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 573. According to ICTY, *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23, Appeals Chamber Judgment, 12 June 2002, para. 57: ‘As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting. It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict’. According to ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000, para. 260: ‘[T]he alleged crimes ... must be closely related to the hostilities or committed in conjunction with the armed conflict’.

81 See Human Rights Watch, *The Ten-dollar Taliban and Women’s Rights*, 13 July 2010, available at: <http://www.hrw.org/node/91466> (last visited 18 January 2011). Afghanistan has adhered to, *inter alia*, the two 1966 International Covenants, the Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention against Torture, and the Convention on the Rights of the Child and its two optional protocols.

82 See the ICJ 1996 Nuclear Weapons Advisory Opinion, above note 26, as well as the Advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004, ICJ Reports 2004. The applicability of international human rights law in situations of armed conflict was

time, however, it should be noted that certain states involved in military operations in Afghanistan contest the fact that human rights law is applicable extraterritorially to the activities of their armed forces.⁸³

Does human rights law apply to armed non-state actors?

Most of the relevant case law and literature has focused on the ways in which *states* are bound by their human rights obligations while acting in situations of armed conflict.⁸⁴ The existence of human rights obligations of ANSAs in situations of non-international armed conflict remains highly controversial.

The main reason put forward to refute the applicability of human rights law to ANSAs is linked to the structure and alleged philosophy underlying international human rights law. Human rights treaties are characterized as setting norms meant to regulate the relationship between a state and the individuals living under its jurisdiction. Thus, such human rights treaties would be ‘neither intended, nor adequate, to govern armed conflict between the state and armed opposition groups’.⁸⁵

Admittedly, in general, human rights treaties do not explicitly refer to non-state actors.⁸⁶ Thus, because of the wording and scope of application of those

also confirmed by the ICJ in the *Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda)*, Judgment of 9 December 2005, ICJ Reports 2005.

83 According to Stephen Pomper, attorney-adviser of the US Department of State (although writing in his private capacity), ‘despite important legal and policy changes during this period [2001–2008] ... the United States maintained its legal position with respect to the non-application of its human rights obligations to extraterritorial armed conflicts’. Stephen Pomper, ‘Human rights obligations, armed conflict and Afghanistan: looking back before looking ahead’, in M. N. Schmitt, above note 22, p. 526. For another view on that issue, see Françoise Hampson, ‘Is human rights law of any relevance to military operations in Afghanistan?’, in *ibid.*, pp. 491 *et seq.* See also UK House of Lords, *Al-Skeini and others (Respondents) v. Secretary of State for Defence (Appellant)*, [2007] UKHL 26, available at: <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.htm>; and UK Supreme Court, *R (on the application of Smith) (FC) (Respondent) v. Secretary of State for Defence (Appellant) and another*, [2010] UKSC 29, available at: <http://www.bailii.org/uk/cases/UKSC/2010/29.html> (both last visited 19 January 2011).

84 See, among others, Noam Lubell, ‘Challenges in applying human rights law to armed conflict’, in *International Review of the Red Cross*, Vol. 87, No. 860, 2005, pp. 737–754; Cordula Droege, ‘Elective affinities? Human rights and humanitarian law’, in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 501–548; Alexander Orakhelashvili, ‘The interaction between human rights and humanitarian law: fragmentation, conflict, parallelism, or convergence?’, in *European Journal of International Law*, Vol. 19, No. 1, 2008, pp. 161–182.

85 L. Zegveld, above note 27, p. 54.

86 For some authors, though, certain provisions of human rights treaties, such as Article 5(1) and Article 20 of the International Covenant of Civil and Political Rights, must be interpreted as also being directly applicable to the behaviour of non-state actors. Article 5 (1) reads: ‘1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant’; and Article 20 stipulates that: ‘1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’. See Theodor Meron, *Human Rights in Internal Strife: Their International Protection*, Grotius, Cambridge, 1987, p. 34; *contra* Nigel Rodley, ‘Can armed opposition groups violate human rights?’,

treaties, judicial or quasi-judicial organs – such as the European Court of Human Rights or UN human rights treaty monitoring bodies – have exercised jurisdiction only with regard to states' behaviour.⁸⁷

There are, however, two human rights treaties that specifically mention armed groups. The first notable one is Article 4 of the *Optional Protocol to the Convention on the Rights of the Child* on the involvement of children in armed conflict, to which Afghanistan is a party.⁸⁸ Looking at the wording of that article, it appears that the direct legal obligation is imposed, through paragraph 2, on *states* parties and not on armed groups, to ensure that children under 18 are not recruited by armed groups. That argument should, though, be considered in the light of the recent practice of the UN Security Council in relation to the situations of children in armed conflict.

In 2005, the Security Council established a mechanism to monitor and report on six 'grave violations' committed by states and armed groups on children, one of them being 'recruiting and using child soldiers'.⁸⁹ One of the consequences for ANSAs of committing these violations is to be listed in an Annex of the Report of the Secretary-General on children and armed conflict, which can lead to sanctions being imposed against such groups.⁹⁰ In that context, the age limit of recruitment of children is set at 18 years old, as in the *Optional Protocol to the Convention of the Rights of the Child*, and not 15 years old, which is the standard

in Kathleen E. Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-first Century*, Martinus Nijhoff, The Hague, 1993, pp. 307–308.

87 However, human rights violations committed by individuals and other non-state actors, such as companies, have been addressed in the case law of different human rights courts, as well as in domestic litigation. For example, the concept of 'Drittwirkung', developed by German courts, allows an individual plaintiff to sue another individual on the basis of a national bill of rights or constitutional provisions. Similarly, in the context of the European Convention of Human Rights, the court has on several occasions held the government responsible for failing to prevent, through judicial or law enforcement methods, the violation of a person's human rights by another person or a private, non-state actor (see, for example, a case relating to marital rape, *SW v. United Kingdom*, Judgment of 22 November 2005). Through the *Alien Tort Claims Act of 1789*, US national courts have established that, in some cases, private companies can be held directly accountable for human rights violations. On these issues, see generally Andrew Clapham, *Human Rights Obligations of Non-state Actors*, Oxford University Press, Oxford, 2006; and Andrew Clapham, 'The "Drittwirkung" of the Convention', in Ronald St. J. Macdonald, Franz Matscher, and Herbert Petzold (eds), *The European System for the Protection of Human Rights*, Martinus Nijhoff, Dordrecht, 1993, pp. 163–206.

88 Which states: '1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years. 2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices. 3. The application of the present article shall not affect the legal status of any party to an armed conflict'.

89 The six violations are: 'killing and maiming of children, recruiting and using child soldiers, attacks against schools or hospitals, rape or other grave sexual violence against children, abduction of children, and denial of humanitarian access for children'. See UN Security Council Resolution 1612 of 26 July 2005.

90 The Council has nevertheless been cautious, 'stressing that the present resolution does not seek to make any legal determination as to whether situations which are referred to in the Secretary-General's report are or are not armed conflicts within the context of the Geneva Conventions and the Additional Protocols thereto, nor does it prejudge the legal status of the non-State parties involved in these situations'. Preamble, UN Security Council Resolution 1612 (2005).

required in Additional Protocols I and II.⁹¹ The application of this higher age is confirmed in practice if we look specifically at Afghanistan. The Special Representative for Children in Armed Conflict has noted that the Taliban ‘have been listed in the 8th report of the Secretary-General on children and armed conflict for the recruitment and use of children under the age of 18 years’.⁹² Although the Security Council is not applying the Optional Protocol as such, practice at international level suggests that armed groups are widely considered to be bound by this norm.⁹³

Another treaty relevant to the overall discussion is the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* of 2009 (The Kampala Convention), which goes further than the aforementioned Optional Protocol. Article 2 explains that one of the objectives of the treaty is also to ‘[p]rovide for the respective obligations, responsibilities and roles of armed groups, non-state actors and other relevant actors, including civil society organizations, with respect to the prevention of internal displacement and protection of, and assistance to, internally displaced persons’. Article 7 goes on to enumerate a list of obligations that could be imposed on those actors.⁹⁴ Even while it stipulates that ‘the protection and assistance to internally displaced persons under this Article shall be governed by international law and in particular international humanitarian law’, it also includes human rights obligations (such as ‘denying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter’). One should be cautious, however, before drawing sweeping conclusions about the impact of Article 7 on the issue of the human rights obligations of non-state armed groups. First, the second paragraph of Article 7 recalls the importance of state responsibility in this context⁹⁵ and,

91 Additional Protocol I, Art. 77(2); and Additional Protocol II, Art. 4(3)(c).

92 Mission Report of the Visit of the Special Representative for Children in Armed Conflict to Afghanistan, 20–26 February 2010, available at: http://www.un.org/children/conflict/_documents/countryvisits/afghanistan.pdf (last visited 29 January 2011).

93 However, as there are different standards applied to armed non-state actors and states (who can lawfully recruit under 18 years of age), it is even more difficult to justify – and convince – ANSAs that this provision directly applies to them.

94 Article 7 reads: ‘Members of armed groups shall be prohibited from: a. Carrying out arbitrary displacement; b. Hampering the provision of protection and assistance to internally displaced persons under any circumstances; c. Denying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter; and separating members of the same family; d. Restricting the freedom of movement of internally displaced persons within and outside their areas of residence; e. Recruiting children or requiring or permitting them to take part in hostilities under any circumstances; f. Forcibly recruiting persons, kidnapping, abduction or hostage taking, engaging in sexual slavery and trafficking in persons especially women and children; g. Impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons; h. Attacking or otherwise harming humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons and shall not destroy, confiscate or divert such materials; and i. Violating the civilian and humanitarian character of the places where internally displaced persons are sheltered and shall not infiltrate such places’.

95 Article 7(2) reads: ‘Nothing in this Convention 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’.

second, it covers the obligations of individual *members* of armed groups and not those of the group itself.

Application of human rights law to armed non-state actors in Afghanistan

It seems to us that the fact that these two human rights treaties mention armed groups is a reflection of the nature of contemporary armed conflicts. Conflicts are essentially non-international in nature, opposing a multiplicity of different actors in hostilities that may last for years, as in the case of Afghanistan. This evolution demands that human rights law and not just humanitarian law be applicable to regulate the situation of all actors concerned. Indeed international humanitarian law seems unable to cover all the violations that are committed by the armed groups against the civilian population but that do not relate to the armed conflict. Neither Common Article 3 nor Additional Protocol II provides an answer to violations of these norms committed by armed groups, which leaves us with human rights. Of course, in that case, the Afghan state has the primary obligation to comply with its positive duty to exercise due diligence to protect the population from harmful interference by ANSAs, but in many instances that is not practically feasible, especially in areas under the control of the Taliban.

The contemporary practice of international organizations has been rather inconsistent in dealing with ANSAs in terms of human rights law, since it mostly denounces and condemns harmful acts or abuses committed by these actors in Afghanistan without considering them *per se* as human rights violations. For instance the UN Security Council has expressed 'its concern over the harmful consequences of the insurgency on the capacity of the Afghan Government to provide security and basic services to the Afghan people, and to secure the full enjoyment of their human rights and fundamental freedoms' and has called 'for full respect for human rights and international humanitarian law throughout Afghanistan'.⁹⁶

The Council has been more far-reaching in its statement when it '*call[ed] upon all parties to uphold international humanitarian and human rights law and to ensure the protection of civilian life*'.⁹⁷ In his March 2010 report on the situation in Afghanistan, under the section on human rights, the UN Secretary-General further noted that '*closely linked to impunity and the abuse of power are attacks on freedom of expression, carried out by both State and non-State actors*'.⁹⁸

96 See, e.g., UN Security Resolutions S/RES/1662 (2006); S/RES/1776 (2007); and S/RES/1890 (2009).

97 UN Security Resolution S/RES/1746 (2007), para. 25.

98 Report of the Secretary-General, *The Situation in Afghanistan and its Implication for International Peace and Security*, 10 March 2010, UN doc. A/64/705-S/2010/127, para. 38.

The UN High Commissioner for Human Rights also observed that ‘the violence, intimidation and harassment to which journalists and media workers continued to be subjected in 2009, at the behest of the Government or at the hands of the armed opposition, impacted on freedom of expression in Afghanistan’.⁹⁹

UNAMA denounced the alarming issue of extrajudicial killing of children and the impact of the conflict on access to basic services, such as health and education.¹⁰⁰ Finally, a more direct reference to the human rights obligations of ANSAs can be found in a recent resolution issued by the UN Human Rights Council. The resolution was meant to address widespread attacks on schools in Afghanistan allegedly committed by the Taliban during the first months of 2010. While it re-affirms that ‘Governments have the primary responsibility to protect their citizens’, it nonetheless ‘urges *all parties* in Afghanistan to take appropriate measures to protect children and uphold their rights’.¹⁰¹

The implications of the references made by these different international organizations about human rights violations committed by ANSAs could simply be interpreted as an appeal or an exhortation to respect human rights as *standards* or *principles*, rather than pointing at the violations of binding legal obligations on such actors.¹⁰² Whether or not these references reflect standards rather than strict binding legal obligations merits further debate. Nevertheless, they clearly demonstrate a need expressed by the international community to hold actors accountable for the violations committed against the civilian population, whatever their source. As underlined by one author:

the most promising theoretical basis for human rights obligations for non-state actors is first to remind ourselves that the foundational basis of human rights is best explained as rights which belong to the individual in recognition of each person’s inherent dignity. The implication is that these natural rights should be respected by everyone and every entity.¹⁰³

99 Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Afghanistan and on the achievements of technical assistance in the field of human rights, 11 January 2010, A/HRC/13/62, para. 55.

100 UNAMA, above note 12, p. 11.

101 Human Rights Council, ‘Addressing attacks on school children in Afghanistan’, UN doc. A/HCR/14/15 (emphasis added). From another angle, it is also interesting to note that this resolution was co-sponsored by the UK and the US, two states that have been traditionally reluctant to accept the applicability of human rights in situations of armed conflict.

102 As Zegveld puts it, the ‘qualification of particular acts of armed opposition groups as human rights violations must be distinguished from the denunciation of these acts as abuses of human rights. International bodies have often condemned acts of armed opposition groups as harming human rights without considering their acts to be breaches of human rights law’. L. Zegveld, above note 27, p. 39.

103 See A. Clapham, above note 44; and, more generally, Andrew Clapham, ‘Human rights obligations of non-state actors in conflict situations’, in *International Review of the Red Cross*, Vol. 88, No. 863, September 2006, pp. 491–523.

Human rights obligations of armed groups exercising de facto authority over a population

Even if it is difficult to establish direct legal human rights obligations of armed groups in general, there seems to be a broader agreement that armed groups could be bound when they exercise element of governmental functions and have de facto authority over a population. This will normally be the case when an armed group controls a certain portion of the territory. Indeed, the need to regulate the relationship between those who govern and those who are governed, which characterizes the *raison d'être* of human rights law, would be reproduced and thus would justify the application of that body of law.¹⁰⁴

Imposing human rights obligations on non-state armed groups that exercise de facto control over a population has the advantage of clarifying the relationship between human rights and humanitarian law in armed conflict situations, in particular concerning the 'fair trial' requirement of Common Article 3.¹⁰⁵ Many ANSAs, including the Taliban, have established some form of judicial system or even have courts in the territory that they control.¹⁰⁶ It is therefore necessary to determine, based on human rights law, what would constitute fair trial procedures in the case of courts or judicial authorities being set up by ANSAs, given that Common Article 3 is not sufficiently explicit on this issue.¹⁰⁷

104 As Rodley emphasizes, 'human rights are those rules that mediate the relationship between, on the one hand, governments or other entities exercising effective power analogous to that of governments and, on the other, those who are subject to that power'. N. Rodley, above note 86, p. 300; see also L. Zegveld, above note 27, p. 149.

105 Common Article 3 refers in this regard to a prohibition on '(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'. As noted by Marco Sassòli and Laura Olson: 'Another factor in non-international armed conflicts which renders our discussion particularly complex (and is very neglected in scholarly writings and even in the ICRC study) is that the humanitarian law in non-international armed conflict is, as Article 3 common to the Geneva Conventions points out, equally binding for "each party to the conflict" – that is, for the non-state armed group just as much as the government side. This raises the question whether human rights are equally addressed to armed groups or whether, by virtue of the operation of the *lex specialis* principle, the answer to our questions is not the same for the government and for its opponent'. Marco Sassòli and Laura 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 *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 602–603.

106 In the case of the Taliban, 'courts' seem to be instituted to examine everyday life problems and not those relating to detention of enemy combatants, which is the situation contemplated by Common Article 3. On the Taliban courts, see 'Afghanistan: Taliban justice "fairer" than state's', in *Human Rights Tribune*, 20 August 2010, available at: <http://www.infosud.org/spip.php?article8710> (last visited 18 January 2011); Rod Norland, 'In bold display, Taliban order stoning deaths', in *New York Times*, 16 August 2010, available at: <http://www.nytimes.com/2010/08/17/world/asia/17stoning.html> (last visited 18 January 2011); Soraya Sarhaddi Nelson, 'Taliban courts filling justice vacuum in Afghanistan', in *NPR*, December 2008, available at: <http://www.npr.org/templates/story/story.php?storyId=98261034> (last visited 18 January 2011).

107 See, however, Jonathan Somer for a more cautious view on the application of human rights provisions on fair trial to armed opposition courts: Jonathan Somer, 'Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict', in *International Review of the Red Cross*, Vol. 89, No. 867, September 2007, pp. 655–690. See also Sandesh Sivakumaran, 'Courts of armed opposition

In Afghanistan, armed groups and warlords actually control villages or broader parts of the territory. As noted by a study on armed groups operating in the country:

[t]here are two different forms of warlords—strongmen in Afghanistan, largely categorized in terms of the scale of their control and their position in terms of traditional structures. National and regional warlords control provinces and parties – such as Dostum and Ismail Khan. However, the vast majority of strongmen operate at the local level, within provinces or districts or between a collection of villages.¹⁰⁸

Moreover, the Taliban call themselves the ‘Islamic Emirate of Afghanistan’, thus indicating that they claim or at least aspire to represent more than merely an armed group. In that case, the application of human rights law to the Taliban appears to be an appealing and logical theory, as it is necessary to ensure that persons living under their control be protected by international law. This would be even more true were the Afghan state to have no possibility of preventing or punishing the human rights violations committed by such an armed group. Ensuring human rights accountability of armed groups that exercise control over a population also seems to be congruent with the principle stated in Article 10 of the Draft Articles on State Responsibility, which declares that ‘the conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law’.¹⁰⁹ Following the approach of the International Law Commission, if the Taliban were ultimately to replace – or become part of¹¹⁰ – the Afghan government, the state that they represented would be responsible under international law for all the violations of humanitarian law – and arguably of human rights law – that the Taliban had committed during the armed conflict. One should note, however, that this retroactive attribution to the state of the conduct of an armed group is problematic. First, such responsibility cannot be implemented during the armed conflict and therefore it has limited

groups: fair trials or summary justice’, in *Journal of International Criminal Justice*, Vol. 7, Issue 3, 2009, pp. 489–513.

108 See Michael Bhatia, ‘Armed groups in Afghanistan’, in Michael Bathia and Mark Sedra (eds), *Afghanistan, Arms and Conflict: Armed Groups, Disarmament and Security in a Post-war Society*, Routledge, London and New York, 2008, p. 84.

109 See Draft Articles on Responsibility of States for Internationally Wrongful Acts, above note 66. See also Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 37.

110 How this alternative might come about is not obvious, and would depend on the role played by the insurrectional movement in the new government. In this regard, the Commentary to Article 10 underlines that: ‘The State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed government. Thus, the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming’. Draft Articles on Responsibility of States for Internationally Wrongful Acts, above note 66, Commentary to Article 10, para. 7. See also Gérard Cahin, ‘Attribution of conduct to the state: insurrectional movements’, in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility*, Oxford University Press, Oxford, 2010, pp. 247–251.

practical value when it is most needed.¹¹¹ Second – and more generally – it is said to be a rather peculiar approach, ‘because it makes a State responsible for the act of an actor over whom it did not have any influence at the time of the act’.¹¹²

Apart from this particular issue of state responsibility, other problems arise with regard to the theory that purports to apply human rights law to the groups exercising de facto authority over a population. First of all, there is no clear legal source that indicates what level of ‘authority’ or control over a population is required to impose human rights obligations on ANSAs. In Afghanistan, the situation of the Taliban before and in 2001 – that is, at the point when they actually ran almost the entire country and represented the de facto government – surely fulfilled the criterion of de facto authority over a population.¹¹³ As of 2011, the Taliban control a significant part of the territory in Afghanistan, but it remains unclear whether a sufficient level of control has been reached as to hold them accountable under human rights law. One could further ask what human rights norms would be applicable in that case. The hypothesis would be that almost all rights, linked perhaps to the capacity of the group to implement those rights (akin to one of the requirements for the application of Additional Protocol II, namely the capacity to implement that Protocol), could be applicable. To allow a wide scope of application of human rights norms to non-state actors exercising de facto authority over a population seems justifiable if we accept that the people living under the control of an armed group must be protected as much as possible.

Further reflection is demanded to determine when the requisite threshold of authority has been met, who decides what that threshold is, and what rights might then be applicable. Interpretation by analogy of the criteria of ‘control’ developed by the Human Rights Committee with regard to the scope of extra-territorial obligations of states parties to the International Covenant on Civil and Political Rights could be a way forward.¹¹⁴ Furthermore, the tripartite typology of obligations to *respect*, *protect*, and *fulfil* developed by UN human rights treaty bodies for state parties could be used as a valuable conceptual framework for the analysis of the extent of the human rights obligations of ANSAs.¹¹⁵ The content of

111 Gérard Cahin, ‘The responsibility of other entities: armed bands and criminal groups’, in James Crawford *et al.*, above note 110, p. 334. For an opposing view, see Jean D’Aspremont, ‘Rebellion and state responsibility: wrongdoing by democratically elected insurgents’, in *International and Comparative Law Quarterly*, Vol. 58, April 2009, p. 427.

112 M. Sassòli, above note 34, p. 8.

113 See Rüdiger Wolfrum and Christian E. Philipp, ‘The status of the Taliban: their obligations and rights under international law’, in *Max Planck Yearbook of United Nations Law*, Vol. 6, 2002, pp. 559–601.

114 With regard to the scope of obligations of states parties, the Committee has underlined that states parties must respect and ensure the rights protected by the Convention ‘to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party’. See Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 29 March 2004, CCPR/C/21/Rev.1/Add. 13, para. 10.

115 This typology is widely used by treaty bodies in assessing the level of obligations imposed on states parties. Reference to this framework is made in regard to economic and social rights as well as civil and political rights. See, Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy*, Princeton University Press, Princeton, 1980. See also Asbjørn Eide, *The Right to Adequate Food as a Human Right*, UN/Commission on Human Rights, Special Rapporteur, UN doc. C/CN.4/Sub.2/1987/23, 7 July 1987.

the obligation would be determined by the level of control of the armed group. For example, in determining an ANSA's scope of obligations it could be argued that, as a minimum, the armed group should refrain from interfering directly or indirectly with the enjoyment of rights by every individual under its control (obligation to respect). Thus, the Taliban, depending on their level of control of territory, would be obliged to respect the right to education of children and not discriminate against women. The scope of obligations would be proportionate to the ANSA's actual level of control, thus not excluding the obligation to ensure or secure human rights, although it might be questionable as to whether such an entity would have any responsibility to deliver education or enact legislation on gender equality.

Finally, a more general problem concerning the argument linking human rights obligations to a certain level of 'control' or 'authority' over a population is that it increases the perception of legitimacy of the armed group. As noted by Clapham,

it is well-known that neither governments nor international organizations will readily admit that rebels are operating in ways which are akin to governments. Linking rebel obligations to their government-like status is likely to result in there being few situations where human rights obligations can be unequivocally applied to insurgents.¹¹⁶

Here, one way of overcoming the issue of legitimacy is to recall that having human rights obligations is independent of political and legal recognition.¹¹⁷

Armed non-state actors are bound by Core Human Rights Obligations

There is another possible argument on how to hold ANSAs accountable for violations of international human rights law. In a recent study, the International Law Association reached the conclusion that even though 'the consensus appears to be that currently NSAs [non-state actors] do *not* incur direct human rights obligations enforceable under international law', ANSAs would still be bound by *jus cogens* norms¹¹⁸ and insurgents should comply with international humanitarian

Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999): on the right to adequate food (Art. 11 of the Covenant); General Comment No. 13 (1999): on the right to education (Art. 13 of the Covenant); General Comment No. 15 (2002): on the right to water (Arts. 11 and 12 of the Covenant). Nowak interprets the words 'to ensure' in Article 2(1) of the ICCPR as incorporating the obligations to protect and to fulfil. Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition, Engel, Kehl am Rhein, 2005, pp. 37–41. See also Human Rights Committee, above note 114.

116 A. Clapham, 'Human rights obligations of non-state actors in conflict situations', above note 103, p. 502.

117 See, in that sense, Article 7(1) of the Kampala Convention, which states that: 'The provisions of this Article shall not, in any way whatsoever, be construed as affording legal status or legitimizing or recognizing armed groups and are without prejudice to the individual criminal responsibility of the members of such groups under domestic or international criminal law.'

118 Norms of *jus cogens* – the peremptory norms of international law – are defined by Article 53 of the 1969 Vienna Convention on the Law of Treaties as norms 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. The ILC

law.¹¹⁹ No mention of a degree of control of territory or a level of de facto authority over a population is included in the reference to *jus cogens*, which could mean that every ANSA would be bound by core human rights norms that are part of *jus cogens* norms. That appears to be the principle lying behind the practice of the Security Council with regard to children in situations of armed conflict. The Security Council and the Special Representative for Children in Armed Conflict do not distinguish as to the type or structure of an armed group when it comes to its listing in the Annex of the Secretary-General's Reports on Children in Armed Conflict. All that is required for its inclusion is that the group has committed one of the six grave violations mentioned in Security Council Resolution 1612.

Which human rights norms are part of *jus cogens* has not been settled. In its commentary on the draft articles on State Responsibility, the International Law Commission has identified as peremptory norms of international law the 'prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination'.¹²⁰ This list is, however, exemplary rather than definitive.¹²¹ The UN Human Rights Committee has identified the following as acts that would violate *jus cogens* norms: arbitrary deprivations of life, torture and inhuman or degrading treatment, taking hostages, imposing collective punishments, arbitrary deprivations of liberty, and deviating from fundamental principles of fair trial, including the presumption of innocence.¹²²

Holding non-state armed groups accountable for the violation of core human rights norms also seems to be in line with the development of international criminal law, which assesses the criminal responsibility of individual members of armed groups when international crimes not necessarily committed in relation to an armed conflict (and thus outside the ambit of international humanitarian law) have been perpetrated. This is the case regarding the crime of genocide and crimes against humanity, situations in which human rights violations are criminalized.¹²³

In conclusion, there is still room for discussion as to how and to what extent ANSAs are bound by human rights law, but one can already note a clear and growing tendency to hold those groups accountable for human rights violations

Draft Articles foresee superior means of enforcement for *jus cogens* norms, by including special regulation for both the responsible state and for all other states in the case of violations. See Christian J. Tams, 'Do serious breaches give rise to any specific obligations of the responsible state?', in *European Journal of International Law*, Vol. 13, 2002, pp. 1161–1180.

119 International Law Association, The Hague Conference 2010, *Non State Actors*, First Report of the Committee (Non-state actors in international law: aims, approach and scope of project and legal issues), para. 3.2 (emphasis original).

120 Commentary on Article 26, in *Yearbook of the International Law Commission*, above note 66, p. 85.

121 A. Clapham, *Human Rights Obligations of Non-state Actors*, above note 87, p. 88.

122 Human Rights Committee, 'General Comment No. 29: States of Emergency (Article 4)', UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, pp. 4–5.

123 See Rome Statute, Arts. 6 and 7; Jan Arno Hessbrügge, 'Human rights violations arising from conduct of non-state actors', in *Buffalo Human Rights Law Review*, Vol. 21, No. 11, 2005, pp. 41–44. See also Philippe Currat, *Les crimes contre l'humanité dans le statut de la Cour pénale internationale*, Bruylant/L.G.D.J./Schulthess, Brussels, 2006.

committed in the course of armed conflicts despite legal uncertainties. This can be explained for different reasons. First, there is a need to protect the civilian population against the threats posed by ANSAs in areas beyond the control of the state. Second, most contemporary armed conflicts last for years, even decades. International humanitarian law was not meant to regulate the everyday life of people living in areas under the control of ANSAs over such an extended period of time. In Afghanistan, civilians living in Taliban-controlled areas strive to lead a 'normal' life despite conditions of extreme violence: people do business; journalists try to report; women go to work. The behaviour of the Taliban is certainly a threat to the human rights of the population, especially of women, children, or journalists, as denounced by the numerous resolutions issued by international organizations as well as reported by human rights non-governmental organizations. The Afghan government seems unable to ensure that these rights are protected, with the result that impunity appears to be the rule rather than the exception across the country.¹²⁴ However, when it comes to the protection of core human rights and dignity, it does not matter in the eyes of the victims whether the violation has been committed by the state or by a non-state actor. Even though all the legal answers have yet to be elaborated, holding ANSAs directly accountable for violations of international human rights law is certainly the direction in which the international community is heading, and rightly so.

Implementation of applicable norms in Afghanistan by armed non-state actors

There is a huge and pressing challenge to effectively implement applicable norms by the various ANSAs in Afghanistan.¹²⁵ Indeed, in its 2010 mid-year report on the protection of civilians in armed conflict, UNAMA stated that:

The human cost of the armed conflict in Afghanistan is escalating in 2010. ... nine years into the conflict, *measures to protect Afghan civilians*

¹²⁴ In its mid-year report of 2010, the UNAMA noted that: 'Anti-Government Elements operate with impunity in Afghanistan. UNAMA HR observed that while the Taliban have made public commitments to avoid civilian casualties, including those found in several provisions of the 2009 Taliban Code of Conduct, no information exists on whether and how Taliban commanders have ensured effective implementation of the provision on the ground ... The Afghan Government often fails in its duty to investigate, arrest and punish perpetrators, including any member of an anti-government element, for violations under domestic criminal laws, international humanitarian law or applicable human rights law'. UNAMA, above note 12, p. 11.

¹²⁵ For proposals to improve compliance by ANSAs, see the preliminary findings of the ongoing research project led by the Geneva Academy into ways to improve the protection of civilians in armed conflict, especially by ANSAs: 'Armed non-state actors and international norms: towards a better protection of civilians in armed conflicts: summary of initial research and discussions during an expert workshop in Geneva in March 2010', September 2010, available at: <http://www.adh-geneva.ch/news/armed-non-state-actors-international-norms> (last visited 18 January 2011). See also Marco Sassòli, 'Possible legal mechanisms to improve compliance by armed groups with international humanitarian law and international human rights law', paper delivered at the Armed Groups Conference, Vancouver, 13–15 November 2003.

*effectively and to minimize the impact of the conflict on basic human rights are more urgent than ever.*¹²⁶

Given these tragic realities, in the remainder of this article we propose a set of general and specific measures that we believe would contribute to improving respect for applicable norms by ANSAs. These measures are legal, political, and programmatic in nature and concern a wide range of actors including, but going beyond, the ANSAs themselves.

First, it is clear that international humanitarian law offers a relatively broad framework of protection to those caught up in armed conflict through both customary and treaty law. Uncertainties remain, however, as to precisely which rules of international humanitarian law apply in an armed conflict not of an international character, both in general and specifically with respect to the situation and actors in Afghanistan. This is not conducive to effective protection efforts and demands clarification.

For instance, as we have seen, the extent to which Additional Protocol II is applicable to the various parties to the conflict in Afghanistan is far from settled. As a first major step, the Government of Afghanistan and all foreign forces belonging to ISAF should commit publicly to respecting all of the provisions of the Protocol – and then call on the Taliban to do the same.¹²⁷ This could be combined with other applicable customary rules into ‘special agreements’¹²⁸ between the Government of Afghanistan, ISAF, and the Taliban, which could then be subject to internal and external monitoring. In August 2010, in what appears to have been a response to the UN’s latest report on civilians in armed conflict, the Taliban proposed, through a statement posted on its website, to set up a joint commission to investigate allegations of civilians being killed and wounded in the conflict in Afghanistan. The statement called for the establishment of a body including members from the Organisation of the Islamic Conference, UN human rights investigators, NATO, and the Taliban.¹²⁹ A positive response to this proposal would either advance the cause of promotion of civilian protection or call the Taliban’s bluff, depending on the reader’s view of the seriousness of their proposal.

126 UNAMA, above note 12, p. i (emphasis added).

127 Preferably without the crude propaganda-like language that all too often characterizes entries on ISAF’s website.

128 Article 3(3) of the Geneva Conventions.

129 ‘The stated committee should [be] given a free hand to survey the affected areas as well as people in order to collect the precise information and the facts and figures and disseminate its findings worldwide’. Cited in Jon Boone, ‘Taliban call for joint inquiry into civilian Afghan deaths considered: UN and Nato cautiously consider proposal, which follows reports of high levels of civilian deaths caused by insurgents’, in *The Guardian*, 16 August 2010, available at: <http://www.guardian.co.uk/world/2010/aug/16/taliban-afghan-civilian-deaths-nato-un> (last visited 18 January 2011). This echoes the common provisions of the Geneva Conventions whereby a party to an international armed conflict is entitled to request an inquiry into any alleged violation of the Conventions (GC I, Art. 52; GC II, Art. 53; GC III, Art. 132; and GC IV, Art. 149).

Second, lines of communication with the Taliban and other ANSAs that are currently focusing on a possible route to a peace agreement¹³⁰ need to encompass civilian protection and other humanitarian concerns.¹³¹ This should include, among other things, a detailed discussion – and where possible agreement – on who is a civilian and thus how the Protocol and other applicable law should be implemented by the parties to the conflict.¹³²

Third, with regard to specific means and methods of warfare, there are ways in which the Taliban might be seen to respect international humanitarian law governing the conduct of hostilities. UNAMA has called for all IED (improvised explosive device) attacks, a weapon of choice of the Taliban, to cease entirely. According to UNAMA, since ‘AGEs [Anti-Government Elements] predominantly targeted military objectives using ... IEDs’,¹³³ in such cases the attacks have respected the principle of distinction (though they might still be said to violate the rules on proportionality in attack).¹³⁴ The tactic has seemingly been extremely

130 Efforts to bring the long-standing conflict to an end through negotiation have increased in recent months. In March 2010, the Afghan President, Hamid Karzai, met, for the first time, a delegation from the country's second biggest militant group, Gulbuddin Hekmatyar's Hizb-I-Islami, to discuss the possibility of a peace agreement. BBC, ‘Afghan Hezb-e-Islami militants hold peace talks in Kabul’, 22 March 2010, available at: news.bbc.co.uk/2/hi/8579380.stm (last visited 18 January 2011). In November 2010, the group reportedly told the BBC that they would agree to a ceasefire if the US forces remained in their bases. Syed Shoaib Hasan, ‘Afghan rebel group offers truce terms’, in *BBC News online*, 18 November 2010, available at: <http://www.bbc.co.uk/news/world-south-asia-11773520> (last visited 18 January 2011). At a peace conference in Kabul in June 2010, the President announced the creation of a High Peace Council to start a dialogue with the Taliban. BBC, ‘Afghan Peace Council begins bid for talks with Taliban’, 7 October 2010, available at: <http://www.bbc.co.uk/news/world-south-asia-11494247> (last visited 18 January 2011). On 11 October 2010, the Afghan President confirmed that ‘unofficial contacts’ with the Taliban had been taking place ‘for quite some time’ to end the insurgency. See, e.g., BBC, ‘Afghan President Karzai confirms Taliban “contacts”’, 11 October 2010, available at: <http://www.bbc.co.uk/news/world-south-asia-11511866> (last visited 18 January 2011); and BBC, ‘Nato’s “safe passage” for Taliban’, 15 October 2010, available at: <http://www.bbc.co.uk/news/world-south-asia-11553388> (last visited 18 January 2011).

131 In response, Amnesty International warned that ‘Plans for a peace deal with the Taleban in Afghanistan could seriously jeopardize the rights of the Afghan people, in particular Afghan women, unless concrete human rights benchmarks are incorporated’. Amnesty International, ‘Afghanistan conference raises fears of sacrificing rights for short-term peace’, 19 July 2010, available at: <http://www.amnesty.org/en/news-and-updates/afghanistan-conference-raises-fears-sacrificing-rights-short-term-peace-2010-07-19> (last visited 18 January 2011).

132 In its August 2010 report, the UN called on the Taliban and other ‘Anti-Government Armed Groups’ to ‘withdraw all orders and statements calling for the killing of civilians, including civilian Government officials; adopt and enforce codes of conduct or other directives that prohibit any and all attacks on civilians; accept that civilians’ cooperating with the Afghan Government and International Military Forces are protected against any attack and immediately cease targeting those civilians’. UNAMA, above note 12, p. v. It appears that this call has so far been rejected, given that apparently after the report was published the Taliban issued an updated ‘Islamic Emirate of Afghanistan Rules for Mujahideen’ that included a determination that anyone working for coalition forces or the Afghan government was a legitimate target. CBC News, ‘Taliban issue new code of conduct’, 3 August 2010, available at: <http://www.cbc.ca/world/story/2010/08/03/conduct-code-taliban.html> (last visited 18 January 2011).

133 UNAMA, above note 12, p. 1.

134 It appears that, often (but by no means always), IEDs are command detonated and that attacks are co-ordinated against ISAF troops. See, e.g., Landmine and Cluster Munition Monitor, ‘Afghanistan country profile, mine ban policy: use’, last updated 4 October 2010, available at: http://www.the-monitor.org/index.php/cp/display/region_profiles/theme/476 (last visited 18 January 2011).

effective against government and especially international military forces.¹³⁵ However, UNAMA affirms that such actors 'often used these tactics in civilian areas where a military target or objective was not clear. Certain tactics and weapons, in particular IEDs and suicide attacks, also appeared in some cases to target specific civilian individuals'.¹³⁶ Furthermore, UNAMA claims that:

IEDs kill and injure more civilians than any other tactic used in the conflict. ... IEDs have been placed on roadsides, in bazaar and commercial areas, outside the homes and offices of Government officials, in bicycles and rickshaws. IEDs are detonated in a variety of ways – they can be triggered by remote-controlled IEDs (RCIED), wire-triggered, or by victims (pressure or sensitive-plated IEDs). When detonated, an IED explosion is indiscriminate and affects everyone in the vicinity of the explosion.¹³⁷

Thus, dialogue could perhaps focus on how civilian casualties could be minimized, given that the Taliban are hardly likely to agree to cease all use of IEDs.

Fourth, the issue of suicide attacks, prevalent in the conflict in Afghanistan, needs to be addressed. Any attack targeted against individual civilians or the civilian population as such is clearly unlawful and constitutes a war crime. Even where such attacks are targeted against military objectives, there are still issues of indiscriminate attacks, proportionality, and perfidy to be considered.¹³⁸ The Taliban addressed proportionality and precautions in attack indirectly in the new version of the 'Code of Conduct' issued by Mullah Omar in 2009.¹³⁹ Codes of conduct issued by ANSAs may facilitate engagement for a better respect of

135 In October 2010, the UK Foreign Secretary, William Hague, told Sky News that IEDs posed the biggest threat to Britain's armed forces in Afghanistan: 'These are the main threats to our forces – these are the weapons of choice of the Taliban. ... So we are spending a lot on improving the protection of vehicles, on having some remote controlled vehicles and, of course, a lot of military effort goes into detecting and disrupting the networks that make and plant the IEDs'. Andy Jack, 'IEDs are biggest threat to UK forces – Hague', in *Sky News Online*, 21 October 2010, available at: <http://news.sky.com/skynews/Home/World-News/Foreign-Secretary-William-Hague-Says-Taliban-IED-Roadside-Bombs-Biggest-Threat-To-UK-Forces/Article/201010315764166?f=rss> (last visited 18 January 2011).

136 UNAMA, above note 12, p. 1. However, UNAMA uses the term IED to cover many different attacks, including, apparently, suicide attacks. See *ibid.*, Glossary.

137 *Ibid.*, p. 2.

138 With respect to perfidy, according to the ICRC customary law study: 'Killing, injuring or capturing an adversary by resort to perfidy is prohibited'. J.-M. Henckaerts and L. Doswald-Beck, above note 79, Rule 65. Perfidy is defined in Additional Protocol I as '[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence' (Art. 37). Thus, simulation of civilian status by a suicide bomber to enable him or her – according to UNAMA, above note 12, p. 4, the first ever reported suicide attack in Afghanistan that involved a female occurred in Kunar province on 21 June 2010 – to reach military personnel in safety would fall within this prohibition. This may be the case in many, probably even the overwhelming majority, of instances.

139 'Rule 41- Make sure you meet these four conditions in conducting the suicide attacks: A- Before he goes for the mission, he should be very education [*sic*] in his mission. B- Suicide attacks should be done always against high ranking people. C- Try your best to avoid killing local people. D- Unless they have special permission from higher authority, for every suicide attack must be approved by the provincial authority'. Rule 46 also includes a general order that bombers must do their best to avoid civilian casualties. See Program for Cultural and Conflict Studies, above note 32, p. 3.

international norms because the expression of the group to commit themselves in written codes enhances the feeling of ownership of the norms and encourages respect.¹⁴⁰ Of course, such a commitment needs to be consistent with humanitarian principles. Regarding the Taliban Code of Conduct, developed on their own initiative, some of its rules are clearly not compatible with international norms.¹⁴¹ Nevertheless, it represents a basis on which an agreement could be built to limit the use of suicide attacks. For example, UNAMA has made a number of references to its provisions, calling upon the Taliban to respect them.¹⁴²

Fifth, in our view it is time to put an end to the almost visceral rejection of the applicability of human rights law to ANSAs and accept that the world has transformed into one where a variety of non-state actors potentially have a range of international human rights law obligations. The origin of human rights law was the need to offer legal protection to the individual against the almighty power of the state. But today, can it be seriously entertained that the individual does not require legal protection against non-state armed groups in Afghanistan and that the recognized state is capable of providing it? The Taliban should therefore be recognized as an entity that has a broad range of legal obligations consonant with international human rights law, especially in areas that it controls and administers,¹⁴³ and the obligations incumbent upon it should be made explicit.

Conclusion

We have attempted to demonstrate the importance of not only international humanitarian law but also international human rights law in seeking to promote essential compliance with international norms by armed non-state actors in Afghanistan. It is clear, however, that, whatever standards are applicable or agreed upon, monitoring will be an essential element in supporting their implementation. Such monitoring should build on the work of the UN and human rights and humanitarian non-governmental organizations, and through initiatives that

140 A. Clapham, 'Human rights obligations of non-state actors in conflict situations', above note 103, p. 512.

141 See some of the rules of the 2006 version of the Taliban's code of conduct: '(24) It is forbidden to work as a teacher under the current puppet regime, because this strengthens the system of the infidels. True Muslims should apply to study with a religiously trained teacher and study in a Mosque or similar institution. Textbooks must come from the period of the Jihad or from the Taliban regime. (25) Anyone who works as a teacher for the current puppet regime must receive a warning. If he nevertheless refuses to give up his job, he must be beaten. If the teacher still continues to instruct contrary to the principles of Islam, the district commander or a group leader must kill him'. Reproduced in *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, above note 21, p. 17.

142 UNAMA, above note 12, p. 5.

143 Thus, according to UNAMA, in 2009–2010, 'AGEs controlled the civilian population through a range of measures often involving violence, assassinations and abductions'. UNAMA, above note 12, p. 1. Fergusson presents another side to the Taliban, claiming that the 'official provincial government simply could not compete with the services the Taliban offered – particularly ... when it came to the administration of justice. A villager involved in, say, a local land dispute, used to have to bribe every official and wait months before a resolution could ever be reached. By stark and shameful contrast, the judgments of the Taliban's Sharia councils were instant as well as free'. J. Fergusson, above note 6, p. 144.

actively engage the Taliban. During his visits to Afghanistan, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions regretted that he did not speak with any formal representatives of the Taliban. Recognizing the political and security obstacles to engaging directly with the Taliban, Alston emphasized that 'there is no reason to assume that the Taliban could never be persuaded to modify its conduct in ways that would improve its respect for human rights'.¹⁴⁴ The international community thus faces diverse challenges when dealing with ANSAs. Some of these have a legal dimension, but other aspects of a broad approach to reducing the impact of conflict on civilians demand programmes, advocacy, and, especially, direct engagement with ANSAs. All of these elements need to be pursued if we are truly to make the law anything approaching a reality.

144 *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, above note 21, para. 42.

The *Layha* for the Mujahideen: an analysis of the code of conduct for the Taliban fighters under Islamic law

Muhammad Munir*

Dr. Muhammad Munir is Associate Professor and Chairman, Department of Law, Faculty of *Shari'a* and Law, International Islamic University, Islamabad.

Abstract

*The following article focuses on the Islamic Emirate of Afghanistan Rules for the Mujahideen** to determine their conformity with the Islamic jus in bello. This code of conduct, or Layha, for Taliban fighters highlights limiting suicide attacks, avoiding civilian casualties, and winning the battle for the hearts and minds of the local civilian population. However, it has altered rules or created new ones for punishing captives that have not previously been used in Islamic military and legal history. Other rules disregard the principle of distinction between combatants and civilians and even allow perfidy, which is strictly prohibited in both Islamic law and international humanitarian law. The author argues that many of the Taliban rules have only a limited basis in, or are wrongly attributed to, Islamic law.*

: : : : : :

* The help of Andrew Bartles-Smith, Prof. Brady Coleman, Major Nasir Jalil (retired), Ahmad Khalid, and Dr. Marty Khan is acknowledged. The quotations from the Qur'an in this work are taken, unless otherwise indicated, from the English translation by Muhammad Asad, *The Message of the Qur'an*, Dar Al-Andalus, Redwood Books, Trowbridge, Wiltshire, 1984, reprinted 1997.

** The full text of the *Layha* is reproduced as an annex at the end of this article.

Do the Taliban qualify as a ‘non-state armed group’?

Since this article deals with the *Layha*,¹ it is important to know whether the Taliban in Afghanistan, as a fighting group, qualify as a ‘non-state Islamic actor’. In the context of international humanitarian law (IHL), ‘non-state actor’ (which includes, for example, an Islamic non-state armed group) is a broad concept and may be taken as meaning any group with a military capacity and organizational structure fighting anywhere in the world. But, as we will see below, not every non-state Muslim military group qualifies as a ‘non-state armed group’ under international humanitarian law. What counts in our discussion is whether the armed struggle waged by a Muslim group (in this case the Taliban) is in conformity with the Islamic *jus in bello* as well as IHL. However, by adding the adjective ‘Islamic’ and the word ‘*mujahideen*’, there is an expectation that the said *mujahideen* would have an Islamic identity and an Islamic agenda, and that their code for the conduct of hostilities would be an Islamic one and operate under coherent Islamic rules. The following analysis seeks to determine whether that expectation is fulfilled.

An armed conflict in international humanitarian law

Regarding the question whether the Taliban qualify as a ‘non-state (Islamic) actor’, it is necessary to ascertain in what circumstances a conflict amounts to an armed conflict under IHL. According to the International Criminal Tribunal for the former Yugoslavia (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’.² Furthermore, the ICTY has specified two elements required for a conflict between governmental authorities and non-state armed groups to become an ‘armed conflict’: the non-state actor should be well organized and have a hierarchical structure; and the conflict should reach a certain level of intensity.³ A non-state armed group that does not fulfil these two conditions is not subject to IHL and their activities may be dealt with under domestic law as banditry, terrorist actions, or unorganized

1 So far, there have been at least three editions of the *Layha for the Mujahideen*. The first was published on 1 August 2006 and contained only thirty-nine sections. The second was published on 9 May 2009 and consisted of sixty-seven sections. The third (present) edition was published on 29 May 2010 and has eighty-five sections. The preamble states that ‘all the military, administrative authorities, as well as all *mujahideen* must comply in their *jihadi* affairs with the provisions of the *Layha* and run their day-to-day *jihadi* activities according to its rules’. *The Islamic Emirate of Afghanistan Layha [Rules] for the Mujahideen*, 2010, p. 5 (hereafter *Layha*). This is repeated in Section 4 of the 2010 edition; see p. 7. All the editions are in the Pashto language and none of them mentions the place of publication.

2 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadic*, ICTY Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 70.

3 The International Court of Justice (ICJ) has on many occasions given its opinion on the criterion of intensity with respect to armed attacks. The Court discussed it for the first time in the *Nicaragua* case (para. 191) and later in the *Oil Platform* case (para. 64). In both these cases, the ICJ underlined the distinction of armed attacks from other attacks by referring to the criterion of intensity.

or short-lived insurrections.⁴ The above two elements are not clearly defined by the Tribunal but it has stated in a subsequent case that ‘what matters is whether the acts are perpetrated in isolation or as a part of a protracted campaign that entails the engagement of both parties in hostilities’.⁵ If the above criteria are applied, many Muslim *jihadi* groups may be excluded from the definition of ‘non-state actor’ under IHL.⁶

The Taliban as an armed group

The Taliban in Afghanistan meet all the above conditions⁷ and thereby qualify as a non-state armed actor.⁸ The present conflict in Afghanistan is internal or non-international in the sense of Article 3 common to the four Geneva Conventions of 1949, but it involves international troops from a number of countries mandated by the Security Council to fight against the Taliban. This is why the situation in Afghanistan may not fit within the old classification of international armed conflict and non-international armed conflict. A third category –internationalized non-international armed conflict – can best describe the situation.⁹

4 ICTY, *Prosecutor v. Tadić*, ICTY Case No. IT-94-1, Judgment (Trial Chamber), 7 May 1997, para. 562.

5 ICTY, *Prosecutor v. Boškoski et al.*, ICTY Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 185.

6 Many small Muslim *jihadi* groups, such as Harakat al-Ansar, Harakat ul-Mujahidin, Al-Umar Mujahidin (all of them operating in Kashmir), Fatah al-Islam (Gaza), and some Islamic militant groups within Somalia, fail to meet these conditions.

7 The Taliban are in effective control of many areas in Afghanistan and they run the day-to-day administration in those areas. According to an investigative article in the *Wall Street Journal*, the Taliban are the main beneficiaries of the Kajaki hydropower plant, repaired and upgraded by the US for more than \$100 million. The Taliban charge a flat fee of 1,000 Pakistani rupees (\$11.65) a month to the consumers in the areas under their control in Helmand Province. The estimated electricity revenue collected by the Taliban amounts to some \$4 million a year, in a country where the monthly wages of an insurgent fighter come to around \$200. The paper claims that the Taliban use the proceeds to fund their war with American and British troops. See Yaroslav Trofimov, ‘US rebuilds a power plant, and Taliban reap a windfall: insurgents charge residents for electricity the Afghan government supplies to areas under rebel control’, in *Wall Street Journal* (European edition), 14 July 2010, p. 14.

8 Apart from the Afghani Taliban, other typical non-state Islamic actors that have been engaged in armed conflict with a government and have, at least at times, fulfilled the stipulations of the ITCY include Al Qaeda, the Islamic Salvation Front (FIS) (Algeria), and the Abu Sayyaf Group (Philippines). The status of two Islamic groups, namely Hamas and Hezbollah, is more complicated. Hamas now controls Gaza but is still a non-state actor because the Occupied Territories (or, to be more precise, Gaza) are not yet recognized as a state. Hezbollah, on the other hand, has a political wing that is represented in the government of Lebanon, but it still qualifies only as a non-state actor. The UN Human Rights Council’s two inquiry missions to investigate human rights violations during the Second Lebanon War between Hezbollah and Israel in 2006 treated the conflict as international. See ‘Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council”: Mission to Lebanon and Israel (7–14 September 2006)’, UN Doc. A/HRC/2/7, 2 October 2006; ‘Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council”: Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1’, UN Doc. A/HRC/3/2, 23 November 2006.

9 See also Avril McDonald, ‘Terrorism, counter-terrorism and the *jus in bello*’, in Michael N. Schmitt (ed.), *Terrorism and International Law: Challenges and Responses*, International Institute of Humanitarian Law, San Remo, 2002, p. 65.

The relevant applicable law to non-state parties to an armed conflict is the said Common Article 3. Additional Protocol II of 1977 on non-international armed conflict is also applicable, as Afghanistan is now party to it.¹⁰ The rules in Common Article 3 have the status of customary international law and non-state groups are bound under international law by customary norms when engaging in an armed conflict. According to the decision of the Appeals Chamber of the Special Court for Sierra Leone (SCSL), ‘it is well-settled that *all* parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties’.¹¹ Whether a conflict is international or non-international, non-state Islamic actors, such as the Taliban in our case, undoubtedly do have obligations under IHL.

The status of the Taliban under Islamic law

It is interesting to consider the status of the Taliban under Islamic law, particularly since the crux of the opinions of many Muslim scholars is that the US attack that led to the dismantling of the Taliban government in Afghanistan was illegal.¹² Another interesting question is whether the Taliban in Afghanistan can be considered as ‘*Ahl al-Baghi*’, or rebels under Islamic law. Muslim jurists have laid down four conditions for a group to qualify as *Ahl al-Baghi*: first, rebelling against state authority by not fulfilling their obligations and refusing loyalty to state laws; second, possessing power and strength; third, openly revolting and fighting against the political authority; and, finally, having their own innovative interpretation of Islamic law to which they strictly adhere (this last condition is controversial).¹³

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

11 Special Court for Sierra Leone (SCSL), *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, para. 22.

12 It is argued that, since the Taliban government did not plan or carry out the 11 September 2001 terrorist attacks on the US, they were not really blameworthy, and thus the dismantling of their government was not warranted. According to Mufti M. Taqi Uthmani, the US attack and overthrow of the Taliban regime was illegal. See Mufti M. Taqi Uthmani, *Al-Balag*, January 2002, pp. 6–7. See also Sheikh Yusuf al-Qaradawi, *Fiqh al-Jihad Dirasa Muqarana li Ahkamihi wa Falsafatihi fi dhaw-i- al-Qur’an wa al-Sunnah*, Dar al-Kutub, Cairo, 2009, Vol. 1, p. 711. The Sheikh rejects the toppling of the Taliban and considers the help provided to the Western-backed government in Kabul illegal and incompatible with the conditions laid down by Muslim jurists for seeking help from non-Muslims; see pp. 710–711. Mufti Zahidur Rashidi and Moulana Ammar Khan Nasir are also of the opinion that the toppling of the Taliban regime was illegal. See their views in a special issue of *Al-Shari’ah* on ‘Al Qaeda, the Taliban and the current war in Afghanistan’, October 2010, pp. 13–57, esp. pp. 17–19, 23, 25, 30, 50.

13 The fourth condition, i.e. innovation of ‘*ta’wil*’, or their own interpretation of the law, is required by the *jamhur* (majority) of Muslim jurists. A well-known example of such rebels in Islamic history is that of the Kharijites (Muslim dissenters). See Muhammad b. Idris al-Shafi’i, *Al-Umm*, Dar al-Ma’rifa, Beirut, n.d., Vol. 4, p. 216; and ‘Abdullah b. Ahmad b. Muhammad b. Qudama, *Al-Mughni ‘Ala Mukhtasar al-Khirqi bi Sharh al-Kabir ‘ala matn al-muqn*’, Dar al-kutub al-Arabi, Beirut, 1972, Vol. 10, p. 52. Some Muslim jurists do not consider the condition of *ta’wil* necessary, deeming it enough if the rebels only aim to gain power and authority. The obvious example of this category is when ‘Abdullah b. Zubair was chosen by the people of Hijaz, Iraq, and Egypt as their head of state, but his group was defeated by the Umayyad Caliph Marwan b. al-Hakam. See ‘Ali b. Ahmad b. Sa’eed, b. Hazm, *Al-Muhalla*, Dar al-Fikr, Beirut, n.d.,

When the rebels cannot be induced by peaceful means to lay down their arms, the Muslim political authority must fight them to bring them into submission rather than to wipe them out.¹⁴ However, as stated above, contemporary Muslim scholars consider the toppling of the Taliban regime in Afghanistan as illegal and view their war with the occupying power as legal.¹⁵ Thus, the Taliban do not constitute an example of ‘*Ahl al-Baghi*’ under Islamic law.

The Taliban’s attitude towards Islamic law on the conduct of hostilities

Before examining the Taliban’s attitude towards Islamic law on the conduct of hostilities, it is pertinent to mention that the *Layha* does not make any mention of, or reference to, international humanitarian law. This may be interpreted as meaning either that the Taliban do not acknowledge the existence of IHL or its application in the conflict, or that they base their rules on Islamic law instead. During their short rule in Afghanistan from 1995 to 2001, the Taliban had a very literal, rigid, and radical interpretation of Islamic law. They never referred to moderation or tolerance, or to the protection of the rights of minorities in Afghanistan.

The law of war as part of the *Layha*

The Taliban assert that their *Layha* is based on Islamic law. The latest 2010 edition mentions that the *Layha* was prepared in accordance with Islamic law in consultation with top scholars, *muftis* (jurisconsults), experts, and specialists;¹⁶ it is unknown, however, who these scholars, muftis, and experts are. In its *jus in bello* part, the code of conduct for the Taliban fighters talks of limiting suicide attacks, avoiding civilian casualties, and winning the battle for the hearts and minds of the local civilian population: Section 57, clause ii declares that ‘A brave son of Islam

Vol. 11, pp. 97–98; Muhammad b. Ahmad b. Juzzi, *Qawanin al-Ahkam al-Shariyyah wa Masa’l al-Furu’ al-Fiqhiyya*, Dar al-‘Ilm lil maliyyin, Beirut, 1974, p. 393; and Muhammad al-Sharbini al-Khatib, *Mughni al-Muhtaj*, Maktaba Mustafa al-Babi, Cairo, 1933, Vol. 4, p. 126.

14 See A. Ibn Hazm, above note 13, Vol. 11, p. 97; I. Shahfi’i, above note 13, Vol. 4, p. 215; M. Khatib, above note 13, *Mughni al-Muhtaj*, Vol. 4, p. 126; Muhammad b. Ahmad al-Qurtubi, *al-Jami’ li Ahkam al-Qur’an*, Matba’a Dar al-Kutub al-Masriyyah, Cairo, 1950, Vol. 16, pp. 317–319; Muhammad Khair Haykal, *Al-Jihad wa al-qital fi al-Syasa al-Shar’iyya*, 2nd edition, Dar al-Bayariq, Beirut, 1996, Vol. 1, pp. 63–69. Haykal’s book does not discuss *syasa al-shar’iyyah*, despite the title.

15 Mufti Taqi Uthmani, Sheikh al-Qaradawi, Mufti Zahidur Rashidi, and Moulana Ammar Khan Nasir support this view. See T. Uthmani, above note 12, pp. 6–7; Y. Qaradawi, above note 12, Vol. 1, pp. 710–711; and Z. Rashidi and A. K. Nasir, above note 12, 13–57, esp. pp. 17–19, 23, 25, 30, 50. However, they disagree whether the war should be called a *jihad* or not. For example, Mufti Zahidur Rashidi views it as a *jihad* (pp. 49–50), whereas Moulana Nasir does not (p. 30).

16 See the *Layha*, 2010 edition, Introduction, p. 4. It states that compliance with it is obligatory for every person with authority and every *mujahid* (p. 5). It also stresses that all military and administrative officials, as well as ordinary *mujahideen*, must follow these rules and conduct their day-to-day *jihadi* affairs accordingly (p. 5).

should not be used for lower and useless targets. The utmost effort should be made to avoid civilian casualties'. Between August 2006 and May 2010 the rules have been changed several times and three different versions have been published and enforced. This indicates that the Taliban use Islam, and the *Layha* in particular, both as rhetoric to serve as a source of unity and to promote mobilization and as a guarantee for compliance with the Islamic law of war.

The 2010 edition of the *Layha* has eighty-five sections. Not all of them are about the conduct of hostilities. In fact, only thirty-seven sections can be considered relevant to warfare, namely Sections 4, 7,¹⁷ and 9–16 (on prisoners of war and contractors/suppliers), 17–22 (spies), 23–26 (contractors and suppliers), 27–33 (war booty), 56 (attacks), 57 (suicide attacks), 67–73 (prohibited acts), and 81 (outfit of the *mujahideen*). The rest concerns, among other things, administrative matters, hierarchical organization, enforcement of *Shari'a* law in areas under Taliban control, and the resolution of disputes between people under Taliban control as well as disputes among the Taliban themselves. We now turn to the substantive parts of the Taliban's *Layha* as compared with the Islamic law of war. However, only the major provisions of the *Layha* will be discussed here.

The fate of captured persons in particular

Regarding prisoners of war (POWs), there seem to be three categories in the *Layha*: first, Afghan army soldiers, police, or other officials (Section 10); second, contractors, suppliers, drivers, and personnel of private security companies (Sections 11 and 23–26); and, finally, foreign soldiers (Section 12). In addition, provision is made for a situation that is common to all the above categories: the killing of types of captive during transportation (Section 13).

As far as the fate of those in the first category is concerned, the provincial Taliban governor has to choose between exchanging them for Taliban prisoners, releasing them without setting any condition, or releasing them after securing credible guarantees.¹⁸ He is not allowed to ransom them. They may be executed or given a *ta'zir* punishment only if ordered by the Imam,¹⁹ his deputy, or the provincial *qadi* (judge).²⁰ Thus, they may be exchanged, released unconditionally, released after credible guarantee, executed, or given some other punishment under *ta'zir*. The provincial governor has to choose one punishment from the first three,

17 The entire Part I, i.e. Sections 1–8, is not about the conduct of war but about inducing and inviting those working for the Afghan regime to join the Taliban, and how to treat them. However, two of those sections are relevant to the conduct of war, namely Section 4, which relates to perfidy committed by a person who surrenders, and Section 7 on armed personnel of the Afghan regime who want to surrender but whose true intention is not clear.

18 Guarantee in the *Layha* means a guarantee to be given in terms of immovable property or a personal guarantee. It does not mean a guarantee of movable property or money guarantee. *Layha*, Introduction, Section 3.

19 The Imam is the head of the Taliban, Mullah Muhammad 'Omar, and *Na'ib Imam* is his deputy. *Layha*, Introduction, Section 1. *Ta'zir* (deterrent, corrective) punishment is discussed below.

20 For the procedure if no provincial *qadi* has been appointed, see *Layha*, Section 10.

otherwise the Imam or his deputy or the provincial *qadi* will choose one of the last two. However, the governor must perform the duties of a *qadi* if none is appointed in a province. We will consider the Islamicity of these punishments at the end of this section.

The fate of those in the second category (contractors, suppliers, drivers, personnel of private security companies, and spokesmen for the infidels) is mentioned in Sections 11 and 23–26. According to Section 11, read in conjunction with Sections 23–26, if it is confirmed that the contractors build bases or supply materials to ‘infidels and their puppet regime’, the *mujahideen* should burn their supplies²¹ and kill such contractors.²² High- and low-ranking officials of private security companies, spokesmen for ‘infidels’, and supply drivers are to be given the death penalty by the district *qadi*.²³ No other option is available for the *qadi*. There is some confusion about supply drivers: Section 24 allows their killing on the spot, while Section 11 indicates that they are given the death sentence by the district *qadi*. Section 26 authorizes the killing of contractors who recruit labourers or other workers.

The fate of a captive non-Muslim combatant can only be decided by the Imam or his deputy, who may choose between that person’s execution, exchange, or release without any condition or ransom.²⁴ Under Section 13 of the *Layha*, if the *mujahideen* have taken captives (who may include locals, foreigners, combatants, contractors, drivers, etc.) and come under attack while transporting them to a secure place, they should kill them if they are enemy combatants or officials. But if the *mujahideen* are not sure about the identity of the captives, they must not be killed, even if this means that they have to be freed. Regarding the treatment of detainees, Section 15 provides that the *mujahideen* should not torture them by starvation, thirst, heat, or cold, even if they deserve death sentences or any other *ta’zir* punishment.²⁵

The fate of all the categories mentioned above may be summarized as follows. (1) Soldiers, police, and other officials of the Afghan regime may be released without any condition, exchanged, or released after they provide a credible guarantee, but they cannot be ransomed and the Taliban governor must decide their fate. They may only be executed or given *ta’zir* punishment if authorized by the Imam or his deputy or the provincial *qadi*, but the governor has to decide on the penalty if no *qadi* is appointed. This means that the governor is the authority in these matters. (2) All types of contractors, suppliers, drivers, personnel

21 Section 23 of the *Layha* allows the burning of private vehicles if used for the transport of goods or other services of ‘infidels’.

22 *Ibid.*, Section 25.

23 *Ibid.*, Section 11. There is no other punishment for them.

24 *Ibid.*, Section 12.

25 According to Section 16 of the *Layha*, *ta’zir* punishment can only be given by the Imam or his deputy or *qadi*. The same section mentions that if a district *qadi* wants to give the death sentence as a *ta’zir* punishment, he must get the approval of the provincial *qadi*; if there is no provincial *qadi*, the governor is authorized to deal with matters of death and *ta’zir*.

of security companies,²⁶ and even those contractors who recruit workers could be either killed or summarily executed or given death sentences by the *qadi* if arrested. (3) The fate of a captured foreign non-Muslim combatant is decided by the Imam or his deputy, who may authorize his execution, exchange, release, or ransom. (4) Hostages who are suspected of being enemy combatants or other officials can be killed if during their transportation to a secure place the *mujahideen* come under attack.

Evaluation under Islamic *jus in bello*: the *Layha* versus Islamic law

There are three key points to be considered from an Islamic *jus in bello* perspective. First, what is the fate of POWs in classical Islamic law as well as Islamic military history? Second, can *ta'zir* punishment be given to any detainee under Islamic law? Finally, can contractors, suppliers, carriers, drivers, and personnel of security companies be summarily executed or sentenced to death by a *qadi* if taken captive?

The fate of POWs in Islam

There is disagreement among the Muslim jurists of various schools of thought regarding the fate of POWs under Islam.²⁷ I will briefly explain the interpretation of

26 It is important to note that, despite their employment more often than not in combat roles (such as securing military logistic lines/oil lines or interrogation of detainees), private military companies (PMCs), also known as private military firms (PMFs) and mostly employed in Iraq and Afghanistan, are covered by existing modern-day IHL. This reflects the grey area of the law. While PMCs constitute a challenge for IHL, they are covered by IHL. Unless they are part of the armed forces of a state or have combat functions for an organized armed group belonging to a party to the conflict, members of PMCs are considered civilians. However, if they participate in hostilities they lose protection from attack during such participation and, if captured, can be tried for mere participation in hostilities. See, e.g., International Committee of the Red Cross (ICRC), 'International humanitarian law and private military/security companies', available at: <http://www.icrc.org/eng/resources/documents/faq/pmsc-faq-150908.htm> (last visited 22 December 2010).

27 Secondary works on Islamic *jus in bello* usually give some space to the issue of POWs but such works are not comprehensive. A good work is Gerhard Conrad, 'Combatants and prisoners of war in classical Islamic law: concepts formulated by Hanafi jurists of the 12th century', in *Revue de Droit Pénal Militaire et de Droit de la Guerre*, Vol. 20, Nos 3–4, 1981, pp. 271–307. This work is exclusively on POWs in Islam, but is not exhaustive and fails to elaborate the complex rules regarding POWs and the reasons behind the differences of opinion among the early Muslim jurists. Another noteworthy study is that of Khaled Abou El Fadl, 'Saving and taking life in war: three modern Muslim views', in *Muslim World*, Vol. 89, No. 2, 1999, pp. 158–180, in which he discusses the work of three modern scholars of the twentieth century; see also Syed Sirajul Islam, 'Abu Ghraib: prisoner abuse in the light of Islamic and international law', in *Intellectual Discourse*, Vol. 15, No. 1, pp. 15–19. Works based on secondary sources include Yadeh Ben Ashoor, 'Islam and international humanitarian law', in *International Review of the Red Cross*, No. 722, March–April 1980, pp. 1–11, especially pp. 3–7; and Troy S. Thomas, 'Prisoners of war in Islam: a legal enquiry', in *Muslim World*, Vol. 87, January 1997, pp. 44–53. The first article briefly discusses the interpretation of Qur'anic verses regarding POWs; unfortunately, the author does not give references for many works discussed in his article. In the second work, the author has given a summary of Islamic law

the relevant verses of the Qur'an, the sayings and the conduct of the Prophet Muhammad (Peace Be Upon Him) and his successors regarding POWs, and the opinions of prominent classical Muslim jurists.²⁸ Taking captives is legal in the Qur'an: '[A]nd take them captive, and besiege them',²⁹ and verse 47:4 says, 'And then tighten their bonds'. Muslim jurists agree that their fate is left to the political authority to decide as he sees fit in the best interest of the Muslim community. However, they diverge over the choices available to the Muslim state to terminate their captivity. The various options mentioned by Muslim jurists include execution, exchange, conditional or unconditional release, ransom, and enslavement. According to the majority of Muslim scholars – Maliki, Shafi'i, Hanbali, Shi'ite, Zahirite, and Awza'i – the political authority has the following options: execution, enslavement, 'mann' (unconditional release), and 'fida' (ransom or release after setting a condition or demanding a promise).³⁰ The Malikites add to this the imposition of 'jizyah' (poll tax) on them.³¹ The Hanafi jurists agree on execution, enslavement, and setting captives free with the condition that they should pay *jizyah*, but there is disagreement on ransom.³² Imam Abu Yusuf³³ and M. Ibn al-Hasan al-Shaybani³⁴ allow ransom.³⁵

The Qur'an mentions the fate of POWs in verse 47:4, which says:

Now when you meet [in war] those who are bent on denying the truth, smite their necks until you overcome them fully, and then tighten their bonds; but thereafter [set them free,] either by an act of grace or against ransom, so that the burden of war may be lifted: thus [shall it be].

This verse renders execution illegal and makes captivity a temporary affair that must lead to either unconditional or conditional freedom, or freedom bought with

regarding POWs. A recent work in Arabic is 'Ameur al-Zemmali (ed.), *Maqalat fi al-Qanun al-Duwali al-Insani wa al-Islam*, 2nd edition, ICRC, n.p., 2007. This is a compilation of fifteen essays previously published in the *International Review of the Red Cross* on the various aspects of Islamic *jus in bello*, in some cases in comparison with international humanitarian law. A comprehensive examination of the subject is given by Ameur Zemmali, *Combattants et prisonniers de guerre en droit islamique et en droit international humanitaire (Combatants and Prisoners of War in Islamic Law and International Humanitarian Law)*, Pédone, Paris, 1997.

28 For a full study of the issue of POWs in Islam, see Muhammad Munir, 'The protection of prisoners of war in Islam', in *Islamic Studies* (forthcoming).

29 Qur'an, verse 9:5.

30 M. Khatib, above note 13, Vol. 4, p. 228; A. Ibn Hazm, above note 13, Vol. 7, pp. 309, 346.

31 Muhammad b. Ahmad b. Rushd, *Bidayat al-Mujtahid*, trans. Imran A. K. Nyazee, Garnet Publishing Ltd., Reading, 1994, Vol. 1, p. 456; Muhammad b. Ahmad b. Juzi, *al-Qawanin al-Fiqhiyya*, Dar al-Kutub al-'Ilmiya, Beirut, n.d., p. 99; Ahmad b. Idris al-Qarafi, *Al-Furuq* (along with Idrar al-suruq 'ala Anwa' al-Furuq), Dar al-m'rifa, Beirut, n.d., Vol. 3, p. 17.

32 'Alauddin Abu Bakr al-Kasani, *Bada'i' al-Sana'i'*, Dar Ehia al-Tourth al-'Arabi, Beirut, 2000, Vol. 6, p. 94.

33 Ya'qub b. Ibrahim Abu Yusuf, *Kitab al-Kiraj*, Maktabh Farooqia, Peshawar, n.d., p. 378.

34 See Muhammad b. al-Hasan al-Shaybani, *Kitab al-Siyar al-Kabir*, *Sharh* (commentary) ed. Abu Bakr al-Sarkhasi, 'Abdullah M. Hasan al-Shafi'i, Dar al-kotob al-'Ilmiya, Beirut, 1997, Vol. 4, p. 300.

35 'A. Kasani, above note 32, Vol. 6, p. 95.

ransom.³⁶ Thus, the political authority has the option of releasing prisoners against ransom, or setting them free without any ransom. This is supported by the instructions of the Prophet (PBUH) that he gave while conquering Mecca, ‘Slay no wounded person, pursue no fugitive, execute no prisoner; and whosoever closes his door is safe’.³⁷ ‘Ali b. Abi Talib (d. 40 AH/661 CE), Al-Hasan b. al-Hasan (d. 110 AH/728 CE), Hammad b. Abi Suliman (d. 120 AH/737 CE),³⁸ Muhammad b. Sirin (d. 110 AH/728 CE), Mujahid b. Jabr Mawla (d. 103 AH/721 CE), ‘Abd al-Malik b. ‘Abd al-‘Aziz b. Jurayj (d. 150 AH/767 CE), ‘Ata b. Abi Rabbah (d. 114 AH/732 CE),³⁹ and Abu ‘Ubayd b. Salam were against the execution of POWs.⁴⁰ According to ‘Imaduddin Isma‘il b. ‘Umar b. Kathir (d. 774 AH/1373 CE), ‘[T]he head of Muslim state has to choose between *mann* and *fida*’ only. His [a POW’s] execution is not allowed’.⁴¹ Ibn Rushd (d. 594 AH/1198 CE) mentions that ‘A group of jurists maintained that it is not permitted to execute the prisoners. Al-Hasan b. Muhammad al-Tamimi (d. 656 AH/1258 CE) has related that there is a consensus (*ijma*) of the Companions on this [that POWs shall not be executed]’.⁴²

According to authentic reports, in all the wars of the Prophet (PBUH) only three to five⁴³ POWs were executed. Thus, only ‘Uqbah b. Abi Mu‘it was executed, out of seventy captives of Badr,⁴⁴ for his crimes against the Prophet (PBUH) and Muslims in Mecca.⁴⁵ The second was Abu ‘Izzah al-Jumahi in Uhd.⁴⁶ The third POW was ‘Abdullah b. Khatal, who was executed on the day that Mecca was conquered.⁴⁷ All of them were executed for the heinous crimes they had

36 Verses 8:67–68 of the Qur’an brought censure upon the Prophet (PBUH) because no revelation attesting to this being lawful had been sent to him and because the Companions were tempted by ransom. However, as is mentioned in these verses, ransom was legalized: ‘Enjoy, then, all that is lawful and good among the things which you have gained in war, and remain conscious of God: verily, God is much-forgiving, a dispenser of grace’.

37 Abu al-‘Abas Ahmad b. Jabir al-Baladhuri, *Kitab Futuh al-Buldan*, trans. Philip Khuri Hitti, Columbia University, New York, 1916, Vol. 1, p. 66.

38 M. Shaybani, above note 34, Vol. 3, p. 124. Shaybani mentions that al-Hasan only allowed the execution of POWs during war, while Hammad b. Abi Suliman used to condemn their execution after the war.

39 Abu Bakar al-Jassas, *Ahkam al-Qur’an*, ed. Sidqi M. Jamil, Dar al-Fikr, Beirut, 2001, Vol. 3, p. 582.

40 Abu ‘Ubayd b. Salam, *Kitab al-Amwal*, trans. Imran A. K. Nyazee, Garnet Publishing Ltd., Reading, 2002, pp. 120–121.

41 ‘Imaduddin Isma‘il b. ‘Umar b. Kathir, *Tafsir al-Qur’an al-‘Azim*, Matba‘ al-Manar, Cairo, 1346 A.H., Vol. 4, p. 221.

42 Abul Walid Muhammad ibn Rushd, *The Distinguished Jurist’s Primer*, trans. Imran Nyazee, Reading: Garnet Publishing Ltd, 1994, Vol. 1, p. 456.

43 However, the reports about the execution of al-Nadr b. al-Harith and one of the two concubines of ‘Abdullah b. Khattal are less authentic.

44 It is said that al-Nadr b. al-Harith was killed in captivity. According to Ibn Kathir, al-Nadr was killed during the war. See Isma‘il b. ‘Umar b. Kathir, *al-Bidaya wa al-Nihaya*, maktaba al-Ma‘rif, Riyadh, 1966, Vol. 3, p. 35.

45 Abu ‘Ubayd, above note 42, p. 130, n. 24.

46 He was set free in Badr on condition that he would stop his blasphemous poetry against Islam and not fight the Muslims again. He broke his promise and again asked for pardon but this time he was executed. See Abu Bakr b. Ahmad al-Sarkhasi, *Kitab al-Mabsut*, ed. Sabir Mustafa Rabab, Dar Ihya al-Turath al-‘Arabi, Beirut, 2002, Vol. 10, p. 26.

47 He was a Muslim living in Medina but he killed an innocent Muslim, reverted to the pre-Islamic faith, joined the enemy and thereby committed high treason, embezzled public money, bought two concubines who would compose blasphemous poetry, and started a campaign against Islam. For the Islamic state

committed against the Islamic State before their captivity and were wanted criminals in the Islamic State (State of Madina of which Muhammad (PBUH) was the Head). It very clearly was never an *established rule* at the time of the Prophet (PBUH) that POWs be executed. Probably Al-Hasan b. Muhammad al-Tamimi struck a chord when he proclaimed that the Companions of the Prophet (PBUH) were unanimous on the prohibition of the killing of POWs.⁴⁸

The pro-execution jurists have cited the execution of the combatants of Banu Quraydha as an example to support their point. But can the decision of an arbitrator chosen by the Banu Quraydha themselves to decide the dispute between them and the Muslims be an example for executing POWs? Can a single incident be treated as a general rule; and can the ruling of an arbitrator be accepted as the general and established conduct of the Prophet (PBUH) and his successors? My answer is in the negative. The tribe betrayed the Muslims during the Battle of Ahzab (Arabic for 'coalition') by turning against them and supporting the large anti-Muslim coalition headed by the infidels of Mecca, thereby breaching the treaty between the Banu Quraydha and the Muslims, which stated that both sides would defend the city together against any external attack. Once the battle was over, the two sides agreed to refer the matter to an arbitrator. The Banu Quraydha were given the choice to choose an arbitrator and they chose Sa'd b. Mu'ad, who was their former ally and who knew the Jewish law. He decided that their combatants should be executed and that their women and children should be enslaved in accordance with that law. According to the Torah:

When thy Lord hath delivered it [the city] unto thy hands, thou shalt smite every male therein with the edge of the sword. But the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou make unto thyself.⁴⁹

there were many other wanted criminals, but they were all pardoned at their request. For details see Muhammad Munir, 'Public international law and Islamic international law: identical expressions of world order', in *Islamabad Law Review*, Vol. 1, Nos 3 and 4, 2003, p. 382.

48 See M. Shaybani, above note 34, Vol. 2, p. 261. This is also the opinion of a great many classical jurists, including 'Abdullah b. 'Umar (d. 73 AH/692 CE), al-Hasan al-Basri (d. 346 AH/957 CE), 'Ata, Dhak b. Muzahim al-Hilali (d. 100 AH/718 CE), and Ismail b. 'Abdul Rahman, known as al-Sudi (d. 127 AH/744 CE). Ibn Rushd agrees with this opinion. See A. Ibn Rushd, above note 31, Vol. 1, p. 369. According to Shi'a jurisprudence, the Imam has only three options: *mann*, *fida* (ransom either for money or in exchange for POWs held by the enemy), or enslavement; Shi'a jurists consider execution while in captivity illegal. See Najmuddin al-Muhaqiq al-Hilli, *Shara'i' al-Islam*, ed. Syed Sadiq al-Sherazi, Dar al-Qari, Beirut, 2004, Vol. 1, p. 251; and Sa'id b. Habbat al-Rawandi, *Fiqh al-Qur'an*, ed. al-Siyad Ahmad al-Husaini, Matba'a Ayatullah, Qum, 1985, Vol. 1, p. 347; Zeinuddin b. 'Ali al-Shahid al-Sani, *Al-Rawdah al-Bahiyah fi Sharh al-Lum'ah al-Dimashqiyah*, Dar Ihya al-Turath al-'Arabi, Beirut, 1983, Vol. 1, p. 222.

49 Deuteronomy 20:13–14 (Holy Bible, New King James Version, The Gideons International, New York, 1987, p. 230). See also *The Holy Scriptures according to the Masoretic Text*, The Jewish Publication Society, Philadelphia, 1953, p. 237; and *Good News Bible: Today's English Version*, Harper Collins, Glasgow, 1976, p. 191. They were punished for their treachery, but this is how the people of a besieged city were supposed to be treated when captured by Jews.

It is clear that if the Banu Quraydha had triumphed over the Muslims they would have dealt with them in exactly the same manner. To sum up this discussion, I conclude that POWs must never be executed. The three who were executed during the life of the Prophet (PBUH) were thus penalized because of the crimes those individuals had committed against the Islamic state or its citizens before their captivity. According to Abu Yusuf Ya'qub b. Ibrahim (d. 183 AH/798 CE) and Imam Abu Bakr al-Sarkhasi, only the head of the Islamic state can decide to execute a particular POW (even if he is guilty of crimes against the state).⁵⁰ Imam Sarkhasi insists that even the commander-in-chief of the army cannot decide to execute a POW.⁵¹ The reason is that execution of a prisoner of war is not a rule and to be a prisoner is not an offence *per se*. In other words, execution of a prisoner of war is an extraordinary act – an act of *syasa*⁵² (only exercised by the head of the Muslim state) and not an ordinary punishment.⁵³ The Third Geneva Convention of 1949 on prisoners of war adopts a similar view in its Article 85, which gives the Detaining Power the right to prosecute a prisoner of war for acts committed prior to his captivity against (the Detaining Power's) law. Under Article 118 of the Third Geneva Convention, prisoners of war must be released and repatriated without delay after the cessation of active hostilities.⁵⁴

The conduct of the Prophet (PBUH) regarding POWs

The conduct of the Prophet (PBUH) and his successors regarding the termination of captivity of POWs is very important. There are many examples of them being set free unconditionally, such as the release of Thumama b. Athal, as well as eighty Meccan fighters.⁵⁵ Similarly, all the fighters of Hawazin, Hunayn, Mecca, Banu al-Mustalaq,⁵⁶ Banu al-Anbar, Fazara, and Yemen were set free

50 Y. Abu Yusuf, above note 33, pp. 378, 380.

51 M. Shaybani, above note 34, Vol. 4, pp. 313–314.

52 *Syasa* literally means 'policy' and comprises the whole of administrative justice, which is dispensed by the sovereign and by his political agents, in contrast to the ideal system of *Shari'a* law, which is administered by the *qadi*. The *mazalim* courts and the institution of *muhtasib* (ombudsman) are examples of *syasa* in the early justice system of the Abbasid Caliphate.

53 See M. T. al-Ghunaymi, 'Nazratun 'Aammah fi al-Qanun al-Duwali al-Insani al-Islami', in Ameer al-Zemmali (ed.), *Maqalat fi al-Qanun al-Duwali al-Insani*, 2nd edition, ICRC, n.p., 2007, p. 48.

54 See also Articles 109 and 111 of the Third Geneva Convention of 1949.

55 Muslim, *Sahih*, Vol. 3, p. 1442, Hadith No. 1808; Yahya b. Sharaf al-Nawawi, *Sharh Sahih Muslim*, Matba' Mahmud Tawfiq, Cairo, n.d., Vol. 7, p. 463.

56 It is said that the captives of Mustaliq were first distributed among the Companions but later, when the Prophet (PBUH) married Juwayriya bt. al-Harith (d. 50 AH/670 CE), the daughter of the leader of the tribe, the Companions set the captives free. See Abu Dawud al-Sajistani, *Sunan Abi Dawud*, ed. Muhammad Abdul Hamid, Maktaba al-asriyya, Beirut, n.d., Hadith No. 3931, Vol. 4, p. 22; and Muhammad b. 'Abdullah al-Nisapuri, *Al-mustadrak 'ala al-sahihayn*, ed. Mustafa 'Abdul Qadar, Dar al-kutub al-ilmiya, Beirut, 1990, Vol. 4, p. 28. One of the narrators in the chain of this *hadith* is considered of weak authority, which makes the *hadith* less authentic. See Muhammad b. Habbab, *Al-ihsan fi taqrib sahih Ibn Habbab*, ed. Shu'aib al-Arnaout, Mu'assasat al-risala, Beirut, 1988, Hadith No. 4054, Vol. 4, p. 11. However, according to an authentic report, her father procured her release and she subsequently married the Prophet (PBUH). See Shibli Nu'mani and Syed Suliman Nadawi, *Sirat al-Nabi*, al-Faisal Nashiran-i-Kutub, Lahore, n.d., Vol. 1, pp. 252–253.

unconditionally.⁵⁷ Abu Bakr – the first successor of the Prophet (PBUH) – released Al-Ash‘as b. Qays (d. 35 AH/656 CE). ‘Umar, the second successor, pardoned Hormuzan (d. 23 AH/643 CE), an Iranian commander.⁵⁸ Abu ‘Ubayd argues that ransom was taken only from the POWs of Badr and was never taken again; his subsequent conduct was to pardon prisoners. ‘The later precedent from the Prophet (PBUH) is to be acted upon’, he stressed, saying that the practice of pardoning by the Prophet (PBUH) came after Badr.⁵⁹ This view has the support of ‘Abdullah b. ‘Abbas (d. 68 AH/687 CE), ‘Abdullah b. ‘Umar, Hasan al-Basri, and ‘Ata b. Abi Rabah. This shows that the general practice of the Prophet (PBUH) and his successors was to set POWs free without any condition or ransom. According to Abu ‘Ubayd, the Prophet (PBUH) did not practise enslavement, while ‘Umar b. al-Khattab bought the slaves of pre-Islamic times and returned them to their relatives.⁶⁰

Thus, the established practice of the Prophet (PBUH) and his successors was to set POWs free. Ransom was taken on only one occasion, and execution was carried out only for crimes liable to the death penalty that were committed against the Islamic state *before* captivity. So what of the *Layha*, which considers execution as one of the options for some captives (such as Afghan soldiers, police, security officials, and foreign soldiers) and as the sole punishment for others (such as contractors, suppliers, carriers, drivers, and personnel of security companies), and allows the killing of captives if they are suspected to be enemy combatants and cannot be transported to a secure place because of an attack. My conclusion is that this rule of the *Layha* has no basis in Islamic law. Conversely, releasing POWs or exchanging them *is* based on Islamic law.

The fate of contractors, suppliers, and drivers

Under Islamic law, contractors, suppliers, and drivers are considered as servants. They do not participate in hostilities and their killing is strictly prohibited. It is reported that, when the Prophet (PBUH) saw the body of a slain woman among the dead at the Battle of Hunayn, he asked: ‘Who killed her?’ The Companions answered: ‘She was killed by the forces of Khalid ibn al-Walid’. The Prophet (PBUH) told one of them: ‘Run to Khalid! Tell him that the Messenger of God

57 Abu ‘Ubayd, above note 40, pp. 116–120.

58 Some 6,000 combatants of Hunayn were not only set free but each one of them was given a special Egyptian set of clothing as well. See S. Nu‘mani and S. S. Nadawi, above note 56, Vol. 1, p. 368. ‘Umar b. al-Khattab ordered Abu ‘Ubayda, his commander, to release the captives of Tustar; see Abu al-‘Abas Ahmad b. Jabir al-Baladhuri, *Kitaqb Futuh al-Buldan*, trans. Francis Clark Murgotten, Columbia University, New York, 1924, Vol. 2, p. 119. ‘Umar also wrote to his commander to release the captives of Ahwaz and Manadhir when these were captured. *Ibid.*, pp. 112–114.

59 A. Baladhuri, above note 58, Vol. 2, pp. 116, 120.

60 He paid 400 *dirhams* or five camels per slave and set them free and said: ‘An Arab shall not be enslaved’. See Abu ‘Ubayd, above note 40, p. 135. The enslavement of the women and children of Banu Quraydha was the result of arbitration; the Prophet (PBUH) did not enslave the POWs of other battles.

forbids him to kill children, women, and servants'.⁶¹ The Prophet (PBUH) is also reported to have prohibited, in the strongest possible words of the Arabic language, the killing of women and servants: 'Never, never kill a woman and a servant'.⁶²

From this it is clear that the killing of such persons as contractors, suppliers, or drivers in an ambush, or putting them to death in captivity, is against Islamic law. It is indicative that the corresponding rules in the *Layha* for the punishment of contractors, suppliers, and drivers have been changed. The 2006 edition of the *Layha* allowed their punishment by beating or imprisonment; their killing was allowed only if they could not be captured. Moreover, their captivity would be ended by either exchanging or ransoming them or by some (unknown) punishment (but *not* by death).⁶³ There was no death penalty for them in captivity or when they did not resist arrest. The 2009 edition of the *Layha* mentions for the first time that contractors, drivers, or other workers, if arrested during transportation, may be given *ta'zir* punishment, be exchanged, or be released unconditionally or after a credible guarantee by the governor. Ransoming was prohibited in that edition and execution could be authorized only by the Imam or his deputy.⁶⁴ Thus, execution for this category of captives was introduced for the first time in 2009; yet, although it required the permission of the Imam, it was attributed to Islamic law.⁶⁵

Finally, in the 2010 edition of the *Layha*, contractors, suppliers, drivers, and personnel of security companies are treated as a different category from Afghan army officials. They face death whenever the *mujahideen* are able to strike at them.⁶⁶ On arrest the only punishment for them is death.⁶⁷ In the new edition, authorization of execution has been placed in the hands of the *mujahideen*, and otherwise of the district *qadis* (judges). The Imam has delegated this authority, which he had exercised since May 2009, to his soldiers and judges. To sum up, the punishment for this category of captive in 2006 was beating or imprisonment. In 2009 they were treated on a par with Afghan soldiers and there was a remote possibility of execution if authorized by the Imam. In 2010 the *mujahideen* are

61 Al-Tabrezi, *Mishkat al-Masabih*, al-Maktab al-Islami, Cairo, n.d., Hadith No. 3955; Ibn Majah, *Sunnan*, Dar Ehya Al-Turath Al-'Arabi, Beirut, n.d., Vol. 2, p. 101. For details, see Muhammad Munir, 'Suicide attacks and Islamic law', in *International Review of the Red Cross*, Vol. 90, No. 869, March 2008, p. 85, also available at: <http://www.icr.org/web/eng/siteeng0.nsf/html/review-869-p71> (last visited 22 December 2010).

62 Ibn Majah, above note 61, Vol. 2, p. 948, Hadith No. 2842; Imam al-Nasa'i, *al-Sunnan al-kubra*, Dar Al-Kotob Al-Elmyia, Beirut, n.d., Vol. 5, p. 187, Hadith Nos 8625 and 8626; Abu Bakr al-Baihaqi, *al-Sunnan al-kubra with al-Jawhar al-Naqi*, Dar al-Fikr, Beirut, n.d., Vol. 9, p. 83. This *hadith* is also quoted with slightly different wording in Abi Ja'far al-Tahawi, *Sharh Ma'ni al-Asa'r*, Dar Al-Kotob Al-'Ilmia, Beirut, n.d., Vol. 3, p. 222.

63 See *The Islamic Emirate of Afghanistan Rules for the Mujahideen* (August 2006), Sections 10 and 11.

64 See *The Islamic Emirate of Afghanistan Rules for the Mujahideen* (May 2009), Sections 8, 20, and 21. The same applied to punishment for Afghan National Army members. If the captive was a commander, a district head, a high-ranking official, or a foreign Muslim, then the authority for all the above options was vested in the Imam or his deputy (Section 8).

65 *Ibid.*, Preamble, pp. 2–4.

66 See *Layha*, Sections 24 and 25.

67 *Ibid.*, Sections 11, 24, and 25.

instructed to kill them in ambush, and, if such persons are arrested, the *qadi* must sentence them to death; no control or monitoring by the Imam or his deputy is required.⁶⁸ The 2010 rule does not treat such persons as POWs or captives entitled to any privileges. Thus, within a period of four years the rules (each time claimed to be based on Islamic law) have been changed three times. Therefore, these rules cannot be based on Islamic law.

Is *ta'zir* punishment an option for the political authority to terminate captivity?

We have described above the various options that are available to the political authority to terminate the captivity of POWs, but the *Layha* prescribes the punishment of *ta'zir* for them as well. *Ta'zir* as a punishment for POWs appeared for the very first time in Islamic legal and military history in the May 2009 edition of the *Layha*, where it is mentioned in Sections 8, 20, and 21 as a punishment for Afghan soldiers, contractors, and drivers.⁶⁹ The 2010 edition, in Sections 10, 15, and 16, also mentions *ta'zir* punishment.⁷⁰ Section 15 says that, although mistreatment of captives is prohibited, 'the *mujahideen* have to implement *ta'zir* [punishment] [to the POWs] whether it is death penalty or any other punishment'. In other words, the *Layha* considers execution of POWs as *ta'zir* punishment. Section 16 is somewhat vague: on the one hand it says that only the Imam or his deputy or the provincial *qadi* are authorized to give a *ta'zir* punishment, and on the other hand that the district *qadi* must obtain the permission of the provincial *qadi* for *ta'zir* punishments. The governor exercises the powers of the provincial *qadi* if the *qadi*'s post is vacant. The role of the Imam or his deputy remains uncertain when a provincial *qadi* or governor can authorize the *ta'zir* punishment. Moreover, application of the *ta'zir* punishment to POWs cannot be found in any classical or modern treatise on, or text of, Islamic *jus in bello*.

The *ta'zir* punishment occupies an important place in the Islamic criminal justice system. Punishments in Islamic law are usually grouped under four headings: *hudud*, *ta'zir*, *qesas*, and *diya*. *Hudud* crimes are punishable by a *hadd*,⁷¹ which means that the penalty for them is prescribed by the Qur'an or by the Sunna (a word spoken, an act done, or a confirmation given by the Holy Prophet

68 In IHL, contractors who supply to the army are treated as POWs under Article 4(4) of the Third Geneva Convention of 1949.

69 In the 2009 edition, *ta'zir* punishment under Section 8 was vested in the governor or the Imam or his deputy, depending on the rank of the captive. However, there was some overlap. Under Sections 20 and 21 of the same edition this authority was vested in the governor.

70 Section 10 covers the options available for dealing with members of the Afghan National Army, police, and other state personnel. *Ta'zir* is not mentioned initially among the options but the end of the section says that only 'the Imam, his deputy or the provincial *qadi*, are authorized to award the death sentence or *ta'zir*'.

71 According to Ahnaf, there are only five *hudud* crimes. They are: *sariqa* (theft), *haraba* (highway robbery), *zina* (adultery/fornication), *qadhaf* (slander), and *shorb al-khamar* (drinking alcohol). Other Sunni schools of thought add two more to this list: *ridda* (apostasy) and *baghi* (transgression). Prosecution and punishment for *hudud* crimes are mandatory.

Muhammad (PBUH)).⁷² *Ta'zir* literally means deterrence; technically, it means the power of the *qadi* to award discretionary and variable punishment.⁷³ *Ta'zir* offences are those that are not included in the other three categories. 'They comprise conduct that results in tangible and intangible individual social harm and for which the purpose of the penalty is to be corrective',⁷⁴ and that is precisely the meaning of the word *ta'zir*. Penalties for *ta'zir* offences may be imprisonment, physical chastisement, compensation, or fines, or a combination of any two thereof. The prosecution and punishment of *ta'zir* offences are discretionary, as opposed to *hudud*, for which they are mandatory; and no *ta'zir* penalty can be greater than a *hadd* penalty. *Qesas* (retaliation/revenge/chastisement)⁷⁵ crimes are not given a specific and mandatory definition or penalty in the Qur'an. However, the Qur'an refers to *qesas* in 2:178, 179; 5: 45; and 17:33. Its meaning and content are shaped by state legislation, judicial decisions, and legal doctrine.⁷⁶

In addition to the above punishments, the Imam or head of a Muslim state has the discretionary power of the sovereign, which enables him to apply Islamic law and to regulate, through legislation, some criminal justice, taxation, and police matters. These had not been under the control of the *qadi* (judge) in the early Abbasid times and were later given the name '*syasa*'. As explained in note 52, *syasa* literally means 'policy' and comprises the whole of administrative justice that is dispensed by the Imam and his political agents.⁷⁷ This area of Islamic law has

72 See Muhammad Taqi Usmani, *The Authority of Sunnah*, Idaratul Qur'an wal 'uloom al-Islamia, Karachi, 1993, p. 6.

73 See Muhammad Munir, 'Is *zina bil jabr* a *hadd*, *ta'zir* or *siyasa* offence? A reappraisal of the Protection of Women Act 2006 in Pakistan', in *Yearbook of Islamic and Middle Eastern Law*, Vol. 14, 2008–2009, p. 115.

74 M. Cherif Bassiouni, 'Crimes and the criminal process', in *Arab Law Quarterly*, Vol. 12, 1997, p. 270.

75 See Hans Wehr, *A Dictionary of Modern Written Arabic*, ed. J. Milton Cowan, Librairie Du Liban, Beirut, 1980, p. 766. Technically, *qesas* means that the accused be treated/punished the same way in which he treated/punished the victim: 'so he is killed as he killed and is wounded as he wounded [the victim]'. *Qesas* is the punishment only for intentional homicide (*qatl al-'amd*) and intentional wounding (*jarh al-'amd*). See 'Abdul Qadar 'Awdah, *Al-tasri'h al-jana'i al-Islami*, 4th edition, Dar Ihya al-Turath al-Arabi, 1985, Vol. 1, p. 663.

76 The *qesas* crimes include murder, voluntary homicide, involuntary homicide, intentional crimes against the person, and unintentional crimes against the person. See 'A. Q. 'Awdah, above note 75, Vol. 1, pp. 663–668; and M. C. Bassiouni, above note 74, p. 270. *Diya* (blood-money) is the punishment for homicide or wounding with quasi-deliberate intent (*shibh al-'amd*), i.e. an intentional act but without using a deadly implement. This includes the performance of expiation (*kaffara*) by the culprit and the payment of the 'heavier blood-money' (*diya mughallaza*) by his '*aqila*' (which consists of all the male members of the culprit's tribe and, if their number is not sufficient, the members of the nearest tribes; alternatively, of the fellow workers in his profession or his confederates). *Diya* is also the punishment for homicide or wounding by *khata'* (mistake), for cases assimilated to mistake (*ma ujriya mujra al-khata'*), and for indirect homicide (*qatl bi al-sabab*). See, 'A. Q. 'Awdah, above note 75, Vol. 1, pp. 668–671. See also Joseph Schacht, *An Introduction to Islamic Law*, Universal Law Publishing Co., Delhi, 1997, pp. 181–186; M. A. Haleem, Omer Sherif, and Kate Daniels (eds), *Criminal Justice in Islam*, I. B. Tauris, London, New York, 2003, pp. 43–44. Details of *qesas* and *diya* are beyond the scope of this article.

77 Another term used instead of *syasa* was '*nazar fil-mazalim*'. The *qadis* have to follow the instructions given to them by the Imam in the exercise of his powers of *syasa* within the bounds set by the *Shari'a* (*syasa al-shari'yyah*). See J. Schacht, above note 76, p. 54. Under the concept of *syasa*, the sovereign may order the use of such procedural methods as he sees fit to discover where the truth lies. Moreover, apart from *hudud* offences, it is for the sovereign to determine what behaviour constitutes an offence and what

not attracted serious scholarship, as authors do not give it enough space,⁷⁸ but throughout Islamic legal history the head of the Muslim state has exercised some discretionary powers under *syasa*.⁷⁹

Muslim jurists of all the four Sunni schools, the Shi'a schools, and their sub-schools have never prescribed *ta'zir* as the punishment for POWs. They did not even discuss it in their treatises on Islamic *jus in bello*. *Ta'zir* is only found in books or chapters on the Islamic criminal justice system, and the penalty for it is discretionary in nature, to be given by the judge. In the *Layha*, the *ta'zir* penalty is imposed by the Imam or his deputy or the (provincial) *qadi*, and a *ta'zir* punishment does not include the option of a ransom or fine.⁸⁰ If *ta'zir* as a punishment is accepted for POWs (which, I have submitted, is wrong), then what has the Imam or his deputy to do with its application? The *Layha* has not only created a new category of punishment but also applies it in a new way. However, *ta'zir* as a punishment for POWs has no basis in Islamic law. In contrast, there does seem to be some basis for the application to a *spy* of *ta'zir* punishment either by the district or provincial *qadi* or by the provincial governor, which appears in Section 17 of the *Layha*.⁸¹

punishment is to be applied in each case. See N. J. Coulson, *A History of Islamic Law*, Universal Law Publishing Co, Delhi, 1997, p. 132.

78 However, see Saeed Hasan Ibrahim, 'Basic principles of criminal procedure under Islamic Shari'a', in Haleem *et al.*, above note 76, p. 22.

79 Muslim jurists expounded the part of the Islamic legal system that was fixed and left the part that was flexible – changing with the times, according to the needs of the Muslim community – to the Imam (the head of the Islamic state). It is this function that the ruler carried out through a policy called '*al-syasa al-shar'iyya*'. A typical example given by Ahnaf of a *syasa* offence is the crime of apostasy. As discussed above, the fate of POWs is left to the Imam or head of the Muslim state. Similarly, Imam Sarkhasi (d. 483 AH/1090 CE) of the Hanafi school of thought, while commenting on the execution of a person by crushing his head between two stones because he had killed a handmaid in exactly the same way, argues that the Prophet (PBUH) punished him by way of *syasa* and that there was no mutilation because he had endangered the peace of the land and was a habitual criminal. See A. Sarkhasi, above note 46, Vol. 26, p. 128. The explanation when the Prophet (PBUH) executed a habitual thief who was previously given *hadd* punishment, but who deserved to be given a harsher punishment, is similar. See Abdur Rahman al-Nasai, *Sunnan al-Nasai*, Maktabh Dar-ul-uloom, Lahore, Hadith No. 4892. For some interesting discussions of *syasa*, see Imran A. Nyazee, *Theories of Islamic Law*, IIIT & IRI, Islamabad, 1995, 2nd reprint, 2005, pp. 111–112. For works on *syasa*, see Ibn Taymiyya, *al-Syasa Al-Shar'iyya*, Dar al-Kutub Al-'Arabiya, Beirut, 1966, trans. Omar A. Farrukh, *Ibn Taimiya on Public and Private Law in Islam*, Khayats, Beirut, 1966; and Ibn Al-Qaim, *Al-Turuq al-Hukmiya fi Al-Syasa Al-Shar'iya*, Matba't Al-Sunnah Al-Muhamaddiya, n.d. M. K. Haykal, above note 14, does not discuss *syasa al-shar'iyyah*, despite its title; it does discuss almost all issues relating to *jihad*.

80 See *Layha*, Introduction, Section 2.

81 The rule seems to be in conformity with Islamic law. However, a person spying on the Taliban will probably be a person who at least knows their language. So only an Afghan or a Pashtun could do this job and not a foreign national. According to the *Layha*, only the Imam, his deputy, the provincial *qadi*, or the provincial governor can order the execution of the spy; see Section 17, p. 20. This section seems to be in conformity with Islamic law. Under Section 20, a person who is accused of spying but whose guilt could not be proved may be sent into exile. In Section 21, the *Layha* strictly prohibits the taking of photographs of any execution. This is in sharp contrast to the Taliban in the Swat Valley in Pakistan, who, during their control of the area in the summer of 2008, made videos of executions and circulate them accordingly. Moreover, under Section 22 of the *Layha*, the relatives of any person facing execution must be informed (p. 25). Other sections that are also grounded on Islamic law are the following: the disputes of people under the Taliban's control must be resolved under Islamic law (Section 62); cases once decided must

Legality of suicide attacks in the *Layha*

The *Layha* allows suicide attacks but there are certain conditions with which the *mujahideen* should comply. First, the suicide bomber should be trained very well to execute the mission. Second, suicide attacks should be carried out against high-value targets. Third, the killing of ordinary people and damage to property should be avoided as far as possible. Finally, all would-be suicide bombers must obtain permission and advice for suicide attacks from the provincial authority. This rule does not apply to those *mujahideen* who are given a ‘special programme and permission by the higher authority’.⁸² It is important to note that suicide attacks were also allowed in the 2009 edition with the same stipulations.⁸³ Moreover, that same rule reveals that there are special agents who are given instructions by either Mullah Omar or his deputy to carry out suicide attacks or other types of attack.

One of the special features of the conduct of hostilities by non-state Islamic entities is that their tactics and strategies rely on methods and means specifically prohibited by both Islamic law and international humanitarian law. By relying on these methods and means, they cannot conduct warfare without intentionally committing criminal violations of Islamic law and of the Geneva Conventions (for which they seemingly care nothing). Among the worst of these violations is perfidy. In Islamic law, perfidy or treachery is to ‘breach the trust and the confidence of the enemy’, and the Prophet (PBUH) and his successors have strictly prohibited it without any exception.⁸⁴ The Prophet (PBUH) is reported to have reiterated this ban on numerous occasions.⁸⁵ In the eighth year after his migration to Medina, he issued commands to his departing army and said, ‘... Fight yet do not cheat, do not breach trust, do not mutilate, do not kill minors’.⁸⁶ On another occasion, while instructing the army led by ‘Abd al-Rahman b. ‘Awf, he said: ‘... never commit breach of trust, nor treachery, nor mutilate anybody nor kill any minor or woman. This is the demand of God and the conduct of His Messenger for your guidance’.⁸⁷ When Abu Jandal b. Suhayl (d. 18 AH/639 CE) fled to Medina from the polytheists of Mecca, he heard that the Prophet

not be reopened (Section 63); the *mujahideen* should take extreme care not to harm someone’s person or property (in the areas under their control) and any violation must be punished accordingly (Section 63); the *mujahideen* are not permitted to let a minor who as yet has no beard to live with them (Section 69); mutilation is strictly prohibited (Section 70); the *mujahideen* are not allowed to collect *usur*, *zakat*, or other donations by force (Section 71); and finally, under Section 73, kidnapping for ransom ‘in the name of the Islamic Emirate’ is strictly prohibited. These provisions obviously apply in the areas under the control of the *mujahideen*.

82 *Layha*, Section 57, pp. 51–52. The *Layha* uses the terms ‘martyrdom attacks’ instead of ‘suicide attacks’, but how can a person be called a ‘*shaheed*’ (martyr) when he kills himself? A *shaheed* is a person killed by the enemy. In addition, the *Layha* uses the term ‘martyr *mujahed*’ for ‘suicide bomber’.

83 See *Layha*, 2009 edition, above note 64, Section 41.

84 For a detailed study of perfidy and ruse, see Muhammad Munir, ‘The conduct of the Prophet (PBUH) in war, with special reference to prohibited acts’, in *Insights*, forthcoming.

85 ‘Abd al-Jalil, *Shu‘ab al-Iman*, MS. Bashir Agha, No. 366, Istanbul, p. 558.

86 Imam Shoukani, *Nail al-Awtar*, Ansar Al-Sunnah Al-Muhammadiyya, Lahore, n.d., Vol. 7, p. 246.

87 Abdul Malik b. Hisham, *Al-Sirah Al-Nabawiyah*, ed. Mustafa Al-Saqa *et al.*, Dar al-Ma‘rifah, Beirut, n.d., Vol. 2, p. 632.

(PBUH) intended to return him to his people in execution of the Prophet's (PBUH) covenant with the latter.⁸⁸ Abu Jandal stood up among the Muslims and asked them if they would return him to the polytheists who would torture him to make him renounce Islam. The Prophet (PBUH) answered, 'Treachery is not good for us, even to save a Muslim from the law of polytheists'.⁸⁹

Islamic law considers any unilateral violation of a treaty by Muslims without first informing the other party to be an act of treachery. The other side must be given due notice of their intention, otherwise the Muslims will be committing perfidy. The Muslim state must abide by the terms of the treaty in letter and spirit. It is reported that the Ummayyad Caliph Amir Mua'wiyah was once preparing his army to attack the neighbouring Roman Empire, although the peace treaty between the two was still in force, for he wanted to attack as soon as it had expired. A Companion of the Prophet (PBUH), 'Amr b. 'Anbasah, considered it treachery to prepare for an attack without giving prior notification to the Romans. He therefore hastened to the Caliph shouting, 'God is great, God is great, we should fulfil the pledge, we should not contravene it!' The Caliph questioned him, whereupon he replied that he had heard the Prophet (PBUH) saying,

If someone has an agreement with another community then there should be no [unilateral] alteration or change in it till its time is over. And if there is risk of a breach by the other side then give them notice of termination of the agreement on a reciprocal basis.⁹⁰

The Qur'anic verse says: 'Or, if thou hast reason to fear treachery from people [with whom] thou hast made a covenant, cast it back at them in an equitable manner: for, verily, God does not love the treacherous'.⁹¹

Shaybani considered it perfidy if a group of Muslims entered the enemy's country feigning to be the representatives of the Caliph, whether or not they showed forged documents; in that case they were not allowed to kill anyone or take away any property as long as they were in the enemy's state. Thus, if they were given protection, then they had to fulfil their obligations arising from that protection. Similarly, if Muslims pretend to be businessmen but are planning to murder someone, they are forbidden to kill, because they have been granted quarter by the enemy.⁹²

A suicide attack is a typical example here of perfidy or treachery, because the bomber feigns to be a civilian, and when he is taken to be a non-combatant and

88 Under the Treaty of Hudaibiyya between the Muslims and the Meccans, if a Muslim were to run away from Mecca and join the Muslims in Medina he would be returned, but if a non-Muslim were to leave Medina and join the Meccans he would not be returned.

89 Ahmad b. Hanbal al-Shaybani, *al-Musnad*, Mu'asasah Qurtubah, Cairo, n.d., Vol. 4, p. 323; Abdul Malik b. Hisham, *al-Sira al-Nabawiyya*, Dar Ehya al-Turath al-'Arabi, Beirut, 1995, Vol. 3, p. 347.

90 M. Shaybani, above note 34, Vol. 1, p. 185. According to Sarkhasi, it means that any act that resembles treachery in letter or spirit must be avoided. See also Imam Termidhi, *Sunnan*, Gagri Yayinlari, Istanbul, n.d., Vol. 4, p. 143, Hadith No. 1580.

91 Qur'an, verse 8:58.

92 M. Shaybani, Vol. 2, pp. 66–67.

spared by the enemy's soldiers, he blows himself up and kills them. Such an act is strictly prohibited in both Islamic law and IHL.⁹³ Other examples of treachery or perfidy include engaging in combat while feigning non-combatant status, using non-combatants as shields, using ambulances to carry ammunitions or soldiers, pretending to surrender, feigning sickness, and feigning to be a civilian. As pointed out above, suicide attacks are strictly prohibited in Islamic law, and a suicide bomber might be committing at least five crimes according to Islamic law: killing civilians, mutilating their bodies, violating the trust of enemy soldiers and civilians, committing suicide,⁹⁴ and destroying civilian property.⁹⁵

Notably, while the *Layha* prohibits mutilation of dead bodies,⁹⁶ by allowing suicide attacks it allows live persons to be mutilated, disfigured, or burnt. Killing in such a way is strictly prohibited in Islamic law. Some scholars argue that suicide attacks are allowed in some situations but not in others. Sheikh Qaradawi, for instance, initially allowed suicide attacks in the occupied territories (Palestine)⁹⁷ but has subsequently disallowed them.⁹⁸

It may be argued that suicide attacks against non-Muslim enemy belligerents occupying Muslim territory, which is the case in Afghanistan, are not forbidden in Islamic law. Before responding to this claim, it is necessary to explain what types of suicide attack Islamic law prohibits in war. The prohibited types of suicide attack include those when a suicide bomber pretends to be a civilian but is wearing a suicide jacket under his civilian outfit and targets combatants or civilians. As already stated, such an attack is an act of perfidy. When the bomber is openly wearing his combat outfit, it might be very difficult even to get close enough to the enemy to carry out such an attack.⁹⁹ Yet if suicide attacks by persons posing as civilians are allowed against occupying forces because they occupy Muslim

93 See Article 37(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Perfidy is defined as 'acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence'.

94 Committing suicide is strictly prohibited in Islamic law. Suicide in Islamic law is intentional self-murder by the believer. There is a *hadith qudsi* – a statement of the Prophet (PBUH) ascribed to God himself – in which he says that a wounded man takes his own life. God then says, 'My servant anticipated my action by taking his soul (life) in his own hand; therefore, he will not be admitted to paradise'. See Isma'il Al-Bukhari, *Sahih Bukhari*, Dar Sahnun, Istanbul, 1992, Vol. 3, p. 32. In another saying of the Prophet (PBUH), he has given a stern warning to a person committing suicide, stating that the wrongdoer would be repeating the suicidal act endlessly in hell and would reside in hell for ever. *Ibid.*, Vol. 3, p. 212.

95 For details, see M. Munir, above note 61.

96 *Layha*, Section 70.

97 Y. Qaradawi, above note 12, Vol. 2, p. 1092.

98 Sheikh Qaradawi argues that, since the Palestinians have obtained missiles that can hit Israel, martyrdom operations are no longer allowed (*ibid.*, p. 1092). If the same argument is applied in Afghanistan, where (1) the Taliban are so strong that for almost ten years the world's strongest and most well-equipped army has been unable to defeat them and (2) the Taliban possess more sophisticated weapons than the Palestinians, then the use of suicide attacks as a method of warfare should be strictly prohibited.

99 One possibility is when such a soldier pretends to be surrendering and, on approaching the enemy, blows himself up. But this again is perfidy, and in the future soldiers who genuinely wanted to surrender would not be trusted by the enemy.

territory, it would mean that the principles of Islamic *jus in bello* are applicable only when Muslims conquer and occupy non-Muslim territories, and not when Muslim territory is occupied. This is unacceptable.

The Taliban's law on suicide attacks asks the bombers to avoid civilian casualties and damage to civilian property.¹⁰⁰ But this cannot be considered as compliance with the principle of distinction between combatants and civilians under Islamic law or IHL, for it is violated in Section 81 of the *Layha*, which urges the fighters to resemble the local population in their outward appearance: they should keep their 'hair style, clothing, shoes and other things just like the local people [because] this will allow the *mujahideen* to protect the local people and will enable them to move freely in any direction'.¹⁰¹ It is clear that this provision is contrary to the principle of distinction.¹⁰² It destroys the credibility of genuine civilians because the adversary's trust is broken, and exposes the genuine civilian population to attacks.

Conclusion

The Taliban's claim that they are the *mujahideen* (holy warriors) of the Islamic Emirate of Afghanistan obviously suggests that they must abide by the rules of Islamic law on the conduct of hostilities. The *Layha*, the code of conduct for their fighters, highlights the limiting of suicide attacks, avoiding civilian casualties, and winning the battle for the hearts and minds of the local civilian population: 'A brave son of Islam should not be used for lower and useless targets. Utmost effort should be made to avoid civilian casualties'.¹⁰³

In terms of limiting the effects of war, banning some forms of torture, and ruling out non-discrimination based on tribal origin, language, or geographical

100 But see Said Mahmoudi, 'Non-state Islamic actors and international humanitarian law', unpublished paper presented at the Conference on Perspectives on International Humanitarian Law between Universalism and Cultural Legitimacy, The Hague, 27 November 2009.

101 Section 81 of the *Layha* corresponds to Section 63 of the 2009 edition. It is clearly very questionable whether disguising the Taliban to look like the locals will protect them (the locals) or will expose them to danger.

102 In most cases, non-state actors do not in fact comply with the principle of distinction that was stressed by the Prophet (PBUH) and his successors in their wars. See Muhammad Munir, 'The protection of women and children in Islamic law and international humanitarian law: a critique of John Kelsay', in *Hamdard Islamicus*, Vol. 25, No. 3, July–September 2002, pp. 69–82; and Muhammad Munir, 'Non-combatant immunity in Islamic law', under review for possible publication in *Journal of Islamic Law and Culture*. According to a *fatwa* (legal ruling) issued on 23 February 1998 by the so-called 'World Islamic Front' – a group consisting of Osama bin Laden and four other persons representing Islamic militant groups in Egypt, Pakistan, and Bangladesh – 'Killing the Americans and their allies – civilian and military – is an individual obligation for any Muslim who can do so in any country ...'. In addition, the *fatwa* urges Muslims 'to kill Americans and plunder their money wherever and whenever they find it'. Available at: <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm> (last visited 22 December 2010). The original *fatwa* is undated but was published on 23 February 1998 in *Al-Quds al-Arabi*, London edition, p. 3, available at: <http://www.library.cornell.edu/colldev/mideast/fatw2.htm> (last visited 22 December 2010). This injunction is contrary to Islamic *jus in bello*.

103 *Layha*, Section 57(2, 3).

background, the *Layha* may be said to show respect for some fundamental humanitarian rules. However, many rules contained in it have no basis either in Islamic law or in international humanitarian law and may even contradict both of them. The rules on the possible execution of POWs, the punishment of contractors, suppliers, and drivers, and the introduction of *ta'zir* as a punishment for captives at the discretion of the judge for common criminals who cannot be punished under *hudud*, *qesas*, or *syasa* are examples of rules that cannot be found in Islamic law. Conversely, the unconditional release of POWs, the exchange of POWs, and the prohibition of mutilation are based on Islamic law. The acts of perfidy allowed by the *Layha* as methods for the conduct of hostilities – such as attacks in which a suicide bomber feigns civilian status – are to be considered perfidy in both divine law and humanitarian law. Rules that combatants should wear the same clothes and shoes and style their hair in the same way as the local people, so as not to be identified by the enemy, violate the principle of distinction between combatants and civilians and endanger the civilian population. There are many provisions in the *Layha* that are based on Islamic law, such as the requirement that disputes between people (under the *mujahideen's* control) should be settled according to Islamic law, the prohibition on harming someone's person or property, the prohibition of the use of force in collecting *usher*, *zakat*, or donations, and the prohibition of kidnapping for ransom, but these are for the administration of areas under the *mujahideen's* control and not elsewhere.

Thus, the present *Layha* contains many provisions of Islamic law as far as administrative control by *mujahideen* is concerned. However, many rules in the *Layha* regarding the conduct of hostilities cannot be said to be based on pure Islamic law. Islam is used more as rhetoric to serve as a source of unity and to mobilize, not as a guarantee for compliance with the Islamic law of war.

The *mujahideen* have to behave well and show proper treatment to the nation, in order to bring the hearts of civilian Muslims closer to them.¹⁰⁴ If this declared aim is to be accomplished in due respect for Islamic law, the code of conduct must abide by Islamic law and the principles of international humanitarian law. The various changes in the *Layha* over the last few years show that there is room for improvement in the search for compliance with those principles and above all with the divine law. In sum, the *Layha* has an ambitious goal to set out principles in accordance with Islamic law and give it a religious sanction, but unfortunately it falls short.

104 This is the crux of the Introduction of the *Layha*. See, Sections 1–8, pp. 6–14.

Annex

This document is reproduced as a reference text to the article ‘The Layha for the Mujahideen: an analysis of the code of conduct for the Taliban fighters under Islamic Law’, by Muhammad Munir, published in this issue. Its publication does not mean that the International Review of the Red Cross endorses its content.

: : : : : :

The Islamic Emirate of Afghanistan. The Layha [Code of Conduct] For Mujahids*

Translator’s Note

The Layha is the code of conduct (manual) and regulations of the Mujahids of the Islamic Emirate. The following document is the second edition of the Layha, published in 2010. It has been originally written in Pashto and translated into English for informational use by the International Committee of the Red Cross. This is not an official translation. Readers will find the original text on: http://alemarah-iaa.net/index.php?option=com_content&view=category&id=9&Itemid=24. The first Layha was published in 2006. This Code of Conduct replaces the 2009 version.

Our aim has been to preserve the spirit of the original Pashto text. Therefore, deviations from the original structure of the articles and paragraphs have been kept to a minimum and made only when necessary in preserving the sense. The translator’s clarifications are shown by square brackets [...], while explanations of some words or phrases are shown in parentheses (...). English equivalents of names, titles, epithets and notions in Islamic theology have been regularized. The meanings of most Islamic judicial notions referred to in the text are given in footnotes. We have followed the Pashto–Russian dictionary of M.G. Aslanov in the transliteration of Arabic and Pashto words.

: : : : : :

In the name of God
(Who is) the most gracious and the most merciful,
We praise and pray for the glorious Messenger.

* Copyright: The Islamic Emirate of Afghanistan. Publisher: The Education Commission. Publication date: First edition – 1430 lunar year of the hegira system / Second edition – 1431 lunar year of the hegira system.

There after: Allah Almighty says [in the Holy Book]:

Allah doth command you to render back your Trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For Allah is He Who heareth and seeth all things (58).

O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: That is best, and most suitable for final determination (59).¹

Striving [*Jihad*] in the way of Almighty Allah is the highest worship and greatest duty through which the honour of the Islamic Ummah² and the sublimation of the expression of Allah Almighty takes place. *Jihad* is a fundamental tool for the success and magnificence of the Muslims through which the dignity and happiness of the Islamic Ummah can be secured. The nations who have carried out *Jihad* enjoy independence and free life. By contrast, the nations which have sheathed the sword and abandoned Jihad have not received any benefits apart from having been shackled to the neck by the chains of slavery and captivity. Today, while the Mujahids are giving their sacred blood for the prestige of Allah's word, for the honour of their own Muslim nation and the Islamic Ummah, in order to be able to organize *Jihad* affairs in the light of a comprehensive *Jihad* strategy and to guide Mujahids in terms of administrative, educational, judicial, moral and ethical aspects [of life] more than ever before, there is a need [for us] to have such a *Layha* [Code of Conduct], which will enable Mujahids to better clarify their aim; to identify the intentions of the enemies of Islam and their supporters; and to easily find a solution for the doubts and vagueness which they are facing in a *Jihad* environment. In accordance with the divine guidelines, the duties should be given to those God-fearing and brave [persons] who are not only capable of carrying out their duties in a good way, but also able to neutralize the enemy's conspiracy in time.

Thanks to the favour and support of God Almighty, the Leadership of the Islamic Emirate, in order to implement the demand of the moment, has been able to compile the *Layha* and the Regulations into 14 chapters and 85 articles in the light of Mohammedan Sharia and through the assistance and advice given by the prominent and erudite theologians [ulema], chief judges [muftis], specialists and knowledgeable persons of the country.

[The Leadership of the Islamic Emirate] based on the assistance of the mentioned persons and taking into account the current situation has added some issues to the second edition [The Code of Conduct and the Regulations] and has elaborated on some matters and introduced some clarifications.

1 Surah 4. An-Nisa' (Women), in *The Holy Quran*, Yusuf Ali Translation.

2 Religious community.

After the publication of the second edition, every person in charge and every Mujahid of the Islamic Emirate has a responsibility and duty in terms of obeying [the rules of] this *Layha* and its implementation.

All military and administrative authorities as well as ordinary Mujahids of the Islamic Emirate in matters of Jihad affairs are bound to all principles of this *Layha* and obliged to organise their daily *Jihad* activities in the light of the regulations of this Code of Conduct.

Vassalam³,
1431 lunar year of the Hegira system, 15 of Jumadi al Thani
2010.05.29
1389.03.08

: : : : : :

Introduction

1. In the *Layha* [Code of Conduct], *Imam* and *Najib Imam*⁴ refer to the Respected Amir ul Momineen⁵ Mullah Mohammad Omar (Mujahid) and his deputy, respectively.
2. In the text of the *Layha*, whenever [the situation of] giving punishment to somebody is mentioned it does not include the collection of money.
3. In the articles of the *Layha*, whenever the taking of guarantees is mentioned, it refers only to unmovable properties and persons. It does not refer to money or movable property.
4. The second edition of the *Layha* was published and went into affect on the 15th of Jumadi al Thani, 1431 lunar year of the Hegira system which corresponds to the 8th of Jauza, 1389 solar year of the Hegira system and to the 29th of May, 2010 year of Christian era. Mujahids and persons in charge of the Islamic Emirate are obliged to implement this Code of Conduct.

Chapter 1 – Issues related to the surrender of the oppositionists and giving them *dawat*⁶ [invitation]

1. Any Muslim can give a *dawat* [invitation] to the employees of the Kabul servant administration in order to encourage them to leave their duties in this corrupted administration and to sever their ties with it.
2. If somebody is leaving this corrupted administration because of somebody's *dawat*, or because of his own faith, then in the case of the ordinary person the

3 And that's all (Arabic).

4 Deputy.

5 Emir of the faithful.

6 To draw in, to attract to the right way.

district chief shall give a letter of permission to him, and in any case of a well-known person or a person who has inflicted harm on Muslims, the district chief shall provide such a letter after consultation with the governor and shall inform the Mujahids about the letter. If any Mujahid will kill the person or cause any harm to him, the person who committed this act shall be given punishment in the light of Islamic principles.

3. Regarding those persons who have surrendered and repented during their period in power (while working with Infidels or their slavery administration), if they harmed someone or caused harm to someone's property, then this person is obliged by Allah Almighty to make amends. If he does not, then he is [considered] guilty. Of course, the court or somebody else cannot receive a compensation or fine for the crime by force, nor can they punish him. If a person took some else's property and are still in possession of it, then the real owners of the property can take it back from this person, but if the property is no longer in their possession, then the real owners can not take compensation by force [from the person]. If a person during his period in power has accumulated debts or made deals such as purchasing and selling on good faith [of both parties concerned] and is still in debt [towards one of the parties concerned], then the debt can be recovered. If somebody asks for the court to be convened regarding such a personal matter, then the individual concerned should attend the court. Of course, if any thefts have taken place, or one tribe has attacked another tribe, village, household, shop, vehicle or anything else, or has committed murder or has taken a property, in this case a trial and compensation are applicable.⁷

4. If a person does not stand on his promise and carries out obvious treachery after accepting the *dawat* [invitation] or calling, the promise given to him is invalidated. In the case of a second surrender or repenting [of the person], if Mujahids are not sure of his sincerity, then a guarantee shall be asked from him.

5. If a person, having been linked to the current corrupted administration and accused of murdering Muslims, or that Muslims hate him and feel an aversion towards him, or is departing from the ranks of the opposite side, then the Mujahids shall ask this person for a guarantee that he will not change his mind and will not inflict harm on anybody. The person in question shall lead his ordinary life, but those responsible in the district are obliged to watch and follow up on him until gaining full trust and confidence in him.

In case an important operation is conducted and the person in question kills a foreign invader or a high ranking government official, or provides the Mujahids with the opportunity to catch them alive, he could be nominated to the leadership and may receive additional privileges.

6. As regards those persons who depart from the inferior administration and surrender to Mujahids, they should not be included into the Mujahid ranks without consultations among the Mujahids and until they gain full confidence in those

7 Al Hidayah, Vol. 2, p. 34; Fath Ul – Qdir, Vol. 5, p.34; Alamgiriya, Vol. 2, p. 284.

persons. After gaining such confidence, the permission shall be obtained from the person responsible for the province.

7. If any armed person from the opposite side leaves his unit and goes to a place where he cannot defend himself and the circumstances look like this person would like to surrender, any attempt to kill him would be unlawful until [the moment] it becomes clear that he does not have any intention of surrendering and will continue to attack and deceive.

8. If somebody from the opposite side contacts a Mujahid to say that he will be at the service of Mujahids inside the opposition's ranks, and that for this [service] he and his [military] squad⁸ or group of his Mujahids should not cause the person any troubles, in case of such a contact, Mujahids have permission to grant him this particular security. They should not give him general security guarantees though. In case of such a contact, the Mujahid should seek permission from the person responsible in the district who, in turn, should request permission from the governor. Given the fact that it will be personal security [guaranties] given to a particular person by a particular person or group, other Mujahids will not have any responsibility in case of any killing or harm done [to the security given to that particular person].

Chapter 2 – About prisoners

9. When an enemy, regardless of whether they are a local or a foreigner is captured, he will be handed over immediately to the person responsible in the province. After the handover it is at the discretion of the person responsible for the province whether to keep him [captive] with the particular Mujahids [those who captured him] or to hand him over to others.

10. If a local soldier, policeman, an official or other responsible person with affiliations to the slave administration has been captured, it is at the discretion of the governor to release them in the case of prisoners exchange, as part of a goodwill gesture or in exchange of solid guaranties. Receiving money for the prisoner's release is forbidden. Only *Imam*, *Najib Imam* and the provincial judge have the authority to execute or to punish. Nobody else has this authority. If a judge has not been appointed yet in a province it is up to the person responsible in the province to decide the fate [of a prisoner] with regard to their execution or punishment.

11. In case of the capture of contractors who transport and supply fuel, equipment or other materials for the infidels and their slave administration, as well as those who build military centres for them and those high- and low-ranking employees of security companies, interpreters of the infidels and drivers involved in enemy supply [business], if a judge proves the fact that the aforementioned persons are indeed involved in such activities, they should be punished by death. If the judge has not been appointed yet in a province it is up to the person responsible in the

8 'Dalğəj' in the original. Military squad or section.

province to decide the fate [of a person] with regard to the issues of proof and execution.

12. If a military infidel has been captured, his execution, release through prisoner exchange, intentional release or release upon payment in case the Muslims need money, is at the discretion of the *Imam* and *Najib Imam*. No one else has of the authority to make this decision. If the captive becomes Muslim, the *Imam* or *Najib Imam* has the authority to release him in a prisoner exchange, provided that there will be no danger of his becoming an infidel again.

13. If the Mujahids capture prisoners and, during transportation to their [Mujahids'] military centres, encounter a threat and are unable to take the captives to a safe place, and if the captives are people of the opposite side who have been captured during the war or who are officials of the opposite side, then the Mujahids present can kill them [the captives]. However, if they do not belong to these groups of people and there are doubts about the prisoners' status and they have not been identified yet or have been captured in relation to juridical [legal] issues, then the Mujahids are not authorized to kill them even if there is no option but to leave the captives at the scene.

14. If a policeman or soldier will surrender to the Mujahids and repent, the Mujahids are not allowed to kill him. If the policeman or soldier has a weapon with him, or if he had accomplished any great deeds, the Mujahids should express endearment towards him.

15. Mujahids should not expose those detained by them to starvation, thirst, cold or heat even if they deserve death. The Mujahids should punish the detained persons in accordance with the decision provided by Sharia concerning them, whether that would entail execution or any other type of punishment.

16. Apart from the *Imam*, *Najib Imam* and the judge nobody has the right to issue a *ta'zir*⁹ punishment. If a district judge, without the presence of the provincial judge, should issue the *ta'zir* execution punishment, the district judge should receive permission from the provincial judge. However, in those provinces where the provincial judge has not been appointed yet, any determination on execution and issues related to *ta'zir* punishment shall be at the discretion of the governor.

Chapter 3 – About spies

17. If evidence of espionage is found regarding a person he will be considered as a perpetrator of social destruction. The provincial judge and district judge and, in case of their absence the person responsible for the province, has the authority to issue the *ta'zir* punishment. The *Imam*, *Najib Imam*, provincial judge and – in case of the absence of the judge – the governor have the authority to execute [kill] the arrested spy. No one else can pass a decision to execute him.

9 'Ta'zir' – punishment not provided in the Sharia, but determined by the judge himself.

18. Whenever a person has been categorized as a perpetrator of social destruction it is obligatory that it be proven in accordance with the four points below.

- FIRST: the person willingly confesses his espionage, without any coercive force applied against him.
- SECOND: two witnesses give testimonies regarding the espionage and the testimonies given by them should be reliable before the judge.
- THIRD: circumstantial evidence (documents) raises strong suspicion, such as specific tools (equipment) used by spies for the purpose of spying and other such evidence.

Of course, not every one can assess the circumstantial evidence. If the court is available, the judge, and if it's not available, a specialist – an efficient and pious person – shall examine the strong and weak [aspects] of the circumstantial evidence. If the circumstantial evidence is [found] weak then the *ta'zir* punishment shall be reduced and if the circumstantial evidence is [found] strong then the punishment shall be strengthened. If the circumstantial evidence is strong enough for a firm conviction [unshakable confidence], and if the *Imam*, *Najib Imam* and judge have determined that execution [killing] is appropriate, then they can execute him.

- FOURTH: a person who is eligible to be a witness is someone who is very just [fair], without fanaticism [prejudice], who keeps himself far from *Kabair* [Grave sins] and never prolongs [when committed] the *Saghair* [Minor sins].

19. A confession obtained through [the means of] coercion, namely beating, threatening, suffering [torture] is not valid and cannot be used to prove the crime. The person who is taking a confession should be religious and bright [quick on the uptake] in order to prevent the use of coercion (force) when taking a confession because, in [accordance with] Sharia, a confession obtained through coercive force is untrustworthy and invalid. During confession, the Mujahids should not make promises to a prisoner, which they have no intention to fulfil.

However, it is not sufficient to merely take confessions or testimonies from a spy concerning other people. In this case those four points mentioned in article 18 shall be applicable and any actions shall be taken in light of them.

20. If Mujahids have concerns and doubts about a person suspected of spying and his crime has not been proven completely in accordance with the principles of the Sharia, the district chief in consultation with qualified people¹⁰ can exile the person from the area to a place where there will be no threat [to his life] and he will be safe. Another option would be taking from the suspect a solid guarantee. A solid guarantee means that trusted people from the respective area or who are sympathetic with the suspect will guarantee that the suspect will behave appropriately. Unmovable property might also be given as a guarantee such that, if the person

10 Those who have the right to cast their vote and express the opinion regarding sensitive issues.

starts spying again or commits another harmful act and escapes, he will not be able to use it.

21. If a criminal deserves death and an execution verdict has been issued against him in accordance with Sharia [by the court], he should be executed by gun, regardless of whether he is a spy or otherwise. Taking pictures of the executed person is prohibited.

22. Given the fact that many Sharia regulations are linked to the death of a human being, in case the Mujahids have executed a person sentenced to death without his relatives having been informed, the Mujahids should use to all possible means they consider appropriate in order to inform the heirs of the executed person about the date of execution.

Chapter 4 – Regarding those who carry out supply and construction activities for the enemy

23. It is lawful to burn private cars which transport materials or which carry out other services for the Infidels. However, trading cars for money or using them is prohibited.

24. Regarding drivers who are captured while transporting the Infidels' materials, if Mujahids are confident that [the drivers] were indeed transporting materials [goods] for the infidels and their slave administration, then the drivers should be killed and their means of transportation should be burned. In case a person is in captivity, and if the judge is convinced that these persons are indeed involved in this business [materials transportation for the infidels and their slave administration] then the judge should give them a death punishment. Of course, in case a province has not yet had its judge appointed, the matters related to proof and execution shall be transferred to the governor.

25. As far as these contractors (leaseholders) are concerned, those who are involved in activities such as construction of centres [bases] for the infidels and their slave administration as well as transportation of fuel or other materials for them, the Mujahids should burn down their transportation means and kill them [leaseholders, contractors].

In case such a person is in captivity, and if the judge is convinced that the person is indeed involved in such activities, then the judge should give them a death punishment. Of course, in case a province has not yet had its judge appointed, the matters related to proof and execution shall be transferred to the governor.

26. If it is clear that contractors are involved in the finding of labour workers and other workers for activities on behalf of the opposite side and they are doing their patronage as well, these contractors should be killed.

Chapter 5 – About spoils [trophy]

27. Spoils [trophy] refer to the goods that are captured during a fight with the combatant infidels. In Afghanistan, a one-fifth portion of the spoils will be

deposited with the person responsible in the province, who will use the spoils in the *Khums*¹¹ [fifth part] expenditures in accordance with instructions given by the leadership. Four parts of the spoils will belong to the Mujahids who were present at the scene or their commander if he was despatched somewhere to set the trap, for information gathering or other matters related to the particular fighting. Four parts of the spoils may also be distributed among those who meet the following two conditions:

- FIRST: those, who are close enough to the field of operation that in case of need they can go there and help.
- SECOND: those who are willing and ready to take part in the operation and are in contact with the fighting Mujahids. For example, thief a commander deploys him [or them] at a site close to the battlefield saying that if required he will call them to join the operation.

Those who do meet the above-mentioned criteria will not be entitled to the spoils.

28. The commanders of Mujahids should write down the names [and other Identity information] of the Mujahids in order to use this information while distributing the spoils and in case of capture or martyrdom of the Mujahids and for other needs.

29. If the Mujahids will fight [war] in a village and the villagers also take part in the fighting, then they are entitled to a share in the spoils, and if they do not participate, then they are not entitled.

30. If a Mujahid becomes a martyr before the end of the fighting then he is not entitled to a share in the spoils. Of course, the Mujahids should show kindness to him and give him a share. If he becomes a martyr on the battlefield or after the ending of the war then he is entitled to a share of the spoils and his part shall be given to his heirs.

31. The money or materials [goods and other valuables] taken from foreign invaders in the result of fighting [war] are considered as spoils. If they are taken by the Mujahids without any fighting, then they are considered as *Fay*¹², and go to the Public Treasury.¹³

32. If Mujahids seize materials from the slave administration as a result of fighting, then the leadership permits it to be divided as spoils. If the materials are taken without fighting, then they should be sent to the Public Treasury in order to be used for the general needs of the Mujahids.

33. Money which has been taken from a common treasury (a bank) and is in the possession of a reliable person who has not yet distributed it among labourers and employees, shall be divided as spoils if it was obtained through fighting [war]. If it was seized without fighting, then it shall be considered as

11 A kind of taxation in the light of Sharia law.

12 *Fay* in Islamic law is a definition of a booty or trophy which should never be divided among the participants of the war and should be given to the Public Treasury.

13 'Bajt-ul-mal' in the original.

Public Treasury. However, if the money has already been delivered to the employees and labourers, then these employees and labourers shall be considered as owners [of the money]. The *Imam*, judge and the person responsible in the province can issue a *ta'zir* punishment to these individuals but cannot take their money from them. The same applies for the wages received by the workers of organizations [NGOs].

Chapter 6 – Regarding organisational structure

34. The persons responsible in the provinces are obliged to create a commission at the provincial level comprised of qualified members. The members must not number less than five. The provincial commission, along with each district chief and with the agreement of the person responsible in the province, should organise such commissions at the district level. A maximum of three members of the district commission and a minimum three members of the provincial commission should be present in the field [area] of their activities. The leaders and members of both commissions should be those persons who will not have an excuse to leave the area of their activities.

35. In those districts where the activities of the Mujahids of the Islamic Emirate are obvious and visible, a person in charge should be appointed as a district chief. Following the agreement reached with the higher-ranking responsible persons, the district chief should appoint a person as a deputy for public¹⁴ affairs, who would not have much involvement in military affairs. This person should have a certain [level of] knowledge about public affairs and should be experienced with good manners and moral values, so that people can easily access him.

36. The creation of new groups and [military] squads is prohibited. In case of urgent need, the person responsible in the province can request the Leadership's permission, following an agreement of the organizing director¹⁵. Unofficial and self-organized [military] squads should join bigger groups through the governor. If they refuse to join and disobey, they should be disarmed.

37. The spokespersons of the Islamic Emirate are appointed by the Leadership, following suggestions from the relevant administration. They will be the representatives of the whole Islamic Emirate. No one else is allowed to talk with the media on behalf of provinces, groups or individuals. Obeying this rule will prevent disorder, confusion and disunity.

38. Each person responsible in the province should set up a Sharia court at the provincial level, comprising one judge and two prominent theologians who will solve complicated issues at the provincial level which seem to be difficult to solve for theologians and those responsible at the district and village levels. The governor

14 It also could be interpreted as civilian affairs.

15 'Tanzima rais' in the Pashto version is the person responsible for the coordination of the organizational and administrative activities in a given zone.

should present a proposition to the Leadership in order to receive an approval for the [proposed] judge and members of the court.

39. The organizing director can bring changes in the organisational structure of the province upon consultation with the governor. The governor can bring changes in the organisational structure of the district upon consultation with the district chief. However, if the governor and district chief cannot reach a common view after consultation, the governor will refer the issue to the organizing director. If the governor and the organizing director do not reach an agreement, the organizing director will present the issue to the Leadership. The provincial commission can change a district chief after [conducting] thorough investigation and receiving permission from the organizing director and the person responsible in the province.

Chapter 7 – Internal matters of Mujahids

40. It is compulsory for the Mujahids to obey their [military] squad leader; for the squad leader to obey the district leader; for the district leader to obey the provincial leader; for the provincial leader to obey the organizing director and for the organizing director to obey the *Imam and Najib Imam* as long as it is rightful under the Sharia.

41. Anyone who is appointed as a person with responsibility must have the following characteristics: Inventiveness, piety, courage, compassion, and generosity. If none [of the candidates] have all these characteristics, then at least inventiveness and piety are required.

42. The military commission, in order to secure progress in military affairs, has a duty to prepare plans [of action] taking into account the might [abilities] of the Mujahids of every area as well as the geography of the area, and to apply and share successful techniques and experiences with the Mujahids. In case of increasing enemy pressure in a province, the Military commission should prepare a programme for the Mujahids of neighbouring and other provinces in order to disperse the enemy's might and decrease the pressure in a particular area. The commission should present [such] programmes for consultation at the level of the Leadership, and after receiving the Leadership's approval should pass an order to the provinces to proceed [with the programme].

43. The military commission should be aware of the Mujahids' situation [conditions] in all provinces and should know capable and effective Mujahids in order to introduce them to the Leadership for a better supply or reward.

44. Given the fact that the majority of the members of the Military commission are military commanders, it will be difficult for them to assemble in one place. Therefore, in case of need, as many members [of the commission] as possible can assemble and continue their work. In addition, it is up to the commission responsible to organize the commission [internal activities] in a way that will prevent delays and problems in work.

45. The Military commission will ask the persons responsible in the provinces to present information about their procedures [performance] and activities and to send from time to time its delegations to the provinces in order to encourage the Mujahids, to ensure progress in military affairs, to strengthen [the situation] and to collect information.

46. In order to tackle public¹⁶ and judicial issues, article 62 of the *Layha* shall be applicable. In case of any matters arising between the common people¹⁷ and Mujahids, or between Mujahids themselves, the resolution of which is a prerogative of the provincial or district commission, the provincial commission should agree with the governor and the district commission should agree with the district chief or his deputy. The commissions should listen attentively to the explanations of the parties concerned and if the provincial commission is unable to resolve the matter, then it should be addressed to the military commission. The military commission should choose a peaceful resolution. If it still fails to resolve the matter, it should then present the issue to the Leadership. The Leadership shall resolve it through the respective structures [boards] or through [the assistance of] the theologians. If a commission¹⁸ has made a decision, then the announcement should be made in the presence of both parties concerned.

47. The provincial and district commissions, along with their other duties, should monitor [the situation] in order to prevent the infiltration of bad people into the ranks of Mujahids. If such persons are identified, they should be reported to the governor. The commissions shall do their best to resolve contradictions [disputes] between Mujahids and between common people and Mujahids. The commissions shall observe the implementation of all decrees and regulations of the Islamic Emirate. The commission shall do its best to draw attention of violators [to their mistakes] and to correct [their behaviour]. In case the behaviour goes uncorrected, those persons should be reported to the governor.

48. If common people or Mujahids have an issue with a member of the military commission or provincial or district commission or with his comrades and the resolution of the issue is entrusted to a commission of which the mentioned person is a member, then the person should not participate in the gatherings dedicated to the resolution of this particular issue.

49. The provincial commission is obliged to organize the members of the commission in a way that once per month they will guide the Mujahids in terms of obedience, piety and moral values and will monitor their conduct.

50. If a Mujahid has committed a crime or has violated the *Layha* repeatedly and the [military] squad leader or district chief decides to withdraw him from the ranks [of Mujahids] because of the committed crime, [in this situation] the leader should forward the case of the criminal to the provincial commission. The provincial commission should thoroughly investigate the issue and in case the crime indeed

16 Civilian or issues related to the common people.

17 Civilians.

18 Any mentioned commission.

deserves expulsion, the provincial commission shall make a decision after receiving an agreement from the governor. After this, nobody will have a right to arm and equip the expelled person. If the person has repented [of the committed crime], then he can be given a duty with the agreement of the provincial commission and the governor.

If the above-mentioned person is a leader of the [military] squad, district chief, district deputy chief or another responsible person, his case should be forward to the military commission via the governor or provincial commission. The Military commission has the authority to try to correct [the behavior of the person], to summoned him, to advise him and to warn him. If after all [the person] did not correct [his conduct], then the commission should introduce him to the Leadership in order to assess his disarming or expelling from the ranks [of Mujahids]. In case he repents, he can be given a duty again, but [in such situations] the approval of the Military commission or governor is required.

51. The persons responsible at the provincial and the district levels, depending on the conditions in the area, should hold consultations at an appropriate time with respective responsible [persons] about operations conducted, actions, achievements and shortcomings in order to be able to prepare more successful strategies in the future and to spare the Mujahids from [possible] harm.

52. If a [military] squad leader in one district or province wants to carry out *Jihad* in another province or district, he can do it. However, he needs permission from the [persons] responsible in the respective province or district. The persons responsible for the respective province or district will be his superior. He should be fully obedient to the person in charge [of the area].

53. If any governor or other leader already has an active group or [military] squad in another province, he should introduce the relevant squad and Mujahids to the person responsible for the relevant province. After this, they will be obedient to the governor of the relevant area and will follow his instructions [when executing their duties]. The person responsible in the province will provide them with logistic supplies as they do for the other Mujahids of the province. In the structure of the Islamic Emirate, united front lines are prohibited. These front lines, *Mahaz*, are not part of the organisational structure of the Emirate.

54. If a military squad leader from a particular province is giving his assistance to the persons responsible for another province with regard to *Jihad* affairs and afterwards wants to continue to carry out *Jihad* in that place, the person responsible in the province should seek accurate information and agreement from the person responsible in the province of origin [of the group leader] before accepting him and giving him a place. Moreover, [the person responsible in the province] should ask a newcomer about the reason behind his decision to leave the previous province and to come to a new one. If the reason does not contradict Sharia, then the person could be accepted.

55. A military squad leader who would like to increase the members of his squad or group cannot invite Mujahids who belong to another squad. Of course, if a Mujahid wants to join another responsible [group leader], he can do it. However,

Jihad tools given to him by the previous military squad leader in order to serve *Jihad*, or those tools which were seized by common effort and for which the squad's property right has been established, shall be returned to the previous squad leader. If an item was given to him as spoils or was obtained as a personal belonging, he can take it with him.

56. Those valiant warrior¹⁹ Mujahids who are entering the enemy centre in order to conduct a group armed attack should consider the following points:

1. These valiant warrior Mujahids should receive a good training and each of them should be given particular tasks.
2. These valiant warrior Mujahids should be very well supplied and equipped in order to be able to resist for a long time and inflict a lot of damage on the enemy.
3. The Mujahids and their leaders should receive in advance full information and understanding about the area they are going to attack.

57. Regarding martyrdom attacks, the four following points should be considered:

- FIRST: A martyr Mujahid should be well-trained prior to the attack.
- SECOND: A martyrdom attack should be used for important and high-value targets. The self-sacrificing heroes of the Islamic Ummah must not be used for low and worthless targets.
- THIRD: In martyrdom attacks, much more care should be taken to prevent the deaths and injuries of common people.
- FOURTH: Apart from those Mujahids who received an individual programme and permission from the Leadership, all other Mujahids must receive permission and instructions from the person responsible in the province before carrying out martyrdom attacks.

58. The general commissions of the Islamic Emirate shall hold from time to time consultative meetings in order to be more successful and advanced on matters under their responsibility.

Chapter 8 – Regarding education and training

59. The educational and training activities within the structure of the Islamic Emirate should be carried out according to the programme and regulations of the Education commission. The persons responsible in the provinces and districts shall conduct their educational efforts in accordance with the strategy of the above-mentioned commission.

¹⁹ 'Mubariz' in the Pashto version, this word could be also translated as a brave soldier, fighter for a cause (for instance, fighter for national liberation).

Chapter 9 – Regarding control and regulation of organizations [NGOs] and companies

60. The persons responsible in the provinces shall deal with organizations [NGOs] and companies in accordance with the instructions issued by the Commission for Control and Regulation of Organizations [NGOs] and Companies.

However, the commission is obliged to consult the relevant person responsible in the province. In case of disagreement between the two entities, instruction should be requested from those responsible in the Leadership. Provincial, district and military squads as well as provincial representatives of the mentioned commission are not authorized to make decisions on their own regarding organizations [NGOs] and companies' issues.

Chapter 10 – About health

61. The Health Commission of the Islamic Emirate has a special procedure in terms of arrangement of its activities. The treatment of the Mujahids shall take place in accordance with this procedure. The provincial health representatives are obliged to obey the regulations and implement the instructions of the Health commission.

Chapter 11 – Public affairs

62. Military squad leaders are not authorised to interfere with affairs of the common people, even if the local residents request the Mujahids to solve judicial issues or other matters. Only the provincial or district authority can examine the case of the applicant and through the relevant procedure, first, should try to resolve the issue via an intermediary and then by means of peaceful and lawful Jirga in a way that [the decision] will not contradict the holy Sharia. If a peaceful solution and reconciling Jirga is not possible then the parties should refer to the court. In case of the court absence, both parties should proceed on the basis of the view expressed by prominent theologians.

63. All decisions regarding issues and disputes made in a proper manner when the Islamic Emirate was in power cannot be reviewed or re-examined at this stage, even if one of the parties concerned is not satisfied [with the decision]. This is because in those days there were better conditions for justice than nowadays.

64. Persons responsible for Mujahids and persons affiliated with them should not interfere with common people's disputes nor should they take sides in a dispute or go to judges or courts as an intermediary or supporter.

65. The persons responsible in the provinces and districts, squad leaders and all other Mujahids should take maximum measures to avoid deaths and injuries among common people, as well as the loss of their vehicles and other properties. In case of carelessness, each one will be held responsible according to their acts and position, and will be punished depending on the nature of their misconduct.

66. If a responsible person or ordinary person harms common people in the name of the Mujahids, the superior [of the perpetrator] is obliged to correct this ordinary person or responsible person. In case the superior fails to correct [the perpetrator], they should report to the Leadership through the person responsible in the provinces. The Leadership will then punish the ordinary person or responsible one according to its judgement. The Leadership can expel [the perpetrator] from the rows of the Mujahids, if considered necessary.

Chapter 12 – About prohibitions

67. From the beginning of the Movement until now, weapons were collected on a huge scale. The collection conducted [by now] is enough and sufficient. From now on, no weapon shall be collected by force for the Public Treasury.

68. In line with the previous order, the Mujahids should strongly avoid smoking cigarettes.

69. Non-adults²⁰ (underage persons without beards) are forbidden to live in the Mujahids residential places and military centres.

70. In the light of Sharia, cutting off parts of the human body²¹ (ears, nose, and lips) is strictly prohibited. The Mujahids should strictly prevent such practices.

71. The Mujahids of the Islamic Emirate must not collect by force '*ushr*, *zakat* and *chanda*'²². If they receive something through *ushr* and *zakat*, they should cover their Sharia expenditures from this income.

72. The Mujahids should not search people's houses. If a search was strictly necessary, then they will obtain permission from the person responsible for the district. The Imam of the mosque in the village and two village elders should accompany the Mujahids during the search.

73. Kidnapping people for money for any reason is prohibited. The persons responsible in the relevant area must firmly prevent this. If people commit this kind of act in the name of the Islamic Emirate, the provincial responsible person should disarm these criminals and give them a strong punishment, following the instructions given by the Leadership.

Chapter 13 – Recommendations

74. Every [military] squad leader is required to spare special time for *Jihadi* training, as well as religious and moral teachings and education of his colleagues. When they are not fighting or there is no emergency [situation], they should not be negligent about their training [and education].

20 'Lagharzani' in Pashto version.

21 'Musla' in the Pashto version.

22 Different kinds of Islamic taxation and donation system.

75. If there is no danger, Mujahids should worship in the mosque collectively. If going to the mosque is difficult, they should worship together in their places of residence.

Special care should be given to recite [read] the Koran²³ and praise God²⁴, because praising and recitation bring satisfaction and strength in the minds.

76. The Mujahid's strength of mind should be dedicated to military activity. They should keep themselves away from people's problems and local conflicts. On one hand, these problems cause extra work; on the other hand, it brings unnecessary conflict of interest among people and the Mujahids themselves. However if there is a case which the Mujahids cannot ignore, they should act in accordance with Article 62.

77. All staff of the Islamic Emirate should try their best to convince people who are deceived by the opposition to surrender and to put their weapons down. On one hand, the enemy ranks will be weakened, and on the other hand, the obstacles created by local people will decrease. Moreover, in some cases the Mujahids can obtain weapons and ammunitions [from the surrenders].

78. The Mujahids have the duty to behave well with people in accordance with Islamic ethic and moral values, and should try to win hearts and minds of ordinary Muslims. A Mujahid should represent the whole Islamic Emirate in a way that all fellow compatriots will welcome him, and be ready to assist and collaborate with him.

79. The Mujahids should keep themselves away from all sorts of ethnic, linguistic, and regional prejudices.

There is a narration from Hazrat Abu Horeira, may God be pleased with him, saying that the Prophet of God, may peace be upon him, had deigned to speak: 'When the one who is fighting under an unknown flag (referring to a person advancing with closed eyes; the good and bad of him cannot be determined), or the one who is angry (upset) due to ethnic prejudice (which is not the word of Allah), or who invites people to ethnocentrism (and not to Almighty Allah), or who assists someone for ethnic reasons (not for Almighty Allah) is killed, this person will die in ignorance and darkness (like during the period before Islam)'.

80. A superior responsible [person] should audit from time to time his subordinate regarding the Jihad's items and financial expenditures.

81. The Mujahids should adapt their physical appearance such as hairstyle, clothes, and shoes in the frame of Sharia and according to the common people of the area. On one hand, the Mujahids and local people will benefit from this in terms of security, and on another hand, will allow Mujahids to move easily in different directions.

23 'Talavat' in the original. Reading (usually of the Koran).

24 'Zikr' in the original. Repetition of the Divine Epithets.

Chapter 14 – About the *Layha*

82. An amendment in this *Layha* is the sole authority of the Islamic Emirate and Advisory Council²⁵ of the Islamic Emirate. If someone else dares to bring changes or violates its rules, his excuse will not be accepted.

83. The Military commission as well as the provincial and district commissions have a duty to keep the Mujahids informed about the provisions of this *Layha* and other decrees of the Islamic Emirate and to ensure its implementation.

84. In case of facing a situation that is not discussed in the booklet, Mujahids should take advice from the person responsible in their districts. In case of failure at this level, the issue must be referred to the person responsible in the province. If a solution is not found, the person responsible in the province should ask for instructions from the organizing director. In case of not finding a solution, the organizing director should ask for instructions from the Leadership.

85. It is compulsory for all the Mujahids to act upon and follow the articles [of the *Layha*]. The violator will be treated according to Islamic principles.

May Allah give us his favour
Honourable Mujahid brothers!

- All your intentions and conduct should be in accordance with divine directions and the doctrine of the Prophet.
- You should stand before the enemy as steel; events and propaganda should not shake your persistence.
- You should give a place in your hearts to your Mujahid brothers and to your people; keep strong links of brotherhood and loyalty with them in order to prevent the enemy being successful in his ill-fated aim of spreading disunity.
- Conduct all your Jihad activities and operations on the base of consultations, carefulness, inventiveness and rationality.
- Never act based on personal dislike, preferences, indifference and urgency when giving somebody a punishment.
- The protection of public properties as well as life and properties of common people is regarded as one of the basic responsibilities of Mujahids. Therefore, you should do your best in order to act in accordance with this responsibility and do not let ambition and indulgence in worldly pleasures arm persons to offend common people or to damage their property in order to get material wealth.

From the speeches of His High Excellency Amir ul Momineen.

²⁵ 'Rahbari Shura' in the original.

Combatants, not bandits: the status of rebels in Islamic law

Sadia Tabassum

Sadia Tabassum is Lecturer in the Department of Law, International Islamic University, Islamabad. She received her LLM in International Law from the same University.

Abstract

The Islamic law on rebellion offers a comprehensive code for regulating the conduct of hostilities in non-international armed conflicts and thus it can be used as a model for improving the contemporary international legal regime. It not only provides an objective criterion for ascertaining existence of armed conflict but also recognizes the combatant status for rebels and the necessary corollaries of their de facto authority in the territory under their control. Thus it helps reduce the sufferings of civilians and ordinary citizens during rebellion and civil wars. At the same time, Islamic law asserts that the territory under the de facto control of the rebels is de jure part of the parent state. It therefore answers the worries of those who fear that the grant of combatant status to rebels might give legitimacy to their struggle.

.....

The contemporary world faces many armed conflicts, most of which are deemed ‘internal’ – or ‘non-international’. This article attempts to identify some of the important problems in the international legal regime regulating these conflicts and to find solutions to these problems by taking the Islamic law of rebellion as our point of reference.

Islamic international law – or *Siyar* – has been proven to deal with the issue of rebellion, civil wars, and internal conflicts in quite some detail. Every manual of *fiqh* (Islamic law) has a chapter on *Siyar* that contains a section on rebellion (*khuruj/baghy*);¹ some manuals of *fiqh* even have separate chapters on rebellion.² The Qur’an, the primary source of Islamic law, provides fundamental

principles not only to regulate warfare in general but also to deal with rebellion and civil wars.³ The *Sunnah* of the Prophet elaborates these rules⁴ and so do the conduct and statement of the pious Caliphs who succeeded the Prophet; these Caliphs, especially ‘Ali, laid down the norms that were accepted by the Muslim jurists who in time developed detailed rules.⁵ Islamic history records several instances of rebellion in its early period⁶ and that is why the subject has always been an issue of concern for jurists. Furthermore, the jurists were very conscious about the obligations of both factions during rebellion because Islamic law regards both warring factions as Muslims.⁷

The contemporary legal regime dealing with non-international armed conflicts faces three serious problems today. First, states generally do not like to acknowledge the existence of an armed conflict within their boundaries.⁸ Even

- 1 Thus, the *Kitab al-Siyar* in the *Kitab al-Asl* of Muhammad b. al-Hasan al-Shaybani contains a section (*Bab*) on *khuruj*. See Majid Khaduri, *The Islamic Law of Nations: Shaybani's Siyar*, John Hopkins Press, Baltimore, 1966, pp. 230–254. The same is true of other manuals of the Hanafi School.
- 2 This is the case with *al-Kitab al-Umm* of Muhammad b. Idris al-Shafi'i. This encyclopaedic work contains several chapters relating to *siyar*, and one of these chapters is *Kitab Qital Ahl al-Baghy wa Ahl al-Riddah* (*Al-Kitab al-Umm*, ed. Ahmad Badr al-Din Hassun, Dar Qutaybah, Beirut, 2003, Vol. 5, pp. 179–242). The later Shafi'i jurists followed this practice. Thus, Abu Ishaq Ibrahim b. 'Ali al-Shirazi's *al-Muhadhdhab* also contains a separate chapter on *baghy* entitled *Kitab Qital Ahl al-Baghy* (*Al-Muhadhdhab fi Fiqh al-Imam al-Shafi'i*, Dar al-Ma'rifah, Beirut, 2003, Vol. 3, pp. 400–423).
- 3 Surat al-Hujurat gives directives for dealing with *baghy*. (49:9–10). Muslim jurists discuss the issues relating to *baghy* while analysing the implications of the religious duty of *al-amr bi 'l-ma'ruf wa al-nahy 'an al munkar* (enjoining right and forbidding wrong). See, for instance, Abu Bakr al-Jassas, *Ahkam al-Qur'an*, Qadimi Kutubkhana, Karachi, n.d., Vol. 1, pp. 99–101 and Vol. 2, pp. 50–51.
- 4 See, for instance, traditions in the *Kitab al-Imarah* in Muslim b. al-Hajjaj al-Qushayri's *al-Sahih*.
- 5 The illustrious Hanafi jurist Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi, in his analysis of the Islamic law of *baghy*, asserts in many places that “‘Ali is the *imam* in this branch of law”. See Abu Bakr Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi, *al-Mabsut*, ed. Muhammad Hasan Isma'il al-Shafi'i, Dar al-Kutub al-'Ilmiyyah, Beirut, 1997, Vol. 10, p. 132.
- 6 'Uthman, the third caliph, was martyred by rebels in 35 AH (655 CE). 'Ali had to fight several wars with his opponents among Muslims and was martyred by a rebel in 40 AH (660 CE). His son al-Husayn was martyred by the government troops in Karbala' in 61 AH (681 CE). There were several other instances of rebellion during the lifetime of the great Muslim jurist and the founder of the Hanafi school of Islamic law, Abu Hanifah al-Nu'man b. Thabit (80–150 AH (699–767 CE)).
- 7 As we shall see later, when non-Muslims take up arms against a Muslim ruler, it is not deemed ‘rebellion’. Rather, the general law of war applies to such a situation. Thus, the rules of rebellion apply only when both the warring factions are Muslims. The Qur'an calls the rebels ‘believers’ (Qur'an, 49:9) and 'Ali is reported to have said regarding his opponents: ‘These are our brothers who rebelled against us’. From this, the *fuqaha* (jurists) derive this fundamental rule of the Islamic law of *baghy*. See Sarakhsi, above note 5, Vol. 10, p. 136.
- 8 Legally speaking, it is true that international humanitarian law (IHL) applies whenever an armed conflict exists *de facto*, even if a party to the conflict does not acknowledge the existence of the conflict. Yet refusal by the state to acknowledge the existence of the armed conflict within its boundaries complicates the application. See for details: International Committee of the Red Cross (ICRC), ‘Improving compliance with international humanitarian law’, background paper prepared for informal high-level expert meeting on current challenges to international humanitarian law, Cambridge, 25–27 June 2004. See also Michelle L. Mack, *Compliance with International Humanitarian Law by Non-state Actors in Non-international Armed Conflicts*, Program on Humanitarian Policy and Conflict Research, Harvard University, Working Paper, 2003, available at: [http://www.reliefweb.int/rw/lib.nsf/db900sid/AMMF-6SYHW3/\\$file/Harvard-Nov2003.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/AMMF-6SYHW3/$file/Harvard-Nov2003.pdf?openelement) (last visited 7 February 2011). See also Marco Sassoli, ‘Taking armed groups seriously: ways to improve their compliance with international humanitarian law’, in *International Humanitarian Legal Studies*, Vol. 1, 2010, pp. 5–51.

when they face strong secessionist movements, they tend to call it a 'law and order' problem or an 'internal affair'.⁹ Second, it may be difficult to make non-state actors comply with *jus in bello* because international law is generally considered binding on states only.¹⁰ Third, and most importantly, the law does not accord combatant status to insurgents, which is why they are subject to the general criminal law of the state against which they take up arms.

In this study we will analyse the detailed rules of Islamic law regarding the legal status of rebels so as to explore the possible solutions to these problems arising within the contemporary law of armed conflict.

Defining rebellion

In his landmark study of the Islamic law of rebellion, Khaled Abou El Fadl defines rebellion as 'the act of resisting or defying the authority of those in power'.¹¹ He says that rebellion can occur either in the form of 'passive non-compliance with the orders of those in power' or in the form of 'armed insurrection'.¹² Regarding the target of a rebellion, Abou El Fadl says that it could be a social or political institution or the religious authority of the '*ulama*' (legal scholars).¹³ We may point out here that passive non-compliance to those in power is not rebellion in the legal sense. Similarly, every violent opposition to government or state cannot be called rebellion because the term 'rebellion' connotes a high intensity of violence and defiance of the government. Hence, from the legal perspective, the classification made by Muhammad Hamidullah (d. 2002), a renowned scholar of Islamic international law, seems more relevant.

The true hallmark of rebellion

Hamidullah says that if opposition to government is directed against certain acts of government officials it is *insurrection*, the punishment for which belongs to the law of the land.¹⁴ He further asserts that if the insurrection is intended to overthrow the legally established government on unjustifiable ground, it is *mutiny*, while if it is

9 There are two major reasons for this. First, states do not want other states and international organizations to interfere in such a situation. Second, states consider insurgents to be criminals and law-breakers. They fear that acknowledging *belligerent* status for insurgents may give some sort of legitimacy to their struggle.

10 As opposed to general international law, IHL binds 'all parties to a conflict', including the non-state actors even if they did not sign the Geneva Conventions or its Additional Protocols. Yet difficulty may arise in making the non-state actors comply with IHL, mainly because they lack ownership of that law.

11 Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law*, Cambridge University Press, Cambridge, 2001, p. 4.

12 *Ibid.*

13 *Ibid.*

14 Muhammad Hamidullah, *The Muslim Conduct of State*, Sheikh Muhammad Ashraf, Lahore, 1945, p. 167.

directed against a tyrannical regime on just ground, it is called a *war of deliverance*.¹⁵ In our opinion, the distinction between mutiny and war of deliverance is based on subjective assessment, as one and the same instance of insurrection may be deemed mutiny by some and a war of deliverance by others.¹⁶ Hence, this distinction serves no useful purpose. The point is simply this: that, as opposed to insurrection, the purpose of mutiny or a war of deliverance is not just to get rid of some government officials but to overthrow the government.

Hamidullah mentions the next stages in the violent opposition to government or state under the titles of rebellion and civil war. He says that when insurrection grows more powerful, to the extent of occupying some territory and controlling it in defiance of the home government, it is called *rebellion*, which may convert into *civil war* if the rebellion grows to the proportion of a government equal to the mother government.¹⁷ Occupying a certain territory and controlling it in defiance of the central government is a useful indicator for identifying rebellion, as we shall see later.

Rebels versus bandits

The early Muslim jurists also gave detailed descriptions of the rulings of Islamic law regarding violent opposition to government. Generally, they used three terms for this purpose: *baghy*, *khuruj*, and *hirabah*.

Baghy literally means disturbing the peace and causing transgression (*ta'addi*).¹⁸ In legal parlance, it denotes rebellion against a *just* ruler (*al-imam al-'adl*).¹⁹ The term *khuruj*, literally 'going out', was originally used for rebellion against the fourth caliph, 'Ali, and those rebels were specifically termed *Khawarij* ('those who went out'). Later, however, the term was assigned to rebellions of various leaders among the household (*ahl al-bayt*) of the Prophet against the tyrannical Umayyad and Abbasid rulers.²⁰ In other words, the term *khuruj* was used for just rebellion against unjust rulers. However, the just and unjust nature of the war is a subjective issue on which opinions may differ. That is why the Muslim jurists developed the code of conduct for rebellion irrespective of whether the rebellion is just or unjust, and it is for this reason that the two terms *khuruj* and *baghy* came to be used interchangeably.²¹ The term *hirabah*, on the other hand, is

15 *Ibid.*

16 We may quote Abou El Fadl here: 'The difference ... between an act of sedition and an act of treason will depend on the context and circumstances of such an act, and on the constructed normative values that guide the differentiation. Therefore, often the distinction created between one and the other is quite arbitrary in nature', above note 11, p. 4.

17 M. Hamidullah, above note 14, p. 168.

18 Abu 'l-Fadl Jamal al-Din Muhammad Ibn Manzur, *Lisan al-'Arab*, Dar Bayrut, Beirut, 1968, Vol. 14, p. 78.

19 Muhamamd Amin b. 'Uthman Ibn 'Abidin al-Shami, *Radd al-Muhtar 'ala al-Durr al-Mukhtar*, Matba't Mustafa al-Babi al-Halbi, Cairo, n.d., Vol. 3, p. 308.

20 For instance, the revolt of Zayd b. 'Ali, the great grandson of 'Ali, is called *khuruj* not *baghy*.

21 Thus in the chapters on *Siyar* in the Hanafi manuals the section entitled '*Bab al-Khawarij*' mentions the rulings of Islamic law regarding rebellion irrespective of whether the rebellion is just or unjust.

used for a particular form of robbery on which *hadd* punishment is imposed.²² While any government would generally deem rebels to be bandits and robbers, the Muslim jurists forcefully asserted that rebellion stands distinct from robbery and that, as such, rebels are not governed by the general criminal law of the land²³ even if punitive action could be taken against them for disturbing the peace and taking the law into their own hands.²⁴

Dar al-baghy: territory under the control of rebels

Territory under the control of the rebels is called *dar al-baghy* ('territory of rebels') and the Hanafi jurists consider it outside the jurisdiction of the central government of the Islamic state. The territory under the control of the central government is called *dar al-'adl*, an antonym of *dar al-baghy*.²⁵ As we shall see later, culprits of a wrong committed in *dar al-baghy* cannot be tried in the courts of *dar al-'adl* even if the central government re-establishes its control over *dar al-baghy*.²⁶ *Dar al-baghy* may conclude treaties with other states as well.²⁷ Decisions of the courts of *dar al-baghy* are generally not reversed even if the central government recaptures that territory.²⁸ Taxes are to be paid while crossing the borders of *dar al-'adl* to *dar al-baghy* and vice versa.²⁹ Thus, for all practical purposes *dar al-baghy* is considered another state.³⁰ However, as we shall see later, it is given only *de facto*, not *de jure*, recognition.³¹

How do we identify rebellion?

The concept of rebellion in Islamic law comes under the doctrine of *fasad fi 'l-ard* ('disturbing peace and order in the land').³² According to Muslim jurists, there

22 'Ala al-Din Abu Bakr Al-Kasani, *Bada'i' al-Sana'i'i fi Tartib al-Shara'i'*, ed. 'Ali Muhammad Mu'awwad and 'Adil Ahmad 'Abd al-Mawjud, Dar al-Kutub al-'Ilmiyyah, Beirut, 2003, Vol. 9, p. 360. In Islamic law, *hadd* is a fixed penalty, the enforcement of which is obligatory as a right of God. *Ibid.*, Vol. 9, p. 177.

23 Thus they held that the rules of *hudud* (fixed penalties for specific crimes), *qisas* (equal punishment for culpable homicide and injuries), *diyah* (financial compensation for homicide), *arsh* (financial compensation for injuries), and *daman* (financial compensation for damage to property) are not applicable to rebels. For details, see below, pp. 8–11.

24 That is why the books on Islamic criminal law devote sections to the issue of rebellion.

25 Sarakhsi, above note 5, Vol. 10, p. 130.

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*

29 Abu 'l-Hasan 'Ali b. Muhammad al-Mawardi, *al-Ahkam al-Sultaniyah wa 'l-Wilayat al-Diniyyah*, Dar Ibn Qutaybah, Kuwait, 1989, p. 166.

30 M. Hamidullah, above note 14, p. 168.

31 When a government gives *de facto* recognition to another government, it means that the former is acknowledging as a matter of fact that the latter is exercising effective control of a certain territory. This does not necessarily mean that this control is legal. *De facto* recognition is usually given where doubts remain as to the long-term viability of the government. As opposed to this, *de jure* recognition implies accepting the legitimacy of the authority of that government on the territory under its effective control. See Malcolm N. Shaw, *International Law*, Cambridge University Press, Cambridge, 2003, pp. 382–388.

32 *Baghy* on unjust grounds is *fasad* and the duty of enjoining right and forbidding wrong requires Muslims to curb this *fasad*. Similarly, if the ruler is unjust, the duty of enjoining right and forbidding wrong requires Muslims to try to remove him because he indulges in *fasad*. Hence, there is no contradiction;

are various forms of *fasad* and the ruler has been given the authority under the doctrine of *siyasah*³³ for maintenance of peace and order in the society. The two important forms of *fasad* mentioned explicitly in the Qur'an are *hirabah*³⁴ and *baghy*.³⁵ In both of these, a strong group of people take up arms in defiance of the law of the land and challenge the writ of the government. However, *hirabah* is dealt with as a crime and the criminal law of the land is applied to the *muharibin*,³⁶ while *baghy* is governed by the law of war and the *bughah* are dealt with as combatants, even though, under the doctrine of *siyasah*, the government can take punitive action against the rebels for disturbing the peace of the society. This issue will be further elaborated below, after we explain the criterion for identification of rebellion.

The litmus test for determining the existence of *baghy* and for distinguishing it from *hirabah* is whether or not those taking up arms against the government challenge the legitimacy of the government or the system. While *muharibin* do not deny the legitimacy of the government or the system, *bughah* consider themselves to be the upholders of justice and claim that they are striving to replace the existing illegitimate and unjust system with a legitimate and just order. In technical terms, it is said that the *bughah* have *ta'wil* (legal justification for their struggle).

Thus, there are two ingredients of *baghy*:

1. A powerful group establishes its authority over a piece of land in defiance of the government (*mana'ah*, resistance capability); and
2. this group challenges the legitimacy of the government (*ta'wil*).

rather, these are two sides of the same picture. For an elaborate discussion on the Qur'anic doctrine of *fasad fi 'l-ard*, see Abu 'l A'la Mawdudi, *al-Jihad fi 'l-Islam*, Idara-e-Tarjuman al-Qur'an, Lahore, 1974, pp. 105–117.

- 33 The famous Hanafi jurist Ibn Nujaym defines *siyasah* as 'the act of the ruler on the basis of *maslahah* (protection of the objectives of the law), even if no specific text [of the Qur'an or the *Sunnah*] can be cited as the source of that act'. Zayn al-'Abidin b. Ibrahim Ibn Nujaym, *al-Bahr al-Ra'iq Sharh Kanz al-Daqa'iq*, Dar al-Ma'rifah, Beirut, n.d., Vol. 5, p. 11. The *fuqaha'* validated various legislative and administrative measures of the ruler on the basis of this doctrine. For instance, the *faramin* of the Mughal emperors or the *qawamin* of the Ottoman sultans were covered by the doctrine of *siyasah*. This authority of the ruler, however, is not absolute. The *fuqaha'* assert that if the ruler uses this authority within the constraints of the general principles of Islamic law, it is *siyasah 'adilah* (good governance) and the directives issued by the ruler under this authority are binding on the subjects. However, if the ruler transgresses these constraints, it amounts to *siyasah zalimah* (bad governance) and such directives of the ruler are invalid. Ibn 'Abidin, above note 19, Vol. 3, p. 162. For details of the doctrine of *siyasah*, see the monumental work of the illustrious Imam Ahmad b. 'Abd al-Halim Ibn Taymiyyah: *al-Siyasah al-Shar'iyyah fi Islah al-Ra'i wa al-Ra'iyyah*, Majma' al-Fiqh al-Islami, Jeddah, n.d.

34 Qur'an, 5:33.

35 *Ibid.*, 48:9–10.

36 The Hanafi jurists generally mention the rules of *hirabah* (robbery) in the chapter on *sariqah* (theft). See, for instance, Sarakhsi, above note 5, Vol. 9, pp. 134 ff. Some of them, however, mention the rules of *hirabah* in a separate chapter. For instance, Kasani first mentions the crimes of *zina* and *qadhif* in the *Kitab al-Hudud* (Kasani, above note 22, Vol. 9, pp. 176–274), after which he mentions the crime of theft in the *Kitab al-Sariqah* (*ibid.*, Vol. 7, pp. 275–359), and then he elaborates the rules of *hirabah* in the *Kitab Qutta' al-Tariq* (*ibid.*, Vol. 7, pp. 360–375). Finally, he begins an elaborate discussion of the law of war in the *Kitab al-Siyar* (*ibid.*, Vol. 7, pp. 376–550), devoting the final section (*fasl*) to the rules of *baghy* (*ibid.*, Vol. 9, pp. 543–550).

Both *muharibin* and *bughah* have enough *mana'ah* but rebels have *ta'wil*, which *muharibin* lack.³⁷

The legal status of rebels in Islamic law: combatants or bandits?

The issue of rebellion attracted serious questions of theology as well as of legality, both of which were very important for Muslim jurists. However, the jurists not only separated the legal issues from those of theology but also separated those of *jus in bello* from those of *jus ad bellum*. Thus, they analysed the questions about the conduct of hostilities during rebellion irrespective of whether the rebellion was just or unjust, that is, without taking sides – an approach adopted by scholars of international humanitarian law (IHL) in the contemporary world.³⁸

Before we explain the extent to which the application of criminal law ceases in case of rebellion, it is pertinent to discuss briefly the various categories of crime in Islamic law.

Categories of crime in Islamic law

As opposed to other legal systems, in which crimes are generally considered violations of the rights of the state, Islamic law divides crimes into four different categories depending on the nature of the right violated:³⁹

- a) *Hadd* is a specific crime deemed to be a violation of a right of God;⁴⁰
- b) *Ta'zir* is a violation of the right of an individual;⁴¹
- c) *Qisas*, including *diyyah* and *arsh*, is deemed to be a violation of the mixed right of God and of an individual in which the right of the individual is deemed to predominate;⁴² and
- d) *Siyasah* is a violation of the right of the state.⁴³

37 Sarakhshi, above note 5, Vol. 10, p. 136. As noted earlier, the question as to who will decide whether the *ta'wil* of these insurgents is valid or not is not the concern of the *fuqaha*. They concentrate only on the code for the conduct of hostilities (*adab al-qital*) in rebellion, irrespective of whether that rebellion is just or not. Thus, Sarakhshi says that, even if the *ta'wil* of the rebels is invalid, it is deemed sufficient to suspend the rules of *qisas*, *diyyah*, and *daman*. *Ibid*.

38 In this analysis, I have primarily relied on the exposition of the Hanafi jurists instead of mixing the views of the various schools. This is because the methodology of *talfiq* or 'conflation' – mixing and combining opinions based on different and sometimes conflicting principles – leads to analytical consistency. However, I have added references to the views of other jurists in the footnotes.

39 See Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Islamic and Western*, Advanced Legal Studies Institute, Islamabad, 1998.

40 The *hadd* of *qadhif* (false imputation of committing illicit sexual intercourse) is deemed a mixed right of God and of the individual but the right of God is deemed predominant. Kasani, above note 22, Vol. 9, p. 250.

41 *Ibid.*, Vol. 9, p. 273.

42 These punishments are the rights of God, and as such the limits of the punishments are deemed 'fixed', but as the right of the individual is predominant the aggrieved individual or his/her legal heirs can pardon, or reach a compromise with, the offender.

43 Ibn 'Abidin, above note 19, Vol. 3, p. 162.

The nature of the rights involved determines the application of various rules and principles of Islamic criminal law. *Hadd* penalties cannot be pardoned by the state because these are deemed to be the rights of God and as such only God can pardon these penalties.⁴⁴ Similarly, the state does not have the authority to pardon *ta'zir* punishments, although the aggrieved individual or his legal heirs can pardon, or reach a compromise with, the offender.⁴⁵ The same is the case with the *qisas* punishments.⁴⁶ One may consider the part of criminal law covering *hadd*, *ta'zir*, and *qisas* and *diyah* as rigid because the state has little role to play in this area. The state can, however, pardon or commute a *siyasah* punishment because it is deemed a right of the state.

As we shall see below, when *mana'ah* is coupled with *ta'wil* – that is, when there is rebellion – the criminal law relating to the first three categories of rights ceases to apply. It is only area relevant to the right of the state (*siyasah*) that remains applicable. Importantly, this part of criminal law is flexible, as the government can pardon or commute the punishments. This becomes the basis for any pronouncement of general amnesty for rebels, as well as for concluding peace settlements with them.

Suspension of a major part of criminal law during rebellion

Muhammad b. al-Hasan al-Shaybani, the father of Muslim international law, says: 'When rebels repent and accept the writ of the government, they should not be punished for the damage they caused [during rebellion]'.⁴⁷ Explaining this ruling, the famous Hanafi jurist Abu Bakr al-Sarakhsi says:

That is to say, they should not be asked to compensate for the damage they caused to the life and property [of the adverse party]. He means to say: when they caused this damage after they had organized their group and had attained *mana'ah*. As for the damage they caused before this, they should be asked to compensate it because [at that stage] the rule was to convince them and to enforce the law on them. Hence, their invalid *ta'wil* would not be deemed sufficient to suspend the rule of compensation before they attained *mana'ah*.⁴⁸

Shaybani himself mentions a similar rule when he says: 'When those who revolt lack *mana'ah*, and only one or two persons from a city challenge the legitimacy of the government and take up arms against it, and afterwards seek *aman* [peace], the whole law will be enforced on them'.⁴⁹ Sarakhsi explains this ruling in

⁴⁴ Kasani, above note 22, Vol. 9, pp. 248–250.

⁴⁵ *Ibid.*, Vol. 9, pp. 273–274.

⁴⁶ *Ibid.*

⁴⁷ Sarakhsi, above note 5, p. 136. The Shafi'i jurist Abu Ishaq al-Shirazi says: 'If a prisoner among the rebels accepts the authority of the government, he shall be released. If he does not accept the authority of the government, he shall be imprison till the end of the hostilities after which he shall be released on the condition that he shall not participate in war.' Shirazi, above note 2, Vol. 3, p. 404.

⁴⁸ Sarakhsi, above note 5, p. 136.

⁴⁹ *Ibid.*, p. 141. The same is the preferred opinion of the Shafi'i school. Shirazi, above note 2, Vol. 3, p. 406.

these words: 'because they are like robbers, and we have already explained that when *ta'wil* lacks *mana'ah*, it has no legal effect [it cannot suspend the rule of compensation]'.⁵⁰

Shaybani further states it explicitly that, even if the government and the rebels conclude a peace treaty on the condition that the rebels would not be asked to make compensation for the damage they caused before they attained *mana'ah*, this condition would be invalid and the law would be enforced on them:

If the rebels have caused damage to life and property before they revolted and fought, and after revolting they conclude a peace treaty on the condition that this damage should not be compensated, this condition will be invalid and the rules of *qisas* and of compensation for damage of property will be applied on them.⁵¹

It does not amount to treachery. Rather, accepting this condition will amount to violating fundamental norms of Islamic law. Hence, this stipulation is deemed *ultra vires* and as such null and void. Sarakhsi elaborates the principle behind this rule in the following words:

because this compensation is binding on them as a right of the individual [whose life or property was damaged] and the ruler does not have the authority to waive the rights of individuals. Hence, the stipulation from their side regarding the suspension of the rule of compensation is invalid and ineffective.⁵²

However, as mentioned above, they will not be asked to compensate for the damage they caused after attaining *mana'ah* in the same way as non-Muslim combatants are not asked to compensate for the damage they caused during war even after they embrace Islam.⁵³ Sarakhsi says:

After they attain *mana'ah*, it becomes practically impossible to enforce the writ of the government on them. Hence, their *ta'wil* – though invalid – should be effective in suspending the rule of compensation from them, like

50 Sarakhsi, above note 5, p. 141.

51 *Ibid.*, p. 138. The Shafi'i jurists have a slightly different approach. Shirazi says: 'If the rebels or the government forces cause harm to each other's life and property out of active hostilities (*fi ghayr al-qital*), compensation (*daman*) is obligatory ... If the government forces cause harm to the life and property of the rebels during war, no compensation will follow ... If the rebels cause harm to government forces during war, there are two opinions ... The preferred opinion is that no compensation will follow'. Shirazi, above note 2, Vol. 3, pp. 405–406. This rule is applicable when the rebels have already attained *mana'ah*. If they cause any harm before attaining *mana'ah*, they will be forced to compensate. *Ibid.*, Vol. 3, p. 409. The rule is the same when they have *mana'ah*, but lack *ta'wil*. *Ibid.*

52 Sarakhsi, above note 5, p. 139.

53 Municipal law of a party, including its criminal law, is not applicable to the acts (or omissions) of the combatants of the other party. This is a necessary corollary of acknowledging the combatant status. As Islamic law acknowledges this status for non-Muslims aliens, it also acknowledges its necessary corollary. The rule holds true even if these non-Muslims later embrace Islam because Islamic law does not allow retrospective application of criminal law.

the *ta'wil* of the people of war [non-Muslim combatants] after they embrace Islam.⁵⁴

Sarakhsi also quotes the precedent of the Companions of the Prophet in this regard. Imam Ibn Shihab al-Zuhri reports the verdict that enjoys the consensus of the Companions regarding the time of civil war between Muslims:

At the time of *fitnah* [war between Muslims] a large number of the Companions of the Prophet were present. They laid down by consensus that there is no worldly compensation or punishment for a murder committed on the basis of a *ta'wil* of the Qur'an, for a sexual relationship established on the basis of a *ta'wil* of the Qur'an and for a property damaged on the basis of a *ta'wil* of the Qur'an. And if something survives in their hands, it shall be returned to its real owner.⁵⁵

It must be noted here that the suspension of the criminal law or of the worldly punishment does not imply that the acts of rebels were lawful. Shaybani asserts that if the rebels acknowledge that their *ta'wil* is invalid they would be advised to make compensation for the damage they caused, although legally they cannot be forced to do so. 'I will advise them by way of *fatwa* to compensate for the damage they caused to life and property. But I will not legally force them to do so.'⁵⁶ Sarakhsi explains this ruling by saying:

[b]ecause they are believers in Islam and they acknowledge that their *ta'wil* was invalid. However, the authority of enforcing the law on them vanished after they attained *mana'ah*. That is why they will not be legally compelled to compensate the damage, but they should be given *fatwa* because they will be responsible before God for this.⁵⁷

As opposed to rebels, a gang of robbers who possess *mana'ah* but lack *ta'wil* are forced to compensate for the damage and are punished for the illegal acts. Sarakhsi says:

[b]ecause for robbers *mana'ah* exists without *ta'wil*, and we have already explained that the rule is changed for rebels only when *mana'ah* is combined with *ta'wil*, and that the rule of compensating for the damage is not changed when one of these exists without the other.⁵⁸

54 *Ibid.*, p. 136.

55 *Ibid.* Shirazi quotes the same precedent: Shirazi, above note 2, Vol. 3, p. 406. Muwaffaq al-Din Ibn Qudamah al-Maqdisi, the famous Hanbali jurist, says: 'When the rebels can not be controlled except by killing, it is permissible to kill them and there is no liability of sin, compensation or expiation on the one who killed them'. Muwaffaq al-Din Ibn Qudamah al-Maqdisi, *Al-Mughni Sharh Mukhtasar al-Khiraqi*, Maktabat al-Riyad al-Hadithah, Riyadh, 1981, Vol. 8, p. 112. He further says: 'And the rebels also do not have the obligation to compensate for the damage they caused to life and property during war'. *Ibid.*, p. 113.

56 Sarakhsi, above note 5, p. 136.

57 *Ibid.*

58 *Ibid.*, p. 142. We noted above that the position is the same in the Shafi'i school. Shirazi, above note 2, Vol. 3, p. 409.

Thus, Islamic law acknowledges some important rights for those fighting in a civil war or – to use the IHL terminology – non-international armed conflict.⁵⁹

Distinction between Muslim and non-Muslim rebels: legal implications

The Muslim jurists do not apply the law of *baghy* to rebels when all the rebels are non-Muslims; they apply it only when non-Muslim rebels are joined by Muslim rebels, or when all the rebels are Muslims. When all the rebels are non-Muslims, the jurists apply the general code of war on them,⁶⁰ which is applicable to other *ahl al-harb*.⁶¹ The jurists discuss this issue under the concept of termination of the contract of *dhimma*.⁶²

According to Islamic law, a contractual relationship exists between the Muslim government and the non-Muslim residents of *dar al-Islam*. By concluding the contract of *dhimma*, the Muslim ruler guarantees the protection of life and property as well as freedom of religion to non-Muslims who agree to abide by the law of the land and to pay *jizyah* (poll tax). The jurists hold that the contract of *dhimma* is terminated only by one of the following two acts: first, when a *dhimmi* becomes permanently settled outside *dar al-Islam*;⁶³ and second, when a strong group of non-Muslims having enough *mana'ah* rebels against the Muslim government.⁶⁴

Thus, the contract of *dhimma* is not terminated by any of the following acts:

- refusal to pay *jizyah*;
- passing humiliating remarks against Islam or the Qur'an;
- committing blasphemy against any of the Prophets (peace be upon them);

59 M. Hamidullah, above note 14, pp. 167–168.

60 The general code of war in Islamic law not only distinguishes between lawful and unlawful targets but also puts many restrictions on the means and methods of warfare. These include, *inter alia*, prohibition of attacking non-combatants, prohibition of mutilation, prohibition of wanton destruction, obligation of observing treaty provisions, permissibility of ruses, and prohibition of perfidy. For a detailed comparative study of the Islamic *jus in bello* and the contemporary law of armed conflict, see Muhammad Mushtaq Ahmad, *Jihad, Muzahamat awr Baghawat Islami Shari'at awr Bayn al-Aqwami Qanun ki Roshni mayn*, Shariah Academy, Gujranwala, 2008, pp. 295–478, 583–594, and 631–668. See also Ameer Zemzami (ed.), *Maqalat fi 'l-Qanun al-Dawli al-Insani wa 'l-Islam*, ICRC, Geneva, 2007.

61 Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi, *Sharh al-Siyar al-Kabir*, Dar al-Kutub al-'Ilmiyyah, Beirut, 1997, Vol. 4, p. 164. One may compare it with the notion of international armed conflict in the contemporary international legal order.

62 According to Muslim jurists, the Islamic state has a contractual relationship with non-Muslims residing permanently within its territory. This contract is called '*dhimma*' (literally, a contract that brings rebuke (*dhamm*) if violated). By virtue of the contract of *dhimma*, the Islamic state guarantees equal protection of life and property to its non-Muslims citizens. For details, see Kasani, above note 22, Vol. 9, pp. 426–458.

63 In modern parlance, one may say that Islamic law does not acknowledge the concept of 'dual nationality'. It may be noted here that Pakistani law also does not acknowledge this concept. See Section 14 of the Pakistan Citizenship Act, 1951.

64 A third factor is also mentioned, namely, embracing Islam. Kasani, above note 22, Vol. 7, p. 446. However, this, of course, is not a cause for the loss of the right to permanent residence in *dar al-Islam*.

- compelling a Muslim to abandon his religion; or
- committing adultery with a Muslim woman.⁶⁵

The jurists consider these as crimes punishable under the law of the land.⁶⁶ Non-Muslims who permanently settle outside *dar al-Islam* are treated like ordinary aliens,⁶⁷ while non-Muslim rebels are treated in the same manner as ordinary non-Muslim enemy combatants.⁶⁸

The net conclusion is that both Muslim and non-Muslim rebels are treated as combatants and the law of war in its totality is applied on them. However, if some or all of the rebels are Muslims, the law puts further restrictions on the authority of the government. For instance, Islamic law prohibits targeting women and children both in its general law of war and in its special law of *baghy*,⁶⁹ while the rules of *ghanimah* applicable to the property of the enemy are not applicable to the property of the rebels, whether Muslims or non-Muslims.⁷⁰

The combatant status acknowledged by Islamic law for rebels, both Muslims and non-Muslims, offers a great incentive to the rebels to comply with the law of war. Because of this status, the general criminal law of the land is not applied to them. In other words, they can be punished only when they violate the law of war. Furthermore, the additional restrictions regarding Muslim rebels can also be accepted by the international community as general rules applicable to all rebels through an international treaty.⁷¹ Finally, as the Islamic law of *baghy* is part of the divine law, Muslim rebels cannot deny the binding nature of this law and they cannot make the plea that the law has been laid down through treaties to which they are not party.

65 Kamal al-Din Muhammad Ibn al-Humam al-Iskandari, *Fath al-Qadir 'ala 'l-Hidayah*, Dar al-Kutub al-'Arabiyyah, Cairo, n.d., Vol. 4, p. 381. Jurists, other than the Hanafis, hold that the contract of *dhimma* is terminated by any of these acts, although some of them hold that this is true only when it was mentioned in the contract that these acts must be avoided. Ibn Qudamah, above note 55, Vol. 8, p. 525; Shams al-Din Muhammad b. Muhammad al-Khatib al-Shirbini, *Mughni al-Muhtaj ila Sharh al-Minhaj*, Matba'at al-Halbi, Beirut, 1933, Vol. 4, p. 258.

66 Iskandari, above note 65, Vol. 4, p. 381.

67 Burhan al-Din 'Ali b. Abi Bakr b. 'Abd al-Jalal al-Farghani al-Marghinani, *Al-Hidayah fi Sharh Bidayat al-Mubtadi*, Dar al-Fikr, Beirut, n.d., Vol. 2, p. 405.

68 Shaybani, above note 61, Vol. 4, p. 164; Iskandari, above note 65, Vol. 4, p. 382. It may be noted here that termination of the contract of *dhimma* by some of the non-Muslims does not affect the legal status of those who did not terminate it. Iskandari, above note 65, Vol. 4, p. 253; Shirbini, above note 65, Vol. 4, p. 258; Ibn Qudamah, above note 55, Vol. 8, p. 524.

69 However, they can be targeted if they directly participate in hostilities.

70 This is the opinion of the *Shafi'i* jurists: Shirazi, above note 2, Vol. 3, pp. 406–407. The Hanafi jurists hold that the additional prohibitory rules of the code of rebellion are only applicable to Muslims rebels: Sarakhsi, above note 5, Vol. 10, p. 137.

71 Islamic law allows a Muslim ruler to conclude treaties with non-Muslims for regulating the conduct of hostilities and for putting restrictions on the authority of the parties to the treaties. Sarakhsi, above note 51, Vol. 1, pp. 210–214.

Legal implications of the *de facto* authority of rebels

Islamic law recognizes some important legal consequences of the *de facto* authority of rebels. This is advantageous in so far as it provides further incentive to rebels to comply with the law of war. The jurists elaborated in detail various aspects of this *de facto* authority, and we will discuss four important implications here.

Collection of revenue by rebels

If rebels collect revenue – that is to say *kharaj*, *zakah*, ‘*ushr*, and *khums*⁷² – from people living in the territory under their control, the central government cannot collect that revenue again even if it later resumes control of that territory.⁷³ The reason mentioned in the famous Hanafi text *al-Hidayah* is that ‘the ruler can collect revenue only when he provides security to his subjects and [in this case] he failed to provide them security’.⁷⁴ Here, an important issue is discussed by the jurists. From the perspective of Islamic law, *zakah* and ‘*ushr* are not only categories of revenue but also acts of worship (‘*ibadah*). That is why a question arises as to whether those who have paid *zakah* and ‘*ushr* to rebels would be *liable before God* to pay it again to the legitimate authority (central government). The answer is that they would be liable before God only if the rebels do not spend this revenue in the heads prescribed by the law.⁷⁵

Decisions of the courts in *dar al-baghy*

The Muslim jurists discussed various aspects of the authority of the courts in *dar al-baghy*. We will analyse three significant points of this debate. First, is it allowed for a person qualified to be a judge to accept such an appointment under the authority of rebels when this person himself denies the legitimacy of their authority? The answer provided by the jurists is that such a person should accept this

72 *Kharaj* is the term used for the tribute paid by non-Muslims to the Muslim government through a peace settlement. See Muammad Rawwas Qal’aji, *Mu’jam Lughat al-Fuqaha*, Dar al-Nafa’is lil-Nashr wa al-Tawzi’, Beirut, 2006, p. 194. This includes *jizyah* (*ibid.*, p. 164). *Zakah* is the revenue collected from the savings of rich Muslims at the rate of 2.5% per annum. It is also deemed an act of ‘*ibadah* (ritual worship). *Ibid.*, p. 233. ‘*Ushr* is a 10% tax levied on the crops of Muslims in un-irrigated land. If the crops are in irrigated land, the rate is 5%, and in that case it is called *nisf al-‘ushr* (half of 10%). *Ibid.*, p. 312. *Khums* is the 20% revenue levied on minerals (*ma’adin*) and buried treasures (*kunuz*). *Ibid.*, p. 201.

73 Marghinani, above note 67, Vol. 2, p. 412. Professor Imran Ahsan Khan Nyazee translated the relevant passage of *al-Hidayah* in these words: ‘What the rebels have collected by way of *kharaj* and ‘*ushr*, from the lands that they came to control, is not to be collected a second time by the *imam*’. *Al-Hidayah: The Guidance*, Amal Press, Bristol, 2008, Vol. 2, p. 343. The Shafi’i jurists have a different approach. They say that *zakah* will not be recollected, while *jizyah* will, and for *kharaj* there are two opinions. Shirazi, above note 2, Vol. 3, p. 407. The same opinion is held by the Hanbali jurists. Ibn Qudamah, above note 55, Vol. 8, pp. 118–119.

74 Marghinani, above note 67, Vol. 2, p. 412.

75 *Ibid.*

post and decide the cases in accordance with the provisions of Islamic law, even if he does not accept the legitimacy of the appointing authority. Shaybani says:

If rebels take control of a city and, from among the people of that city, appoint as a judge someone who does not support them, he shall enforce *hudud* and *qisas* and shall settle the disputes between people in accordance with the norms of justice. He has no other option but to do so.⁷⁶

In this regard, the jurists generally cite the precedent of the famous Qadi Shurayh, who not only accepted appointment as a judge from Caliph ‘Umar b. al-Khattab but also acted as a judge in Kufah during the tyrannical rule of the Umayyad Caliph ‘Abd al-Malik b. Marwan and the governorship of al-Hajjaj b. Yusuf. The illustrious Hanafi jurist Abu Bakr al-Jassas cited this precedent, saying that ‘among the Arabs and even among the clan of Marwan, ‘Abd al-Malik was the worst in oppression, transgression and tyranny and among his governors the worst was al-Hajjaj’.⁷⁷

Another precedent quoted by the jurists is that ‘Umar b. ‘Abd al-‘Aziz (Allah have mercy on him), the famous Umayyad Caliph who tried to restore the system of the *al-Khulafa’ al-Rashidin*, did not reappoint the judges who had been appointed by the preceding Umayyad Caliph, who was considered to be a tyrant. Sarakhsi explains the legal principles underlying this rule in the following way:

Deciding disputes in accordance with the norms of justice and protecting the oppressed from oppression are included in the meaning of ‘enjoining right and forbidding wrong’, which is the obligation of every Muslim. However, for the one who is among the subjects it is not possible to impose his decisions on others. When it became possible for him because of the power of the one who appointed him, he has to decide in accordance with what is obligatory upon him, irrespective of whether the appointing authority is just or unjust. This is because the condition for the validity of appointment is the capability of enforcing decisions, and this condition is fulfilled here.⁷⁸

The second issue is the validity of the decisions of the courts of *dar al-baghy*. The jurists have laid down the fundamental principle that, if a judge of *dar al-baghy* sends his decision to a judge of *dar al-‘adl*, it will not be accepted by the latter.⁷⁹ Sarakhsi mentions two reasons for this rule:

1. For the courts of *dar al-‘adl*, rebels are sinners (*fussaq*) and the testimony and decisions of those who commit major sins are unacceptable. In other words,

76 Sarakhsi, above note 5, Vol. 10, p. 138. Ibn Qudamah says: ‘When rebels appoint a judge who is qualified for the post, his legal position is similar to the judge of the central government’. Ibn Qudamah, above note 55, Vol. 8, p. 119.

77 Jassas, above note 3, Vol. 1, p. 99.

78 Sarakhsi, above note 5, Vol. 10, p. 138.

79 *Ibid.*, Vol. 10, p. 142. The Shafi’i jurists hold that it is better for the judge of *ahl al-‘adl* not to accept the decision of the judge of *ahl al-baghy*. However, if he accepts it and decides accordingly, the decision will be enforced. Shirazi, above note 2, Vol. 3, p. 407. The Hanbali jurists take the same position. Ibn Qudamah, above note 55, Vol. 8, p. 120.

the courts of *dar al-baghy* have no legal authority to bind the courts of *dar al-'adl*.

2. The rebels do not accept the sanctity of the life and property of the people of *dar al-'adl*. Hence, there is a possibility that the court of *dar al-baghy* may have decided the case on an invalid basis.⁸⁰

However, if the judge of *dar al-'adl*, after reviewing the decision of the judge of *dar al-baghy*, concludes that the case was decided on valid legal grounds, such as when he knows that the witnesses were not rebels, he would enforce that decision.⁸¹ If it is unknown whether the witnesses were rebels or not, the court of *dar al-'adl* would still not enforce this decision 'because for the one who lives under the authority of the rebels, the presumption is that he is also among them. Hence, the judge [of *dar al-'adl*] will act on this presumption unless the contrary is proved'.⁸² The net conclusion is that decisions of the courts of *dar al-baghy* will not be enforced by the courts of *dar al-'adl* unless, after a thorough review of the decision, the latter conclude that it is valid.

The third issue covers the legal status of the decisions of the courts of *dar al-baghy* after the central government recaptures that territory. Shaybani says:

Rebels take control of a city and appoint a judge there who settles many disputes. Later on, when the central government recaptures that city and the decisions of that judge are challenged before a judge of *ahl al-'adl*, he will enforce only those decisions which are valid.⁸³

If such decisions are valid according to one school of Islamic law and invalid according to another school, they will be deemed valid even if the judge of *ahl al-'adl* belongs to the school that considers them invalid, 'because the decision of a judge in contentious cases [where the jurists disagree] is enforced'.⁸⁴ It means that only those decisions of the courts of *dar al-baghy* will be invalidated that are against the consensus opinion of the jurists. Moreover, such decisions will be invalidated only when they are challenged by an aggrieved party in the courts of *ahl al-'adl*. Hence, generally the decisions of the courts of *dar al-baghy* are not reopened.⁸⁵

80 Shirazi says that the decisions of the judge of the rebels will only not be enforced if he does not believe in the sanctity of the life and property of *ahl al-'adl*. Shirazi, above note 2, Vol. 3, p. 407.

81 Sarakhsi, above note 5, Vol. 10, p. 138.

82 *Ibid.*

83 *Ibid.*, p. 142. The Shafi'i jurists are of the opinion that decisions of the rebel courts shall not be overturned even after the territory is recaptured by the central government because such decisions are presumed to be based on *ijtihad*. Shirazi, above note 2, Vol. 3, p. 407.

84 Sarakhsi, above note 5, Vol. 10, p. 142. See also Ibn Qudamah, above note 55, Vol. 8, p. 120.

85 This is known as the doctrine of 'past and closed transactions'. There is an interesting example of this doctrine in Pakistani judicial history when some judges of the Supreme Court 'rebelled' against the then chief justice Sajjad Ali Shah. It was finally concluded that, after the so-called *Judges Case (Al-Jehad Trust v. Federation of Pakistan, PLD 1996 SC 324)*, Justice Shah was not qualified to continue as chief justice because he was not the most senior judge of the Supreme Court. However, the cases decided by Justice Shah as 'de facto chief justice' were not reopened, on the basis of the doctrine of past and closed transactions. *Malik Asad Ali v. Federation of Pakistan*, 1998 SCMR 15; see also Hamid Khan, *Constitutional and Political History of Pakistan*, Oxford University Press, Karachi, 2001, pp. 274–275.

Treaties of rebels with a foreign power and their legal effects on the supporters of the central government

A peace treaty in Islamic law is deemed to be a category of the larger doctrine of *aman*.⁸⁶ One of the fundamental principles of *aman* is that every Muslim has the authority to grant *aman* to an individual or even a group of non-Muslims, provided that the one who grants *aman* forms part of a strong group that possesses *mana'ah*.⁸⁷ This *aman* granted by an individual Muslim binds all Muslims.⁸⁸ Hence, all Muslims are duty bound to protect the life and liberty of the one to whom an individual Muslim or a group of Muslims has granted *aman*.⁸⁹

On the basis of these principles, the jurists explicitly stated that if rebels conclude a peace treaty with non-Muslims, it will not be permissible for the central government to fight those non-Muslims in violation of that peace treaty.⁹⁰ However, if the peace treaty is concluded on the condition that the non-Muslim party will support the rebels in their war against the central government, this treaty will not be deemed a valid *aman* and the non-Muslims will not be considered *musta'minin*. Sarakhsi explains this in the following words:

Because *musta'min* is the one who enters *dar al-Islam* after pledging not to fight Muslims, while these people enter *dar al-Islam* for the very purpose of fighting those Muslims who support the central government. Hence, we know that they are not *musta'minin*. Furthermore, when *musta'minin* [after entering *dar al-Islam*] organize their group in order to fight Muslims and take action against them [Muslims], this is considered a breach of *aman* on their part.

86 Kasani divides *aman* into two basic categories: *aman mu'abbad* (also called *dhimmah*) and *aman mu'aqqat*. see Kasani, above note 22, Vol. 9, p. 411. The former is a treaty of perpetual peace whereby the non-Muslim party agrees to pay *jizyah* to Muslims and is thereby entitled to the right of permanent residence in *dar al-Islam*, with Muslims guaranteeing them the protection of life and liberty. The latter is further divided into *aman ma'ruf* (ordinary *aman*), which is accorded to those who want to enter *dar al-Islam* temporarily, and *muwada'ah* (peace treaty), which is concluded with a foreign group of non-Muslims who are willing to establish a peaceful relationship. *Muwada'ah* may be either time-specific (*mu'aqqatah*) or not (*mutlaqah*). *Ibid.*, Vol. 9, p. 424.

87 That is why a Muslim prisoner in the custody of the enemy or a Muslim trader in a foreign land cannot grant *aman*. Shaybani, above note 51, Vol. 1, p. 213.

88 *Ibid.*, Vol. 1, p. 201.

89 However, a Muslim ruler has the authority to prohibit his subjects from granting *aman* in a particular situation, if someone grants *aman* after this prohibition, it will have no validity. *Ibid.*, Vol. 1, p. 227. Moreover, a Muslim ruler also has the authority to terminate the *aman* granted by one or more of his subjects, but he cannot take any action against those to whom *aman* was granted unless he gives them a notice of the termination of *aman* and provides them with an opportunity to reach a place where they deem themselves safe (*ma'man*). *Ibid.*, Vol. 2, p. 229.

90 Sarakhsi, above note 5, Vol. 10, p. 141. Not only that, but the *fuqaha'* also assert that, even if the rebels seize the property of these *ahl al-muwada'ah*, in violation of the peace treaty, the central government should not buy this property from them. Rather, it should advise the rebels to return the property to the rightful owner. If the rebels surrender, or the government overpowers them, the government will be bound to return the property to the rightful owner. *Ibid.*

Therefore, this intention [to fight Muslims] must invalidate the *aman* from the beginning.⁹¹

In this passage, it is important to note that Sarakhsi considers the territory of rebels as part of *dar al-Islam* and builds his arguments on this presumption. In other words, although rebels have established their *de facto* authority over this territory, yet in the eyes of the law this is deemed to be part of *dar al-Islam*. We will return to this issue later.

Attack of a foreign power on rebels and the legal responsibility of the central government

As a general rule, it is not permissible for *ahl al-‘adl* to support rebels in war. Hence, if during a war between *ahl al-‘adl* and rebels a person from among *ahl al-‘adl* is killed while he is on the side of the rebels, neither *qisas* nor *diyah* will be imposed on the one who killed him, as is the case when a person is killed while he is on the side of non-Muslims.⁹² However, when rebels are attacked by a foreign power, even the central government is under an obligation to support the rebels.⁹³ Shaybani says that this obligation is imposed even on those *ahl al-‘adl* who temporarily go to *dar al-baghy*:

The same obligation is imposed on those *ahl al-‘adl* who happened to be in the territory of rebels when it was attacked by the enemy. They have no option but to fight for protecting the rights and honour of Muslims.⁹⁴

Sarakhsi, in his usual authoritative style, explains the principle behind this ruling in these words:

Because the rebels are Muslims, hence fighting in support of them gives respect and power to the religion of Islam. Moreover, by fighting the attackers, they defend Muslims from their enemy. And defending Muslims from their enemy is obligatory on everyone who has the capacity to do so.⁹⁵

In other words, even when two groups of Muslims have a mutual conflict, none of them should seek support of non-Muslims against the other.⁹⁶ Their mutual

91 *Ibid.*, Vol. 10, p. 143. The Shafi‘i and Hanbali jurists hold the same view and Shirazi and Ibn Qudamah give the same argument. Shirazi, above note 2, Vol. 3, p. 406; Ibn Qudamah, above note 55, Vol. 8, p. 121. The same principle applies to any treaty of the central government with non-Muslims for military support against Muslim rebels.

92 Sarakhsi, above note 5, Vol. 10, p. 140.

93 The basis for this obligation is that, even after rebellion, the rebels are deemed to be Muslims. *Ibid.*, Vol. 10, p. 107.

94 *Ibid.*

95 *Ibid.*

96 Shirazi, above note 2, Vol. 3, p. 404; Muhammad b. ‘Arafah al-Dasuqi, *Hashiyah ‘ala al-Sharh al-Kabir*, ‘Isa al-Babi, Cairo, 1934, Vol. 4, p. 299; Mansur b. Yunus al-Buhuti, *Kashshaf al-Qina’ ‘an Matn al-Iqna’*, ‘Alam al-Kutub, Beirut, 1983, Vol. 6, p. 164.

conflict is thus deemed an ‘internal affair’ of the Muslim community, in which non-Muslims should not interfere.

De facto authority and legitimacy

Does all this mean that Islamic law gives some kind of legitimacy to rebellion? The answer is an emphatic ‘no’! The combatant status, as noted earlier, is given to all those who participate in war, irrespective of whether or not they are on the right side. For instance, the contemporary law of armed conflict applies equally to all parties to a conflict no matter which party has lawfully or unlawfully resorted to force. In international armed conflicts, combatant status is thus granted to all armed forces independently of any *jus ad bellum* argument. Similarly, the Muslim jurists acknowledge combatant status for rebels when their *mana’ah* is coupled with *ta’wil*, irrespective of whether their *ta’wil* is just or unjust.⁹⁷ Rather, even when they assert that the *ta’wil* of the rebels is unjust, they acknowledge the combatant status for them if their unjust *ta’wil* is coupled by *mana’ah*.⁹⁸

We also noted that this rule has been established by the consensus of the Companions of the Prophet.⁹⁹ Furthermore, we saw that the primary source for the Islamic law of *baghy* is the conduct of ‘Ali, who recognized the combatant status of those who rebelled against him, although the *ta’wil* of these rebels was undoubtedly flawed. The conclusion is that acknowledging the combatant status for the rebels does not give legitimacy to their struggle.

This is further explained by the fact that the jurists deem *dar al-baghy* to be part of *dar al-Islam* even after the rebels establish their *de facto* control over that territory.¹⁰⁰ In other words, the jurists acknowledge the necessary corollaries of the *de facto* authority of the rebels in *dar al-baghy*, yet they do not give *de jure* recognition to this authority.

Conclusions

The Islamic law on rebellion provides the yardstick of ‘*ta’wil* plus *mana’ah*’ for the identification of the existence of an armed conflict. Moreover, it distinguishes between rebels and an ordinary gang of robbers by recognizing the combatant status for rebels as well as the necessary corollaries of their *de facto* authority in the territory under their control. Thus, it offers incentives to rebels for complying with the law of war, thereby reducing the sufferings of civilians and ordinary citizens

97 Sarakhsi, above note 5, Vol. 10, p. 136.

98 *Ibid.*

99 *Ibid.*

100 According to the Hanafi jurists, if a person seizes the property of another person in one *dar* and takes it to another *dar*, he becomes the owner of that property (*ibid.*, Vol. 10, p. 62). However, if a person takes such property from *dar al-‘adl* to *dar al-baghy*, or vice versa, he does not become the owner thereof, ‘because the *dar* of *ahl al-‘adl* and *ahl al-baghy* is one’ (*ibid.*, Vol. 10, p. 135).

during rebellion and civil wars. At the same time, Islamic law asserts that the territory under the *de facto* control of the rebels is *de jure* part of the parent state. Thus, it answers the worries of those who fear that the grant of combatant status to rebels may give legitimacy to their struggle. Unlike the contemporary law of armed conflict, which for the most part has been laid down through treaties to which the rebels are not a party, the Islamic law on rebellion forms an integral part of the divine law and, as such, is binding on all rebels who claim to be Muslims.

Even non-Muslims can seek guidance from this law. If all rebels are non-Muslims, they are not treated like rebels but like ordinary enemy combatants. By virtue of the combatant status, the operation of the general criminal law of the land ceases, even though the government can take punitive action against the rebels for disturbing the peace. This is a solution to the problems faced by the contemporary law of armed conflict.

Islamic law acknowledges certain important legal consequences of the *de facto* authority of the combatants, both Muslims and non-Muslims, in the territory under their control. This offers another incentive for compliance with the law of war.

When non-Muslims are joined by Muslims, or when all rebels are Muslims, Islamic law puts some *additional* restrictions on the authority of the state. It is only this last point on which Islamic law distinguishes between Muslim and non-Muslim rebels. The reason is obvious. Islamic law talks in terms of Muslim and non-Muslim, while the contemporary law of armed conflict distinguishes between nationals and non-nationals. This is a difference that is found in the very nature of the two systems. However, these additional restrictions can be made applicable to all rebels, both Muslims and non-Muslims, by concluding treaties, since Islamic law acknowledges the validity of treaties for regulating the conduct of hostilities.

Between a rock and a hard place: integration or independence of humanitarian action?

Antonio Donini

Antonio Donini is Senior Researcher, Feinstein International Center,
Tufts University.

Abstract

This article looks at the tension between principles and politics in the response to the Afghan crisis, and more specifically at the extent to which humanitarian agencies have been able to protect themselves and their activities from overt instrumentalization by those pursuing partisan political agendas. After a short historical introduction, it focuses on the tensions around the issue of ‘coherence’ – the code word for the integration of humanitarian action into the wider political designs of the United Nations itself and of the UN-mandated military coalition that has been operating in Afghanistan since late 2001. The article ends with some more general conclusions on the humanitarian–political relationship and what Afghanistan ‘means’ for the future of humanitarian action.

.....

The international community’s response to the Afghan crisis spans a thirty-year period that saw the end of the cold war, the ensuing disorder and reshuffling of political, military, and economic agendas in Central and South Asia, and the tentative emergence – and now the likely decline – of a hegemonic order built around globalization and securitization. Thirty years of failed interventions, civil wars, and aborted nation-building attempts have resulted in unprecedented levels of human suffering and volatility in Afghanistan, an unending crisis now spreading in the surrounding region. The high hopes of peace and stability raised by the US-led

intervention after the 11 September 2001 attacks on the United States have given way to widespread despondency, disillusionment, and the likely evaporation of the mirage of a *pax americana*.

Humanitarian action has been a constant in Afghanistan's troubled recent history. It has, of course, been affected by the structural changes in the nature of the conflict and by the wider developments in the international community's approaches to conflict and crisis. Humanitarian action has waxed and waned, depending on the vagaries of the local and international political contexts. There have been periods of extreme politicization and manipulation, and times when humanitarian principles were relatively easy to uphold. The political and military vicissitudes that shaped the crisis gave rise in turn to massive humanitarian needs. The manner in which the international community responded to these assistance and protection needs, as well as the fluctuations of the response over time, were heavily influenced by political agendas that were often at odds with humanitarian objectives. From the start, as in most complex emergencies, the space for humanitarian action was determined by politics. This intrusion of the political has ranged from the relatively benign to the overt manipulation of humanitarian action for partisan purposes.

As we shall see, there are two important lessons to reflect upon. They are quite obvious and commonsensical but all too often disregarded. The first is that there is a negative correlation between direct superpower involvement and the ability of the humanitarian enterprise to engage with crises in a relatively principled manner. In Afghanistan, the 'highs' in politics (cold war and post-9/11 interventions) correspond to 'lows' in principles. Conversely, superpower dis-attention to the Afghan crisis, as in the 1992–1998 period of internecine conflict, allowed more space for issues of principle and for significant innovations in how the United Nations (UN) and other external players could do business in a crisis country. The corollary to this law is that when great-power interest is high, policy and decision-making, including on humanitarian and human rights issues, are taken over by the political people in the donor and UN bureaucracies, thereby displacing the humanitarian folk who often have a better understanding of realities on the ground.

The second lesson is that the 'instrumentalization' of humanitarian assistance for political gain, besides being in itself a violation of humanitarian principles, rarely works. Subordination of humanitarian principles to so-called higher imperatives of realpolitik may allow short-term gains, but in the long term the chickens come home to roost. And, in Afghanistan, the blowback from the politics and the manipulations of humanitarian assistance in the 1980s continues to this day.

In the humanitarian response to the Afghan crisis, it is useful for analytical purposes to distinguish between four distinct phases:

1. *From the Soviet invasion to the fall of Najibullah (1979–1992) – or the cold war period and its immediate aftermath:* in humanitarian terms, there were two distinct phases to this period: the non-governmental organization (NGO)

cross-border solidarity phase, during which UN humanitarian agencies operated, by necessity, only in neighbouring countries; and the second phase, which saw the arrival of the UN agencies on the scene and was accompanied by the first attempt to set up a robust UN humanitarian co-ordination mechanism while simultaneous UN attempts to broker peace followed a formulaic cold war script.

2. *The civil war and the triumph of warlordism (1992–1996)*: the volatility of the situation in Afghanistan, which included the devastation and complete breakdown of institutions, hampered the provision of assistance and provoked great soul-searching in the assistance community (What are we doing here? Are we fuelling the war?), as well as growing disillusionment in a UN peace process that was increasingly reduced to ‘talks about talks’.
3. *The Taliban period (1996–10 September 2001)*: the rise of the Taliban regime triggered a resurgence of interest in humanitarian principles and was coupled with a second attempt at robust and coherent co-ordination among, at least in theory, the assistance, human rights, and political dimensions of the international response.
4. *Post 9/11 – from ‘nation-building lite’ to a return to chaos*: the heavy engagement of the international community that has accompanied renewed interest in Afghanistan since 2001 has, again, been characterized by politics trumping principles in a vain quest for a durable peace. This period comprises an ascending phase, in which post-conflict rhetoric ruled and the need for humanitarian action was dismissed, and a descending (into chaos?) phase, which in many ways resembles the Soviet occupation and in which principles are again struggling to regain some currency.

Each of these periods corresponds to a shift: from weak unitary state to fragmenting state; from fragmenting to failing state; from failing to rogue state; and from rogue state to a corrupt and fissured ‘protégé’ state.²

Humanitarian action in Afghanistan has always been subject to varying degrees of political instrumentalization. During the mid- to late 1980s, humanitarian assistance was used by the US and its allies as a tool for political and military objectives to give the Soviet Union ‘its Vietnam’. The context was the cold war, and overt manipulation was *de rigueur*. When the UN humanitarian agencies, which had been confined to assisting refugees outside the country, appeared on the Afghan scene after the 1988 Geneva Accords that resulted in the eventual withdrawal of Soviet troops, they found a very messy situation, with an array of NGOs sponsored largely by the United States and other Western governments

1 Michael Ignatieff, ‘Nation-building lite’, in *New York Times*, 28 July 2002.

2 Or perhaps even a ‘cannibalistic’ state? See Kevin Meredith, Sergio Villarreal, and Mitchel Wilkinson, ‘Afghanistan: The de-evolution of insurgency’, in *Small Wars Journal*, October 2010, available at: <http://smallwarsjournal.com/blog/2010/10/afghanistan-the-deevolution-of/> (last visited 8 December 2010).

providing so-called humanitarian assistance to *mujahedin* (resistance fighters) commanders.³ The inept often combined with the unscrupulous: cash was liberally handed out and compromises with unsavoury commanders were made, from which it became very difficult for the NGOs to disentangle themselves. Not all NGOs were incompetent or indifferent to principles. Some did good technical work, particularly medical NGOs. But, by and large, all had taken sides in support of the *mujahedin* cause.⁴ While there was some concern for impartiality, solidarity trumped neutrality. In the NGO community, neutrality was a dirty word.

The UN tried, with difficulty, to introduce a more principled approach and to reduce the one-sidedness of aid. The special UN Co-ordinator, Sadruddin Aga Khan, negotiated a 'humanitarian consensus' with all parties to the conflict, as well as all the neighbouring countries. In order to appear more equidistant and reduce the stranglehold of Pakistan-based agencies (and their Inter-Services Intelligence (ISI) minders) on the assistance market, the United Nations opened offices in and set up assistance activities from Iran and the then Soviet Union, as well as in Kabul and other Afghan cities.⁵ It was thus able to operate cross-border and cross-line from government-held cities to territory controlled by the *mujahedin*. NGOs remained essentially Peshawar- (and Quetta-)based, and considered the very thought of opening offices in Kabul as anathema.⁶ Donors had no qualms about imposing their political agenda on the NGOs they funded, and attempted to do so with the UN. These were times of easy money, no accountability, and happy-go-lucky operationalism.⁷

3 Very little scholarly analysis of the role of NGOs in Afghanistan has been written either during or since the cold war period. An exception is Helga Baitenmann, 'NGOs and the Afghan war: the politicization of humanitarian aid', in *Third World Quarterly*, Vol. 12, No. 1, January 1990, pp. 62–85. Between 1990 and 2002, only two studies addressed the issue, albeit tangentially: Antonio Donini, *The Policies of Mercy: UN Coordination in Afghanistan, Mozambique, and Rwanda*, Thomas J. Watson Institute for International Studies, Providence, RI, Occasional Paper No. 22, 1996; and Nigel Nicholds with John Borton, *The Changing Role of NGOs in the Provision of Relief and Rehabilitation Assistance: Case Study 1 – Afghanistan/Pakistan*, Overseas Development Institute, London, Working Paper 74, 1994. Fiona Terry's *Condemned to Repeat: The Paradox of Humanitarian Action*, Cornell University Press, Ithaca and London, 2002, contains a chapter on manipulations around the Afghan refugees issue and its implications for humanitarianism; it includes a brief analysis of the cross-border 'solidarity' days.

4 Even *Médecins Sans Frontières* (MSF), today one of the paragons of principled humanitarianism, had no qualms about taking sides: see F. Terry, above note 3, p. 73.

5 A. Donini, above note 3, p. 35.

6 During the Najibullah period there were no international NGOs in government-held territory (except for the International Assistance Mission, a faith-based medical organization). Oxfam was the first international NGO to open shop in Kabul, in late 1991. The International Committee of the Red Cross had a presence throughout the war years, except for a hiatus at the beginning of the Soviet occupation.

7 See Antonio Donini, 'Principles, politics, and pragmatism in the international response to the Afghan crisis', in Antonio Donini, Norah Niland, and Karin Wermester (eds), *Nation-building Unraveled? Aid, Peace and Justice in Afghanistan*, Kumarian Press, Bloomfield, CN, 2004, pp. 120–124.

Feeding chickens . . . that come home to roost

A personal recollection of strong-arm tactics: In the fall of 1989, forces led by Jalaluddin Haqqani had laid siege to the city of Khost in eastern Afghanistan. The US embassy in Islamabad requested UNOCA (the then UN Office for the Coordination of Humanitarian Assistance to Afghanistan) to pre-position food outside the city so that the civilian population could be 'drawn out' and the mujahedin could step up their offensive. According to the ambassador, IDPs (internally displaced persons) were fleeing towards the border with Pakistan and required assistance. The UN was reluctant but agreed to do an assessment. With a WFP (UN World Food Programme) colleague (and an ISI escort) we drove to the border, where we were met by Haqqani and his mujahedin, and then to his base in the hills above Khost, from which he was rocketing the town. We asked to interview some IDP families, but there were none at hand. We interviewed some kuchis (nomads) who were smuggling timber into Pakistan and they had seen none. Haqqani showed us the caves where he was planning to store the food and produced freshly thumb-printed lists of prospective beneficiaries. On that occasion we declined to help, but subsequently the UN agreed to send a few truckloads of wheat to the Haqqani base. As a UN colleague explained, 'This is a ticket we have to pay to keep the US and the ISI happy. If we don't, they will block our cross-border access to Afghanistan'. Twenty years later, Haqqani is still around and allegedly still benefiting from ISI largesse: with his sons he runs the 'Haqqani Network', known for its ruthlessness and responsible for much of the insurgent activity in eastern Afghanistan and in and around Kabul.

When the Najibullah regime collapsed in April 1992, Afghanistan dropped off the radar screen. There were no longer any ideological stakes to fight for. Afghanistan became an orphan of the cold war and the political patrons of the cross-border NGO cottage industry suddenly lost interest. Commanders lost their aura and became 'warlords'. Also, some of the more shady characters, such as those who were adept at mixing assistance and intelligence gathering, left the Afghan circuit. Paradoxically, it became easier for the United Nations and humanitarian NGOs to advocate a more principled approach. Mainstream international agencies with proven track records, which had eschewed the Afghan context during the cross-border period, were now on the scene. As mentioned above, Afghanistan thus confirms the rule that, when superpower interests are at stake, principled humanitarianism suffers. Conversely, when the superpower is not paying attention, principles have a better chance. It should also be noted that, in those cold war days, 'integration' as an operational template in complex crises had not yet appeared on the horizon.

First attempts at integration

As intense factional fighting with frequently shifting alliances replaced the anti-communist struggle, aid agencies started asking themselves some hard questions.

Massive soul-searching spread through the humanitarian community in 1992–1994. What did the assistance effort add up to? Had it prolonged the war? Were aid agencies part of the problem or of the solution? The field-based quest for more effective and principled action was helped by emerging processes at UN headquarters aimed at improving overall UN performance in intractable crises, in accordance with the ‘unitary approach’ that was articulated in the UN Secretary-General’s *Agenda for Peace*. As a result, in 1998 the Strategic Framework for Afghanistan was born of the frustrations of agencies in the field with a seemingly unending war in which the impact of humanitarian action was questioned, and of an overarching concern at headquarters for a more coherent, system-wide UN response to complex crises. The key assumption was that, by reducing the disconnects between the political, assistance, and human rights pillars of UN action, there was a better chance for an effective peace strategy. This was both the strength and, in the end, the indictment of the Strategic Framework.

The objective of the Strategic Framework was to provide a stronger voice, or at least equal billing, to humanitarian and human rights concerns vis-à-vis the UN’s political initiatives. Principles and modalities for common programming were agreed across the assistance community, including the vast majority of NGOs – and functioned much in the same way as the ‘cluster system’ does today. Co-ordination on the ground was boosted, as was the ability of the aid system to present a relatively united front in its difficult negotiations with the Taliban for access and acceptance. The main integration/coherence was thus within the assistance community. It was facilitated by the fact that donors were limiting their involvement in Afghanistan to humanitarian assistance: capacity-building of Taliban institutions was proscribed for fear of legitimizing the regime. In effect, the humanitarian system created its own parallel structures to respond to a deepening crisis for which resources were scarce and international support was weak. Development policy discussions were not a priority for the Taliban, who were intent on winning the war and international recognition.

The Strategic Framework was criticized by some for the alleged subordination of humanitarian and human rights concerns to the UN’s political agenda. Some organizations, particularly at the ‘Dunantist’ end of the humanitarian spectrum (i.e. those who strive to respect more closely the founding principles of the Red Cross Movement), such as Médecins Sans Frontières (MSF), claimed that humanitarian action was being compromised by the Strategic Framework because it provided a single umbrella for the three components of UN action in Afghanistan – political, humanitarian, and human rights. In fact, quite the opposite happened, at least during the period between 1999 and mid-2001: because the Strategic Framework contained a clear set of principles and objectives to which all segments of the United Nations and the vast majority of the NGOs had subscribed, the humanitarian voice had a better chance of being heard. This was, of course, facilitated by the fact that no major power had strategic political stakes in Afghanistan; that humanitarian action was the main form of UN engagement on the ground; and that the peace process was mostly reduced to ‘talks about talks’, with no substantive discussions among the belligerents.

The Strategic Framework facilitated the search for common approaches in the aid community on how to deal with restrictive Taliban policies and on issues such as negotiations for access to vulnerable groups, particularly to ‘internally stuck people’ (ISPs). In the case of Afghanistan, it can be argued that issues of principles and rights got a hearing because of the relatively strong degree of unity in the humanitarian assistance community and because the Strategic Framework allowed the humanitarian voice to be heard at the political UN and donor levels.⁸ In the end, there was little integration between the assistance pillar and the political pillar of the Strategic Framework. While it is true that the Strategic Framework was based on the assumption that assistance activities should ‘advance the logic of peace’, because the Taliban were ostracized and the peace process was going nowhere, aid-induced pacification was more virtual than real.

Principles under the *kilim*

All this changed utterly after 9/11. Whatever coherence the Strategic Framework might have brought to overall assistance and protection efforts in Afghanistan was shattered by the political and military hurricane that followed. Humanitarian and human rights concerns were pushed aside. They were swept under the *kilim* (carpet).

First, the nature of the crisis was radically changed by the US-led intervention. The Bonn Agreement, and the UN Security Council resolutions that endorsed it, resulted in a process of taking sides by the United Nations and the assistance community. This was not immediately apparent to aid agencies that were benefiting from the sudden windfall of donor largesse, but it was to the ‘spoilers’ and ‘losers’ – the remnants of the Taliban and other groups who had temporarily gone underground but were already planning their comeback. Humanitarian players who had been part of the Afghan landscape for many years, and who had been broadly accepted by all parties to the conflict, were now being viewed with suspicion by the losers, if not as legitimate targets in their war effort. This was because the humanitarian agencies in the post-Bonn peace agreement euphoria accepted the conventional wisdom that their erstwhile interlocutors, the Taliban, were no longer a player with whom a dialogue needed to be maintained. The Karzai government had been legitimized by its Western backers and donors urged the UN and NGOs to work with the government. To be fair, few needed prodding. This in turn broke the social contract of acceptance that normally allows

8 For a detailed analysis of the Strategic Framework, see A. Donini, above note 7, pp. 126–130, and the bibliographical references provided therein. See also, Mark Duffield, Patricia Gossman, and Nicholas Leader, *Review of the Strategic Framework for Afghanistan*, Afghanistan Research and Evaluation Unit, Islamabad, 2001, available at: http://www.areu.org.af/index.php?searchword=Strategic+Framework&option=com_search&Itemid=112 (last visited 24 November 2010). On negotiations with the Taliban, see Antonio Donini, ‘Negotiating with the Taliban’, in Larry Minear and Hazel Smith (eds), *Humanitarian Diplomacy: Practitioners and their Craft*, United Nations University Press, Tokyo, 2007.

humanitarian agencies to operate in volatile environments. To aggravate matters, the situation was defined and accepted by all except a handful of analysts as ‘post-conflict’ and therefore no longer requiring a humanitarian response.⁹ Of course, humanitarian needs did not disappear; the designation simply warped the analysis. As a consequence, the strong UN humanitarian capacity that existed in the country up to 9/11 was summarily disbanded.

Second, the locus of integration shifted from the humanitarian to the political arena – and the former was increasingly subordinated to the latter. The United Nations Assistance Mission in Afghanistan (UNAMA) was established as the most integrated UN mission until then.¹⁰ All UN political, assistance, and human rights functions were brought under the stewardship of a single official. The mission’s operating system revolved around the twin mantras of ‘support the government’ and ‘nothing must derail the peace process’. In other words, politics – in this instance, to support the Karzai government – ruled. These features of UNAMA had a number of consequences for humanitarian action. Because of the lack of decisiveness in the UN assistance pillar, into which the previous humanitarian assistance co-ordination structure had been folded, and the Klondike-style rush of aid agencies attracted by the sudden availability of funds, co-ordination essentially collapsed. Donors set up shop in Kabul and privileged their own bilateral channels and implementing agencies. This undermined multilateralism and defeated any attempt at coherence in the assistance realm. NGOs distanced themselves from the UN, either because they distrusted the politicization of UNAMA or because they were now flush with funds. The myriad new reputable or fly-by-night players who appeared on the scene simply ignored it.

At the same time, the UN humanitarian efforts that had been a driving force – and the vehicle for co-ordination – in Taliban times came to be seen as antagonistic to the peace-building agenda by the political side of UNAMA, largely because they were trying to hold on to their principled approach and were resisting the politicization of humanitarian action. It thus became much more difficult to raise protection concerns within and outside the mission. In the winter and spring of 2002 there were massive abuses in the north of the country – including reprisals against communities thought to be pro-Taliban, forced displacement, and recruitment, as well as the killings and rape of aid workers – but there was little interest or traction on the UN and Coalition sides either to acknowledge or to take action to curb these violations.¹¹

As a result, and as has now become painfully obvious, what remained of the humanitarian community, and the wider assistance community, came to be

9 In early 2002, an Afghan analyst remarked: ‘The Taliban are like broken glass. You don’t see it, but when you walk on it, it hurts’ (personal communication).

10 A fact facilitated by the appointment of Lakhdar Brahimi, who had given his name to the ‘Brahimi Report’ – the UN’s rulebook for integrated missions – as Special Representative of the Secretary-General (SRSG). See *Report of the Panel on United Nations Peace Operations*, UN Report A/55/305 – S/2000/809 of 21 August 2000.

11 See Norah Niland, ‘Justice postponed: the marginalization of human rights in Afghanistan’, in A. Donini *et al.*, above note 7, pp. 61–83.

perceived by the Taliban and other insurgent groups as having taken sides in a 'Western conspiracy' and as providing a prop for the corrupt Kabul administration, whose legitimacy was increasingly questioned and whose writ outside the capital remained weak. In sum, the integration agenda implemented by the UN (a) marginalized humanitarian action and subordinated it to a partisan political agenda, (b) made it more difficult for aid agencies to access vulnerable groups, and (c) put the lives of aid workers at risk. The charitable explanation is perhaps to say that the post-9/11 enthusiasm clouded the vision of the main players in the UN leadership, Western donors, and aid agencies. Peace seemed within grasp. Nonetheless, there were, and still are, good reasons to be sceptical of the integration/coherence agenda whether writ narrow – limited to the UN – or writ large across the joined-up approaches of the NATO military Coalition and its civilian appendages.

Kicking the anthill

If we fast forward to 2010, we find humanitarianism in Afghanistan in a parlous state. The optimism of 2002 has been replaced both within and outside the aid community by growing despondency, if not foreboding. Many, in Western establishments saw Afghanistan as a testing ground for new approaches to conflict resolution, if not world ordering. Some, on the heels of Kosovo and later of Iraq, even waxed lyrical about a new and benign imperialism.¹² For the past nine years, Afghanistan has been a testing ground for 'joined up', 'comprehensive', or coherent approaches to conflict resolution. We will look briefly both at the UN and Coalition current versions of 'coherence' and at how they impact on humanitarian action.

While the UN had an integrated mission from early 2002, the integration of Coalition efforts – whereby political, military, and civilian activities fit into a single strategy – came later. Both Afghanistan and Iraq (and now Kenya and Somalia) are laboratories where different types of military/political/assistance hybrids have been tested by the US and its partners.¹³ These can be grouped under the moniker of 'stabilization' operations and cover a number of approaches, ranging from the relatively indirect – where civilian assistance activities are delivered from more or less militarized Provincial Reconstruction Teams (PRTs) – to the direct involvement of the military in assistance activities.¹⁴ Examples of the latter would

12 Michael Ignatieff, *Empire Lite: Nation-building in Bosnia, Kosovo, Afghanistan*, Vintage, London, 2004.

13 The incorporation of relief and other forms of assistance into military operations is nothing new. US NGOs were willing participants in such approaches during the Vietnam War. Most US NGOs – and most of the NGOs involved in Vietnam were American – positioned themselves, by default if not by design, as virtual extensions of US policy in the region, working in close partnership with the US government. A review of the experience of four major NGOs – Vietnam Christian Service, CARE, International Voluntary Services, and Catholic Relief Services – is instructive regarding the infiltration of humanitarian activities by political agendas. See George C. Herring, 'Introduction to special issue: non-governmental organizations and the Vietnam War', in *Peace & Change*, Vol. 27, No. 2, April 2002, pp. 162–164.

14 There is no single model for PRTs. Some are more civilianized or, like the Dutch PRT in Oruzgan, under civilian command. In theory this means that assistance activities maintain some separation from military

include the direct delivery of ‘humanitarian assistance’, by the military as described in the box below.

Giving ‘humanitarian’ a bad name

A NATO/ISAF press release reads: ‘Humanitarian operations are helping both the people of Afghanistan and coalition forces fight the global war on terror. Under a strategy known as “information operations”, coalition mentors assigned to Afghan Regional Security Integration Command – North are developing humanitarian projects for even the most remote villages in the Hindu Kush Mountains. During a recent mission in both Faryab and Badghis Provinces, the Afghan National Army and their coalition mentors ... provided relief to the Afghan people ... In return for their generosity, the ANA asked the elders to provide them with assistance in tracking down anti-government forces’.¹⁵

‘Stability operations are humanitarian relief missions that the military conducts outside the U.S. in pre-conflict, conflict and post-conflict countries, disaster areas or underdeveloped nations, and in coordination with other federal agencies, allied governments and international organizations. Such missions can include re-establishing a safe environment and essential services, delivering aid, transporting personnel, providing direct health care to the population, mentoring host country military medical personnel and helping nations rebuild their health infrastructure. Improving local medical capacity can in turn help stabilize governments and produce healthier populations. The new policy elevates the importance of such military health support in stability operations, called Medical Stability Operations (MSOs), to a DoD [US Department of Defense] priority that is comparable with combat operations’.¹⁶

In the language of the military, the objective of stabilization is to ‘shape, clear, hold, and build’.¹⁷ Essentially, these activities involve a concerted set of actions in ‘swing’ or ‘critical’ districts that are recaptured from or might otherwise

objectives. Others are more militarized and more integrated. On balance there has been a progressive militarization of PRTs, with civilians increasingly excluded from decision-making. See Sippi Azarbaijani-Moghaddam, Mirwais Wardak, Idrees Zaman, and Annabel Taylor, *Afghan Hearts, Afghan Minds: Exploring Afghan Perceptions of Civil–Military Relations*, British Agencies Afghanistan Group and European Network of NGOs in Afghanistan, London, 2008. For a critique of the British approach, see Stuart Gordon, ‘The United Kingdom’s stabilisation model and Afghanistan: the impact on humanitarian actors’, in *Disasters*, Vol. 34, (Supplement S3), 2010, pp. S368–S387.

15 ‘ARSIC-N and ANA travel outside boundaries to deliver aid’, International Security Assistance Force (ISAF) Press Release, 23 December 2007, available at <http://www.reliefweb.int/rw/rwb.nsf/db900SID/PANA-7A7FC7?OpenDocument&RSS20=18-P> (last visited 25 November 2010).

16 ‘New DoD policy outlines military health support in global stability missions’, Press Release, 24 May 2010, available at: http://www.health.mil/News_And_Multimedia/Releases/detail/10-05-24/New_DoD_Policy_Outlines_Military_Health_Support_in_Global_Stability_Missions.aspx (last visited 24 November 2010).

17 Anthony H. Cordesman, *Shape, Clear, Hold, and Build: The Uncertain Lessons of the Afghan & Iraq Wars*, Centre for Strategic and International Studies, September 2009, available at: <http://csis.org/publication/shape-clear-hold-and-build-uncertain-lessons-afghan-iraq-wars> (last visited 24 November 2010).

fall to the Taliban. Once the district is secured, the theory goes, the UN and its agencies, the government, and the NGOs come in, first with quick impact projects (QIPs) and then with more durable initiatives, to transform physical security into more durable human security. This is based on the postulate that 'hearts and minds' and other assistance activities can actually 'deliver' durable security, an assumption that has also been increasingly questioned.¹⁸

An example of this is the 'government in a box' approach that was tried out, and largely failed, after the Coalition offensive in Marjah (Helmand Province) in March 2010. Understandably, agencies and NGOs, particularly those with long histories of work in Afghanistan, have been reluctant to jump onto the stabilization bandwagon despite strong donor pressure to do so. Assistance newcomers – private contractors or for-profit 'quasi NGOs' such as DAI¹⁹ – have been much more ready, willing, and able to take the plunge.

In Afghanistan, all major assistance donors – with the exception of Switzerland and India – are belligerents. This is unprecedented. Unsurprisingly, the militarization of aid and its incorporation into political agendas has reached unheard-of levels. One of the consequences of such 'coherence' is that, because 'post-conflictiness' was declared by the international community in 2002, bilateral donors' interest in and funding for humanitarian activities has been and remains very small. Until recently, there was much denial as to whether the deepening crisis had generated humanitarian needs. Apart from the Humanitarian Aid department of the European Commission (ECHO) and the Office of US Foreign Disaster Assistance (OFDA), the relatively principled branches of the European Commission and USAID, there were no officials with humanitarian portfolios in donor embassies in Kabul in early 2010.²⁰

The UN and humanitarian action: a failed mandate

While donors' support for coherent agendas and disregard for humanitarian principles is somewhat understandable, given the reality of being active belligerents, the posture of the UN is not. Afghanistan is the only complex emergency where the UN is politically fully aligned with one set of belligerents and does not

18 This is the subject of an ongoing research project co-ordinated by Andrew Wilder at Feinstein International Center (FIC): see Andrew Wilder, 'A "weapons system" based on wishful thinking', Opinion editorial, in *The Boston Globe*, 16 September 2009, available at: http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/09/16/a_weapons_system_based_on_wishful_thinking/ (last visited 24 November 2010). See also 'Conference report: winning "hearts and minds" in Afghanistan: assessing the effectiveness of development aid in COIN operations', available at: <https://wikis.uit.tufts.edu/confluence/pages/viewpage.action?pageId=34085650> (last visited 26 November 2010) for a description of the Tufts/FIC study on hearts and minds.

19 'Development Alternatives, Inc' – now known simply as DAI – is a for-profit company that implements many USAID projects: see <http://www.dai.com/about/index.php> (last visited 24 November 2010). Because it works in ways similar to NGOs, but usually with armed escorts, this blurs the line between non-governmental and militarized assistance.

20 Personal observation.

act as an honest broker in ‘talking peace’ to the other side. It is also the only complex emergency where the UN’s humanitarian wing – the Office for the Coordination of Humanitarian Affairs (OCHA) – and the broader humanitarian community are not vigorously negotiating with the other side for access²¹ or openly calling on all parties to the conflict to respect humanitarian principles. This represents a failure of mandate²² and a failure of leadership.²³ The UN Humanitarian Coordinator also acts as Deputy Special Representative of the Secretary-General (DSRSG) in charge of assistance and as UN Resident Coordinator. This conflation underscores the consequences of integration from a humanitarian perspective: it is difficult, if not impossible, for the same person to be an advocate for humanitarian principles and impartial humanitarian action and at the same time act as the main interlocutor on reconstruction and development issues with the government and the Coalition forces. The government – as well as major donors and the Coalition forces themselves – have not been keen to acknowledge the depth of the conflict-related humanitarian crisis, as this would undermine the rhetoric of post-conflict nation-building. Nor have they encouraged the UN to step out of the relative comfort of government-held cities to assess the humanitarian situation on the ground. Until early 2010, OCHA and the DSRSG had done little to engage with the other side. Conversely the International Committee of the Red Cross (ICRC), unlike the UN, has nurtured its relationship with all the belligerents. It is the only humanitarian agency that has been able to develop a modicum of trust with the other side – to the extent that the World Health Organization, for example, needs to rely on the ICRC’s contacts for its immunization drives. Since its return to Afghanistan in 2009, MSF has followed the same approach.²⁴

The one-sidedness of the UN stems from the various UN Security Council resolutions establishing UNAMA and supporting the International Security Assistance Force (ISAF) and Operation Enduring Freedom (OEF). These resolutions repeatedly refer to ‘synergies’ and strengthening co-operation and coherence between the UN’s Special Representative, the foreign military forces, and the Karzai government.²⁵ The frequent references to links between the US civilian and military

21 To be fair, some preliminary contacts have been made but as yet with no visible results.

22 UN General Assembly resolution 46/182 of 19 December 1991, which established the Department of Humanitarian Affairs (DHA) – now OCHA – specifically gives OCHA the responsibility of ‘[a]ctively facilitating, including through negotiation if needed, the access by the operational organizations to emergency areas for the rapid provision of emergency assistance by obtaining the consent of all parties concerned, through modalities such as the establishment of temporary relief corridors where needed, days and zones of tranquility and other forms’ (Annex, para. 35(d)).

23 For more detail on humanitarian leadership (or lack thereof), see Antonio Donini, *NGOs and Humanitarian Reform: Mapping Study Afghanistan Report*, NGO Humanitarian Reform Consortium, 2009, available at: <http://www.reliefweb.int/rw/rwb.nsf/db900sid/SNAA-7WC45P?OpenDocument> (last visited 24 November 2010).

24 Michiel Hofman and Sophie Delaunay, *Afghanistan: A Return to Humanitarian Action*, MSF, Geneva, Switzerland, March 2010, available at: http://www.doctorswithoutborders.org/publications/reports/2010/MSF-Return-to-Humanitarian-Action_4311.pdf (last visited 24 November 2010).

25 See, e.g., UN Security Council resolution 1868 of 23 March 2009, S/RES/1868 (2009), para. 4(b), extending UNAMA; Resolution 1917 of 22 March 2010, S/RES/1917 (2010), para. 5(b), extending UNAMA; Resolution 1890 of 8 October 2009, S/RES/1890 (2009), para. 5, extending ISAF.

surge and UNAMA's activities also reinforce the impression that the UN is joined at the hip with the international military intervention and the Karzai government. Moreover, the public messages of the UN bureaucracy from its top level down have singularly lacked equidistance. Examples of this abound. Both the UN Secretary-General and his Special Representative (SRSG) have publicly and repeatedly welcomed the military surge and the prosecution of the war.²⁶ The SRSG is often seen in public with ISAF commanders, visiting ministers of the belligerent powers and assorted dignitaries. Many aid workers, UN and NGO alike, felt that the UN Secretary-General's remarks to the press expressing 'admiration' for ISAF, after the October 2009 attack on the Bakhtar guest house in which five UN staff were killed, were particularly insensitive.²⁷ Such statements allow the armed opposition to underscore the lack of impartiality of the UN as a whole for not acting 'as per its responsibilities and caliber as a universal body' and for calling 'for more brutality under the leadership of USA'.²⁸ More generally, the level of trust of ordinary Afghans in the UN is deeply fractured.²⁹

It is true that, in the last couple of years, the UN has become more vocal on issues of civilian protection and humanitarian principles, and in documenting the impact of the war on civilians. It has also started to recognize more openly the need for negotiated humanitarian access, which implies talking to the insurgents. 'Reconciliation', the code word for peace talks, is now on the agenda. But its posture – an integrated mission in support of the government, aligned with the Coalition, ensconced in government-held towns – and its credibility remain weak. Now that talks about talks, or even peace negotiations, are on the agenda, it will be difficult for the UN to shake off the legacy of its lack of neutrality and of equidistance from the warring parties.

From a humanitarian perspective, the consequences of the early declaration of 'post-conflict' and downgrading of the UN's humanitarian capacity in early 2002 are now in stark relief. While a separate humanitarian co-ordination presence was re-established – with one foot out of the integrated mission – in early 2009, OCHA's capacity remains uncertain and its ability to negotiate humanitarian access and acceptance untested. This is compounded by the absence of reliable data

26 See, e.g., Xion Tong (ed.), 'UN Afghanistan envoy backs call for more NATO troops', in *Xinhua*, 23 October 2009, available at: news.xinhuanet.com/english/2009-10/23/content_12309531.htm (last visited 24 November 2010).

27 'I express my admiration for all the dedication of the women and men of the United Nations, voluntary humanitarian workers, NGOs and other members of the international community, including ISAF (International Security Assistance Force) for their dedication and commitment'. Press conference, Kabul, 2 November 2009, available at: <http://unama.unmissions.org/Default.aspx?tabid=1761&ctl=Details&mid=1892&ItemID=6374> (last visited 24 November 2010).

28 Statement of the Islamic Emirate of Afghanistan, 5 November 2009, available at: <http://www.alqimmah.net/showthread.php?t=11606> (last visited 25 November 2010). The statement goes on to lament that 'We have not seen any resolution by the Security Council, which speaks of grace, tolerance and altruism'. Similar criticism of the UN's 'partial standing' was expressed on 22 March: see <http://www.alqimmah.net/archive/index.php/t-15269.html> (last visited 25 November 2010).

29 This was a recurring theme in interviews with Afghan analysts and NGO and UN staff in Kabul in January 2010.

and analysis on the depth and breadth of the humanitarian caseload, a task that would normally be undertaken by OCHA. The failure to put together a credible picture of how the war is affecting the delivery of health and other essential services in the wide swathes of the country where the government has no hold is particularly serious, as it feeds donor reluctance to acknowledge that a robust humanitarian response is necessary.³⁰ More broadly, the aid community suffers from the confusion faced by ordinary Afghans, not to mention the armed opposition, in distinguishing humanitarians from other aid and political players. The perception that the aid enterprise has taken sides is of course reinforced by the fact that aid agencies are only present in government-held towns.

Thus, there is no humanitarian consensus that would define the basic operational requirements of humanitarian agencies in a conflict setting, no clarity on humanitarian needs, and an extremely politicized environment where aid agencies are pressured into supporting the Coalition and the government's political and military agendas. As a result, there is little understanding of, and respect for, humanitarian principles by the Taliban and other insurgents who tar the UN and NGOs with the occupiers' brush. Moreover, there is at best limited interest or support for principled humanitarian action by Coalition forces, major donors, and the political UN, whose emphasis is on the co-optation and militarization of aid or, failing that, on its displacement via for-profit entities.

In the fraught urban geography of Kabul and other major cities, there is little to distinguish UN compounds from those of the Coalition or of private security companies; this accentuates the perception that the UN and the foreign militaries are parts of a joint enterprise. Bunkerized behind blast walls of seemingly ever-increasing height,³¹ the beleaguered aid community is cutting itself off from the Afghan population whom it is meant to assist. This is particularly true of the UN, whose international staff can only move around, with crippling restrictions, in armoured vehicles (save for a few more stable areas in the centre and the north of the country); but for the NGOs as well the sphere of operation is rapidly shrinking: long-standing relationships with communities are fraying because of the impossibility of senior staff to visit project activities. Remote management and difficulties

30 Several factors conspire to create this information vacuum: the bunkerization of aid agencies, growing risk-aversion, lack of monitoring of projects in insecure areas, remote-control management, etc. Attacks against aid workers have had a chilling effect. These factors are compounded by the reluctance, with few exceptions, to engage in contact and relationship with the armed opposition(s). Recent information seems to show that the Taliban are not necessarily hostile to NGO activities, particularly in the health sector, though they may be hostile to the presence of foreigners; see Leonard S. Rubinstein, *Humanitarian Space Shrinking for Health Program Delivery in Afghanistan and Pakistan*, PeaceBrief No. 59, US Institute of Peace, Washington, DC, October 2010, available at: <http://www.usip.org/resources/humanitarian-space-shrinking-health-program-delivery-in-afghanistan-and-pakistan> (last visited 24 November 2010).

31 This trend, which does not only apply to Afghanistan, is analysed by Mark Duffield, who describes the international 'gated communities' in urban areas, the fortified aid compounds, and the exclusive means of transport that mesh these secure sites into an 'archipelago' of international aid. Mark Duffield, 'The fortified aid compound: architecture and security in post-interventionary society', in *Journal of Intervention and Statebuilding* (forthcoming, 2010).

in monitoring are affecting programme quality. Responsibility and risk are being transferred to local staff, and the risk of being associated with the government or the Coalition is one that, understandably, many are not prepared to take. In short, the one-sidedness of aid agencies, real or perceived, is affecting both the reach and the quality of their work. Undoubtedly, acute vulnerabilities requiring urgent attention are not being addressed. With the exception of the ICRC and a few others, mainstream international agencies (UN and NGO alike) who claim to have a humanitarian mandate are becoming more risk-averse and loath to rethink their *modus operandi*. As a result, they are allowing their sphere of responsibility to be defined by political and security considerations rather than by the acuteness of need and the humanitarian imperative to save and protect lives.

Conclusions

The temptation to use humanitarian action to achieve political or military objectives or, more broadly, to incorporate humanitarian action in grand political designs is a recurrent theme in Afghanistan's recent troubled history. Views differ greatly on the pertinence of such integrated or coherent approaches, which seem to have become the orthodoxy both in the UN and in most Western governments. The effectiveness and long-term impact of such approaches is, of course, another matter.

From a humanitarian perspective, there are two questions here: Should humanitarian action be linked to, or included in, integrated or coherent approaches to conflict resolution? Even if it is not included, what is the impact of such approaches on principled humanitarian action? The answer to the first question is straightforward: humanitarians should not take sides. They should not make any pronouncement on whether a war is just or unjust, as this would undermine their ability to access vulnerable groups and address needs. Obviously, then, they should not engage in controversies of a political nature and even less join up in action with belligerents. Neutrality is not an end in itself; it is a means of fulfilling the humanitarian imperative. The use of the term 'humanitarian' for stabilization activities that are not based on need but on a political-military agenda further muddies the waters. And the perception of being associated with a belligerent carries potentially deadly consequences for humanitarian aid workers. In practice, only the ICRC and a handful of NGOs at the 'Dunantist' end of the spectrum (MSF, Emergency, Solidarités) can qualify as principled humanitarians in Afghanistan today. Most NGOs are multi-mandate agencies that perform a variety of relief and/or development functions, in most cases receive funds from belligerent nations, and/or work as government implementing partners, if not for military/assistance hybrids such as the PRTs. As for the UN agencies, they are perceived as having lost all semblance of independence and impartiality, let alone neutrality.

The answer to the second question is more complicated. It has to do with the political economy of the relationships between the range of military, political,

and assistance entities on the ground. The UN is, and is seen as being, aligned with the US-led Coalition intervention. It has provided uncritical support to the Karzai government and has shown no equidistance vis-à-vis the belligerents. The UN's humanitarian capacity is therefore weak and is further diminished by its association with the integrated mission. As mentioned above, the majority of NGOs work as implementing partners for government programmes, or in any case are seen as part of the international enterprise that supports the government. Unlike other conflict situations, there are few NGOs with a humanitarian track record in Afghanistan. As for bilateral donors, they see 'their' NGOs as force multipliers for their political and military objectives. Indirectly, therefore, stabilization operations affect humanitarianism because that is where the money is and NGOs are forced to balance principle with institutional survival. There is a 'rice bowl' issue here: if the NGOs refuse to do the bidding of the stabilization donors, the private contractors or the military itself will do the job.

Thus, even if humanitarian agencies are not involved in stabilization activities, these can have potentially dangerous consequences for the perceived neutrality and impartiality of humanitarian personnel. They are likely to make the negotiation of humanitarian space, which requires a minimum of acceptance and trust from all belligerents, that much more difficult. So far, only the ICRC has been able to develop a steady dialogue on access and acceptance with the Taliban. Now that there is a separate OCHA office outside the UN integrated mission – whose traditional function would be to negotiate access with all belligerents on behalf of the wider humanitarian community – there is some potential for a more active and principled UN humanitarian role. Re-establishing the bona fides of the humanitarian UN will be difficult, however, as tensions will inevitably arise with the Coalition and the political UN if these continue to claim that the humanitarians 'are in the same boat' of supporting the government and its political outreach.

In sum, there are good practical reasons for separating or insulating principled humanitarian action from integrated missions or stabilization activities. An even stronger theoretical argument points to the flaws of incorporating humanitarian action in the 'coherence' agenda. Humanitarian action derives its legitimacy from universal principles enshrined in the UN Charter, the Universal Declaration of Human Rights, and international humanitarian law. Such principles often do not sit well with Security Council political compromises; politics, the 'art of the possible', is not necessarily informed by principle. Incorporating a function that draws legitimacy from the UN Charter (or the Universal Declaration) within a management structure born of political compromise in the Security Council is questionable and, in the case of Afghanistan, has proved to be counter-productive.

The issue of better insulation of principled humanitarian action, if not complete separation, from politics and stabilization approaches is likely to remain an unresolved item on the humanitarian agenda for some time to come. The ICRC and other Dunantist humanitarian organizations remain wary of, if not hostile to, integration. Some (for example, MSF) have now officially seceded from UN

and NGO humanitarian co-ordination bodies precisely because of the perceived conflation of principled humanitarian action and politics. On balance, the integration/coherence agenda has not served humanitarianism well: it has blurred the lines, compromised acceptance, made access to vulnerable groups more difficult, and put aid workers in harm's way.³²

32 The Feinstein International Center's Humanitarian Agenda 2015 research on local perceptions of the work of aid agencies has documented 'coherence' issues in thirteen countries. All the studies are available at fic.tufts.edu. The final report, A. Donini *et al.*, *The State of the Humanitarian Enterprise*, 2008, is available at: <https://wikis.uit.tufts.edu/confluence/display/FIC/Humanitarian+Agenda+2015+-+The+State+of+the+Humanitarian+Enterprise> (last visited 8 December 2010).



30 years in Afghanistan. ICRC photo archives account by Alberto Cairo

.....

The *Review* asked Alberto Cairo, head of the International Committee of the Red Cross (ICRC) orthopaedic programme in Afghanistan since 1992, to make his own selection of pictures from the ICRC's photo library collection, which covers its activities in conflicts throughout the world from the 1860s to the present day.¹ There are now more than 115,000 photos available in digital format.

Alberto, an Italian national, studied law before becoming a physiotherapist. From 1987 he spent three years in Juba, Sudan, with *L'Organismo di Volontariato per la Cooperazione Internazionale (OVCI)*, an Italian non-governmental organization for disabled children. In 1990 he joined the ICRC and was assigned to its Surgical Hospital for War Wounded in Kabul. Apart from a short ICRC mission in Sarajevo in 1993, he has never left Afghanistan. In 1994, during Afghanistan's civil war, Alberto worked with the ICRC's Economic Security Department to assist the internally displaced inhabitants of Kabul. Today, he is responsible for the country's seven ICRC orthopaedic centres, a programme that provides the disabled with physical rehabilitation and social reintegration.

Through his selection and comments, Alberto gives his personal account of his experiences while working closely with the people through the different stages of Afghanistan's troubled contemporary history.

ICRC presence in Afghanistan

The ICRC has been present in Afghanistan since 1979, working initially out of Pakistan, and since 1987 from its delegation in Kabul. Today, Afghanistan is the ICRC's largest operation worldwide. The institution has over 130 expatriates and more than 1,400 national staff based in Kabul and in fourteen other locations throughout the country.

The ICRC regularly visits places of detention run by nations contributing to the NATO-led International Security Assistance Force (ISAF), by the US forces, and by the Afghan authorities. The aim is to monitor conditions of detention and the treatment of detainees. In 2010, it also began visiting people detained by the armed opposition. Moreover, it helps families who are separated by the conflict to stay in touch with one another through Red Cross messages and telephone calls, and endeavours to trace those family members who have gone missing.

The ICRC assists Sheberghan Hospital in the north of Afghanistan and Mirwais Regional Hospital in the south, both of which are run by the Ministry of Public Health. Some twenty expatriate doctors, nurses, and administrative personnel are based in Kandahar, and provide support to the medical, administrative, and logistics staff at Mirwais. The ICRC also gives technical and financial support for ten Afghan Red Crescent clinics and for their community-based first-aid volunteers who deliver health care to people in their respective villages. In addition, the ICRC runs four first-aid posts in areas where conflict is ongoing.

One of the ICRC's most important activities in Afghanistan is the distribution of aid, in co-operation with the Afghan Red Crescent Society, to tens of thousands of people displaced by the fighting. Meanwhile, ICRC water engineers work closely with local water boards on urban and rural programmes. The institution promotes hygiene awareness in religious schools and detention centres, and with families in their homes.

Reminding parties to a conflict of their obligation to protect civilians and keep them safe from harm is a fundamental part of the ICRC's efforts to promote compliance with international humanitarian law (IHL) worldwide. In Afghanistan, the institution spreads knowledge of IHL within civil society, government bodies, the armed forces, and armed opposition groups country-wide.

1 The ICRC photo galleries are available at: <http://www.icrc.org/eng/resources/photos/index.jsp> (last visited 17 May 2011).



12/1989 © CICR/PIRALLA, Cédric

Takhar province. Ethnic Turkman mujahideen get ready to fight.

After the Russian invasion in December 1979, the Islamic resistance was immediately organized with the help of Pakistan and the Western countries. A farmer assisting his wounded son explained that, in his village, the commander demanded at least two pairs of hands from every family. 'And if someone refuses?' I asked. 'Shame and fear prevent him. Anyway, where could he hide?' The commander had absolute power. Meanwhile, the only ways to avoid conscription by the government side were by leaving the country or joining the mujahideen. The foreign press lauded the mujahideen to the skies, calling them champions of liberty, fearless heroes, martyrs. Seen from close quarters, the halo lost its shine and serious misdemeanours appeared. To fight for the independence of one's own country did not justify disproportionate reprisals and vendettas, above all the bombs that for years had been launched against the civilian population of besieged Kabul. At the same time, many commanders were being openly accused of amassing fortunes by pocketing the funds sent from abroad.



12/1989 © CICR/PIRALLA, Cédric

Laghman province. A camel caravan brings weapons to the mujahideen.

The Russians and the Afghan communist regime tried to stop the convoys supplying the mujahideen with weapons. This was a futile enterprise, since the border between Pakistan and Afghanistan was impossible to control. When in 1992 the US and Russia agreed to provide no more weapons to the Afghan factions, Afghanistan was already packed with arms of all kinds. There were landmines laid everywhere, making Afghanistan one of the most mined countries in the world, a legacy for many years to come.



11/01/1989 © CICR/HALONEN, Pekka

Kabul. An ICRC convoy transports goods for the detainees of Pul-i-charki prison.

From the early 1980s, one by one the Western embassies were shut down and foreign businesses and many humanitarian organizations recalled their personnel. To see the ICRC settle in Afghanistan made many both happy and puzzled at the same time. Taking care of detainees? Allowed by the communist authorities? They had never heard of anything like this. Amid hope and fear, the Afghans understood that important changes were in the air.



01/12/1988 © CICR/FRESARD, Claire

Kabul. ICRC surgical hospital for war wounded, Karte Seh.

After the Soviet invasion in 1979, the Afghan authorities refused to allow the ICRC into the country, obliging it to operate from Pakistan. It was only allowed to return in 1987, thanks to the policy of 'national reconciliation'. A hospital was immediately opened for war wounded. There one could witness a daily miracle. The ICRC ambulances left Kabul, crossed the front line that encircled it, and reached the first-aid posts set up by the mujahideen in the fields. There they collected the wounded and brought them back to the capital, controlled by the communist regime. The governing bodies guaranteed safe passage to everyone travelling in vehicles marked with the red cross or being treated in our hospital, providing a genuine example of diplomatic immunity. Not bad for a reputedly barbarous population. I remember the crackling radio conversations between nurses in the ambulances and the hospital, the provisional diagnoses, the orders for us to be ready to receive and treat the wounded immediately on arrival. Once recovered, they would be returned to the villages on the other side.



21/10/1990 © CICR/BREGNARD, Didier

Afghan women washing clothes in a river.

The idyllic atmosphere of this picture is deceptive. The burden of the war falls heavily on Afghan women. Often left to fend for themselves and for their children, they have to face both prejudices and traditions, and are twice punished, by the war and by the customs of the country.



02/1993 © CICR/MULLER, Yannick

Coming from Pakistan, an ICRC convoy transports medicines for the hospitals of Kabul.

After the mujahideen took Kabul in 1992, life continued amid the fighting. Prices in the bazaar were forced up by the greed of merchants and by the heavy taxes imposed by the mujahideen whenever it suited them. The road between Kabul and Jalalabad, the only route for goods coming in from Pakistan, had at least twenty roadblocks where merchandise could be confiscated with complete impunity. Trying to persuade armed and aggressive men to spare the ICRC trucks carrying medical supplies to the hospitals was hard work. Several vehicles were stolen. The arrival of the convoys in Kabul were greeted with cheers by the exhausted population.



20/05/1994 © CICR/GASSMANN, Thierry

Jalalabad. Samarkhel camp.

War and regime changes have systematically displaced entire communities. In 1994, when the mujahideen of Dustom and Hekmatiar attacked Masood's positions, thousands of people fled from Kabul to Jalalabad, followed a few days later by the inhabitants of the Tagab Valley, forced to leave their homes as well. Jalalabad became surrounded by camps of displaced people, satellite towns in the desert, composed of tents: Farm-e-hada, Surkh-dewal Muntaz, Camp-e-Tagab, Samarkhel. Samarkhel, with 30,000 people, was the biggest camp. The ICRC provided the displaced inhabitants with essential items such as drinking water, latrines, food, and blankets. When I visited the camp, I had the impression of witnessing a tragedy of dreadful proportions. Nevertheless people were smiling, determined not to give up.



23/05/1994 © CICR/GASSMANN, Thierry

Kabul, 1994. A mujahideen leads a child through the ruins.

The whole city of Kabul woke up at 4:30 a.m. on 1 January 1994. For a few seconds I stayed in bed listening to the noises, the whistle of bombs passing overhead and the explosive bang of impact. I counted the explosions. After the tenth I decided to go down to the kitchen, the safest room in the house, and slipped into knee socks and anorak. Bursts of machine-gun fire sounded close. I could hear shouts, orders perhaps. A second later I heard the crash of breaking glass coming from the upper floor. The windows were rattling. I was worried. I had seen houses set on fire by splinters from a Howitzer. I had to check. On my way upstairs I was all but knocked over by a blast of icy wind from my bedroom. The big window overlooking the courtyard lay in splinters. Falling, it had dragged to the floor the thick curtain designed to keep out light and draughts. There was no sign of fire. I piled books, blankets, and clothes onto the bed and bundled them up in a sheet. The machine-gun fire started again. There was no time to think. Closing the door behind me, I fled downstairs murmuring 'Happy New Year!'



02/1996 © CICR/AHAD, Zalmat

Kabul. At the ICRC orthopaedic centre, prosthetic feet are manufactured in their thousands.

The first ICRC orthopaedic centre for war amputees opened in Kabul in 1988. Not considered a priority, prosthetics and physiotherapy were stopped as soon as the fighting intensified and the centre closed for weeks. But the sight of hundreds of one-legged people in the streets and the awareness of how a prosthesis could improve the quality of their life led us to change our minds. Since 1994, the orthopaedic centre in Kabul has always remained open, suspending the activity only when absolutely necessary (often for only a few hours), moving four times, and installing and dismantling the workshop in record time, thanks to the dedication of the Afghan workers, who are almost all ex-patients and themselves disabled. Today, looking back to those times, I wonder how they coped in those dramatic days. I was roused by their determination. Unstoppable.



01/01/1997 © CICR/DAGOE, Jan

Kabul. Taliban fighters.

We first heard of the Taliban in 1994. Rumours spread fast. 'People from Kandahar, possibly from Pakistan'; 'They are fighting the warlords, they kick them out'; 'They are removing check points and bandits from the roads! And they do not steal!'; 'But who are they?'; 'If they bring peace they are welcome, whoever they are!'. It did not end like that. Things got much more complex.



25/09/1998 © CICR/PAGETTI, Franco

Kabul. Widows queueing at a relief distribution centre.

From 1995 to 2001, support for widows and disabled people was left entirely on the shoulders of the international organizations, the ICRC among them. A woman told me it was the saddest experience of her life. Not so much for the effort of standing for hours in line, come rain come shine, but for the humiliation. 'I am a teacher, I have always worked. This is begging.' But she was grateful for that food keeping her family alive. Like thousands of women, with the arrival of the Taliban she had lost her job. A widow with four children and no brothers or in-laws who could help, she had been through terrible days. And she could do nothing but live with it. Each distribution was a sea of blue, lavender, or dark yellow burqas slowly swaying. Identical figures with no identity. I found them disturbing.



12/2001 © CICR/DRIESSE, Christophe

Shibartu village, Bamiyan province. Ethnic Hazaras at a food supply distribution point.

Besieged by the Taliban, the Hazaras who managed to flee took refuge in the upper part of their valleys – places of stunning beauty but appalling living conditions. It took a long time before the news of the Hazaras' ordeal was known. The ICRC eventually managed to bring them relief and help despite huge difficulties and after severe delays. Many of the displaced people had by then died of starvation or exposure.



04/1995 © CICR/MARCO, Iavelli

Bamiyan. Young amputee in front of a 53-metre high Buddha dating from the 5th century.

The picture is a memory of what is lost forever. March 2001. No one believed it at first, then pictures confirmed the news. The Buddhas of Bamiyan had been destroyed. Carved in the fourth of fifth century and admired by millions of pilgrims and tourists from every country, they were part of the heritage of mankind, the pride of the Afghan people, and unique works of art. 'Every pagan symbol must be destroyed,' the Taliban told journalists when the demolition was complete. It had taken four days of trial and error before they managed to destroy them. Four days to obliterate masterpieces that had stood for millennia. The deed was the subject of many long discussions on radio and television all over the world. Rather than purely iconoclastic madness, the main motive was one of vendetta, to punish the West for refusing to recognize the Islamic Emirate of Afghanistan. I remember several Afghans crying at the news.



01/2001 © World Picture News/HAKIMI, Abdul Qadir

Kabul, November 2001. ICRC collecting the dead bodies of Taliban fighters killed while retreating. Out of respect for human dignity, the burial of corpses abandoned by the roadside is a matter of urgency. Bodies are lying in many parts of the city. In Shar-e-Naw, the city centre, we count nearly twenty. The first four we find are horribly mutilated. We have no idea how they met with such a fate. Twelve more are found in the park. Separated from their retreating colleagues, they had sought protection up in the trees, from where, we are told, they shouted and fired at the people below before becoming easy targets themselves. They were all only boys, probably foreign. Having recomposed the bodies as fast as possible, we number and photograph them in case their families come looking for them.



09/2002 © CICR/HEATHCOTE, Carlo

Kabul. Rebuilding houses.

From early 2002, Afghan refugees started streaming back from Pakistan and Iran. A new and wonderful experience for Afghanistan: the fragmented country was becoming whole again. Trucks piled high with bundles, furniture, bicycles arrived in the city every day. The men and boys sat on top of the household goods. The younger ones might never have seen Kabul, or perhaps, after being away for so many years, had forgotten what it was like. The women and girls sat lower down, all in burqas, all looking around with curiosity. It would have been splendid if only there had been houses and factories, functioning schools, and hospitals awaiting them. Instead, when they arrived they were left to their own devices and had to survive as best they could. The first priority was to find a house. Kabul has since become a huge building yard, where every space is used. The rich build incredible mansions in the residential areas, with columns, mosaics, and huge glass walls; the poor a few rooms on the slope of the hills, in violation of the town planning – they could be demolished at any time.



08/2004 © CICR/VOETEN, Teun Anthony

Zabul province, Kak Afghan district. After receiving information that Taliban might be hiding out in the village of Gozak, C-Company searches the village. Soldiers kick in a locked door.

The war is far from being over in many regions. Their number is growing. 'Every American search is a blow to the peace process,' a resident of Zabul told me. 'Entering our houses, violating our privacy, and terrorizing our children will never be forgiven.'



09/2003 © CICR/WAHIDY, Farzana

Kabul, district 7. Women reading brochures on mine awareness.

Nobody knows how many landmines and other explosive remnants of war there are. Every day at least two incidents are reported (in 2002, they were up to fifteen a day). Besides de-mining, prevention through mine awareness programmes is essential, above all for children, women, and anyone with limited access to news and general information. Many victims are still the children of poor families who collect and sell scrap metal, despite such practices being forbidden.



08/10/2005 © CICR/MOECKLI, Olivier

Herat, ICRC Orthopaedic Centre. A landmine victim at the training section.

The Orthopaedic Centres of the ICRC are a focal point for those who have lost a limb due to landmines. At the beginning bewildered and afraid, they soon learn to stand and walk again. But, over the years, I have come to realize that, when you lose a limb, a bit of your life, your heart, and your mind are also lost. And while you can be given a plastic leg easily enough, who is going to give you back the other things? Most of the amputees we see are men between the ages of 20 and 35: the years when they marry, become fathers, and are working to support themselves and their dependants. All of a sudden they lose everything, perhaps for ever. They are dependent on others, the future looks black. In Afghanistan there are no insurance schemes, no health service, no social assistance. Are these not valid reasons for despair? Many disabled people recover from depression when given a job or a micro-loan to start a business. Others fail to respond to our attempts.



29/03/2006 © CICR/LOUIS, Virginie

Kunduz province. A Red Cross message is handed to the family of a man detained in Guantanamo. The delivery of a Red Cross message is always a very moving moment. A thing that was in the hands of someone detained far away is brought to his family, with a message in it. Fathers, mothers, and children kiss the paper as a sacred relic, in tears. The link is re-established, hope grows stronger.



23/10/2007 © CICR/KOKIC, Marko

Kandahar, central prison. ICRC protection delegates visit 200 security detainees.

On several occasions, I accompanied colleagues from the ‘protection’ programme when they visited prisons. Their job was to register the new arrivals, have private conversations with the detainees, collect messages for delivery to their families, and ensure that conditions in the cells were humane. Every time, we found disabled prisoners with broken prostheses; and since the authorities forbade us to transfer them to the Orthopaedic Centre, replacements had to be made in the prison. The curiosity aroused by the prospect of seeing inside a prison vanished at the first visit. No sooner had I stepped inside the heavy main door than I was gripped by a feeling of anguish. Our delegates had to overcome this every day. It was difficult enough to listen to the detainees’ stories, to see the treatment that rode roughshod over their dignity; but to involve oneself in long discussions with the prison authorities in order to guarantee a decent existence for the inmates seemed, to me at least, almost impossible. Dialogue and persuasion are the techniques adopted by the Red Cross. If the manager is not complying with his duties one takes the complaint to increasingly higher authorities, even as far as the minister or head of state. This is done without scandal or leaks to the press, which would only recoil upon the detainees themselves and make things even worse for them. Delegates and interpreters frequently stumbled out of the interminable meetings exhausted and frustrated. I would have cried the whole affair from the rooftops, let everybody know what was going on. But one had to bite one’s tongue.



20/10/2010 © CICR/HOLT, Kate

Kandahar, ICRC Office. Relatives talking to a detainee in Guantánamo, where he has been held for nine years, via video telephone conference.

In 2008, a new service was introduced for those detained in the American prison of Bagram, 60 kilometres north of Kabul, a maximum security centre, a Guantánamo in Afghanistan: a videophone connection between the ICRC main office in Kabul and the prison. A crowd of men, women, and children regularly gather to see and hear relatives who have been imprisoned for years, assuring themselves that they are alive. Most of them come from rural areas, simple people, intimidated by TV and microphones. They cry, laugh, speak all at once, touch the screen. Now they can even see and talk to their relatives detained in the real Guantánamo, across the sea. Hurray for the new technology!



26/10/2007 © CICR/KOKIC, Marko

Kabul, Darulaman Palace. Afghanistan and its people have endured close to three decades of war.

'Darulaman Palace was our pride. Now it is our shame. We have destroyed it, with our own hands,' an old shopkeeper told me. 'What have we become?' A sad state of affairs when you think of the potential of the Afghans. Combining intelligence, curiosity, and common sense, they are quick to learn, can adapt to very dangerous, difficult situations with humour and resourcefulness, and are physically tough (partly due to the relentless natural selection of infant mortality) and hard workers, yet they have become one of the most wretched peoples on earth.

The International Committee of the Red Cross in Afghanistan: reasserting the neutrality of humanitarian action

Fiona Terry*

Fiona Terry is an independent researcher who recently completed studies for the International Committee of the Red Cross in Sudan and Afghanistan. She holds a doctorate in international relations from the Australian National University, and is the author of *Condemned to Repeat? The Paradox of Humanitarian Action* (Cornell University Press, Ithaca and London, 2002).

Abstract

Neutrality as a guiding principle of humanitarian action was roundly rejected by most actors in Afghanistan's latest conflict. One party to the conflict commandeered assistance and aid organizations into a counter-insurgency campaign, and the other rejected Western aid organizations as agents of an imperialist West. The murder in 2003 of the International Committee of the Red Cross (ICRC) water engineer Ricardo Munguia, because of what he symbolized, cast doubt on whether the ICRC could be perceived as neutral in this highly polarized context. Rather than abandon a neutral stance, however, as so many aid organizations did, the ICRC persevered and, through some innovative and sometimes risky initiatives, managed to show both sides the benefits of having a neutral intermediary in conflict. Today, the ICRC continues to expand its reach to Afghans in dire need of humanitarian assistance.

* The author would like to thank Jacques de Maio, Reto Stocker, Bijan Farnoudi, and Patrick Vial for their comments on an earlier draft. This article reflects the author's opinions and not necessarily those of the ICRC.



Shot in the thigh during NATO's Operation Moshtarak in Helmand Province in February this year, a young Afghan man arrived at the first-aid post of the International Committee of the Red Cross (ICRC) in Marjah. He was stabilized and sent by local taxi to the nearest hospital. Driving on roads riddled with improvised explosive devices (IEDs) – which were temporarily deactivated by insurgents at the ICRC's request – the taxi was stopped at a checkpoint at the entrance to the town. Time was lost as the taxi driver and security forces argued over sending the patient to the interrogation centre or hospital. An ICRC delegate called the checkpoint by mobile phone: 'We understand your security concerns, but please let the patient receive medical care. You can question him later'. The taxi was allowed to pass and the patient reached the hospital. Although not quite what the founder of the Red Cross Movement, Henry Dunant, had in mind 150 years ago when dressing wounds on the battlefield of Solferino, the ICRC's adaptation of his idea to the realities of war in Afghanistan would surely meet with his approval.

Such adaptation is the culmination of years of efforts by the ICRC to gain respect from all parties to the conflict for its role assisting victims, regardless of who they are and what side they are on. Behind this taxi ride to hospital lies a complex story of success and failure: success in persuading insurgents to disarm roadside bombs, if only temporarily, and government security forces to prioritize medical care over interrogation; but failure in having to engage local taxis to play a role that is first and foremost the responsibility of military forces and secondarily of the ICRC or Afghan Red Crescent Society. That an ICRC vehicle cannot drive along this road for fear of being attacked attests to the limits of acceptance by certain groups present in Afghanistan for what the ICRC does and what it represents.

This article explores some of these successes and failures: the challenges that have confronted the ICRC since the US invasion of Afghanistan in 2001, and how it has responded to them. The first part examines the dangers facing ICRC teams when trying to reach Afghans in need of assistance in conflict-affected parts of the country, largely due to the extreme polarization that has occurred around the 'war on terror'/'war on Islam' and the insurgency against the Western-backed government of Hamid Karzai. The second part considers the innovative ways in which the ICRC has sought to expand the humanitarian space in Afghanistan and the risks that these entailed. The final part looks to some of the future challenges that are likely to arise as international security forces scale down their presence and prepare to hand back the country to a government sullied by allegations of corruption and nepotism, a growing insurgency pushing up from the south, re-legitimized warlords in the north, and an impressive array of militias formed, funded, and equipped as part of the West's exit strategy from this quagmire.

Between two extremes: the instrumentalization and rejection of humanitarian aid

The deliberate killing of the ICRC water engineer Ricardo Munguia in March 2003, as he travelled from Kandahar to Tirin Kot, shocked the ICRC to its core. In addition to the personal tragedy felt by his family and colleagues, Ricardo's death shattered long-held assumptions that the ICRC's reputation for neutrality and effective work in Afghanistan over the past thirty years would protect its delegates from attack. Neither the man who ordered the killing nor the man who carried it out was a stranger to the ICRC's work: they each wore an ICRC prosthesis on one leg. Yet this did not stop them killing Ricardo as a symbol of the imperialist West which they considered was waging a war on Islam. Suddenly a silent pact, an unwritten rule concerning the relationship between knowing the ICRC and respecting it, was broken, and the organization had to question whether the perception of its neutrality could again be upheld in the new types of conflict being waged in Iraq, Afghanistan, and Somalia.

The instrumentalization of aid

It is tempting to blame the international military forces for Ricardo's death, joining the chorus of recriminations against the military for 'blurring the lines' between military and humanitarian personnel by using aid as part of its counter-insurgency strategy. International military forces have certainly engaged in unscrupulous activities during the war, such as wearing civilian clothing and driving white cars to disguise themselves as aid workers, dropping pamphlets over southern Afghanistan that told residents they were to give information on the Taliban and Al Qaeda if they wished to continue receiving 'humanitarian' aid, and generally using aid as a tool to 'win the hearts and minds' of the Afghan population. For many military personnel, the logic was simple: 'The more they help us find the bad guys, the more good stuff they'll get', explained a member of a Provincial Reconstruction Team as he delivered blankets to displaced Afghans in the south.¹ Civilians have paid the highest price for this instrumentalization of aid: in retaliation for 'collaborating' with the enemy, insurgents have attacked villages that have accepted such aid; and villages thought to be harbouring insurgents have been bombed or raided by NATO forces on the basis of intelligence collected while doling out the 'good stuff'. Legitimate aid organizations have also come under suspicion – on several occasions, when arrests, bombings, or poppy eradication occurred not long after ICRC staff had visited an area, the ICRC was accused of having passed information to Coalition forces. While there is nothing intrinsically wrong with the involvement of military forces in aid operations, this instrumentalization of aid has tarnished the image of 'humanitarian' assistance and turned it into a weapon of war.

1 Kim Sengupta, 'Aid workers feel the fatal chill of new Cold War', in *The Independent*, London, 10 May 2004. The Provincial Reconstruction Teams (PRTs) use a combination of civilian and military resources.

The rejection of aid

But the killing of Ricardo was not a case of ‘blurred lines’ and mistaken identity. There was no confusion in the mind of the Taliban commander Mullah Dadullah that he was ordering the execution of a civilian humanitarian worker, not of a soldier, military contractor, or spy.² Ricardo’s killing represented a deeper, more insidious threat that no amount of independence from the military could surmount, namely outright rejection of supposedly universal humanitarian norms and of respect for those who espouse them. The ICRC had managed, with difficulty, to negotiate minimum acceptable conditions for it to work throughout Afghanistan during the Taliban period (1996–2001) and had not been a target of attack. But the ‘war on terror’ played a crucial role in radicalizing a whole generation of Muslims who might not otherwise have been attracted to extreme strands of Islamic thought. The invasion of Iraq; abuse of Muslims in detention facilities in Afghanistan, Iraq, Cuba, and elsewhere; the enduring plight of Palestinians; air strikes that kill and maim civilians; and local grievances at the behaviour of Afghan government and Coalition troops have provided fodder to the Islamists and provoked a groundswell of opposition to the Western world.

This radicalization has, in turn, transformed the image of mainstream aid organizations – deeply embedded culturally, politically, and financially in the Western sphere – from that of benign infidels to agents of Western imperialism, spreading values that are contrary to those of conservative strains of Islam. While clashes over issues such as discrimination against women and ethnic and religious minorities are unavoidable, though not new, Western aid organizations share responsibility for this more recent perception swing against them, for the vast majority abandoned neutrality as a guiding principle of their humanitarian action and directed their aid in accordance with the political and military objectives of the ‘legitimate’ side. In the euphoric period following the ousting of the Taliban regime, they uncritically accepted the ‘post-conflict’ and ‘stabilization’ discourses that designated an end to the need for humanitarian assistance, and hence the principles that guided them. The overwhelming majority embraced a role in ‘post-conflict’ reconstruction and development efforts, and joined the political project to extend the government’s legitimacy throughout the country. A neutral approach was deemed ‘impossible’, ‘old fashioned’, and even morally contestable in these new conflicts, and the integrated political–military–‘humanitarian’ approach to state-building was embraced as the way of the future.³ The ICRC’s efforts to

2 Although it has never been confirmed, it is widely believed to have been Mullah Dadullah on the other end of the satellite phone who ordered Ricardo’s execution. Dadullah was a particularly brutal frontline commander under the Taliban and a member of the leadership council formed after the fall of the Taliban regime, who was based in Quetta and conducted operations in the south. He was killed by NATO forces in May 2007.

3 See, e.g., Peter J. Hoffman and Thomas G. Weiss, *Sword & Salve: Confronting New Wars and Humanitarian Crises*, Rowman & Littlefield, Lanham, MD and Oxford, 2006, p. 99; Paul O’Brien, ‘Politicized humanitarianism: a response to Nicolas de Torrente’, in *Harvard Human Rights Journal*, Vol. 17, 2004, pp. 31–39.

contradict the dominant discourse and highlight the continued need for genuine humanitarian assistance were not appreciated. Indeed, as late in the day as April 2008, the ICRC President, Jakob Kellenberger, was admonished by senior officials of the UN Assistance Mission in Afghanistan (UNAMA) for sounding 'too negative' in a public statement, issued during a trip to Kabul, that expressed concern at the humanitarian situation and the intensification of the conflict.⁴

Nine years on, however, many organizations have removed their rose-tinted glasses to find that the government and the international peace-building process they so eagerly supported are floundering amid rampant corruption, a culture of impunity at all levels, increasing repression, civilian casualties, rising criminality, and an overall loss of legitimacy that is feeding support to the Taliban and other opposition groups. Growing insecurity has led to the scaling back or withdrawal of aid agencies, first from the south and east, and now even from the north and west of Afghanistan, putting a stop to many of the activities these agencies gave up their independence to carry out. Just when humanitarian needs are greatest, aid organizations have the least capacity to respond to them: the paediatric ward of Kandahar hospital is receiving a steady stream of malnourished children from rural areas in the south, yet aid organizations are unable to reach them. Almost all foreign staff of the UN, for instance, pulled out of Kandahar and the whole southern region in April 2010.

The ICRC gave considerable thought to means of working in such a polarized context. It stopped activities in contested areas of the south immediately after Ricardo's death, but continued to visit suspected Taliban and other fighters held by international and Afghan authorities in detention facilities around the country, advocating humane treatment for them in accordance with international law. However, it refused to subscribe to the growing discourse citing attacks on the ICRC in Afghanistan and Iraq as proof that a neutral approach was no longer possible, and sought instead to understand better what was at play. Through a variety of innovative approaches, discussed further below, it began to demonstrate to all sides the benefits of having a neutral intermediary in the midst of conflict. It took three years to restore sufficient mutual confidence with the Taliban to enable the ICRC to venture out of Kandahar again and begin to address the humanitarian needs of the victims of the insurgency and counter-insurgency campaigns. A further four years on, the ICRC continues to expand its operations in Afghanistan as other aid organizations reduce or are forced to terminate theirs.

As shown in the introduction, however, a certain acceptance of the ICRC's work by the conflict's main protagonists has not automatically led to guarantees of safety for teams moving around in rural areas of the south and east. As early as September 2003, the ICRC received a letter from the Taliban saying: 'We can differentiate between organizations that are sympathetic to Afghans and those that are puppets of the Americans',⁵ and the movement has released international staff

4 Internal ICRC document, 29 April 2008.

5 Internal confidential document.

of both the ICRC and ACF (Action Contre la Faim) captured on various occasions, with apologies sent to both organizations. But there are several other factors that impede safe access to many areas and necessitate alternative methods of delivering supplies and services, such as the use of local taxis to evacuate the wounded.

Foreign fighters

The first and least understood of the dangers lying in wait are the foreign fighters: the Pakistani, Arab, and Uzbek jihadists who have come to Afghanistan to rid its soil of the foreign ‘crusaders’. Their true number is controversial; a higher number is cited to emphasize the global threat posed by an unstable Afghanistan, and a lower one to give the contrary impression. Areas near the Pakistan border are thought to have higher percentages of foreigners than elsewhere – one Taliban cleric suggested that 40% of fighters in the Garmser region of Helmand Province in March 2008 were foreigners, while a British officer’s estimate for the whole of Helmand Province in October 2007 was 25–33%.⁶ Foreign fighters pose a greater risk to aid organizations than Afghan insurgents, since they have no constituency in Afghanistan, whether family, tribe, or clan, to answer to or care for. Their sole purpose is to fight NATO and government forces and those who collaborate with them. The Taliban, by contrast, see a growing interest in easing the hardships faced by populations whose support they have or want. Earlier this year in Faryab Province, for example, armed opposition groups presented themselves at clinics to announce that they were in charge of an area and encouraged the clinics to continue, rather than destroying them or threatening staff as in the past. The Taliban have, moreover, always sought some international legitimacy, especially coveting the Afghan seat at the United Nations, whereas the jihadist movements seek neither local nor international approbation, striving instead to destabilize and shock. There is consequently little basis on which aid organizations can appeal to foreign fighters to persuade them not to attack. Even contact with them has remained elusive, just as it was when they were present in training camps in Afghanistan during the Taliban times, before Al Qaeda became a household name.

Unreliable security guarantees

Second, although the Taliban clearly have a leadership structure and *shura* (council) of senior insurgents living mostly in Pakistan,⁷ it is unclear who at the lower levels falls under the *shura*’s command and hence the extent to which it can be relied upon to give security guarantees. The opacity of the hierarchical chain makes it difficult even to know from whom ‘guarantees’ should be sought. Furthermore, fighters on the ground might have a complex overlay of allegiances to

6 See Tom Coghlan, ‘The Taliban in Helmand: an oral history’, in Antonio Giustozzi, *Decoding the New Taliban: Insights from the Afghan Field*, Colombia University Press, New York, 2009, p. 133.

7 Graeme Smith, ‘What Kandahar’s Taliban say’, in A. Giustozzi, above note 6, p. 193.

family, clan, village, tribe, and business interests that will influence individual behaviour. As one Talib explained,

the ICRC is well appreciated by high-ranking Taliban in Quetta and Afghanistan but the problem is with commanders in the field ... there is a Taliban commander every 100 metres [along the road], many of whom don't like each other. It is the problem of our culture. If one likes the ICRC the other will not and will make problems ... there is no central control.⁸

The problem of security 'guarantees' was exemplified in May 2007 when, at the Taliban's repeated request, the ICRC agreed to visit a hospital in Lashkar Gah that the Italian non-governmental organization (NGO), Emergency, had quit a few months earlier after problems with the government. The Kandahar office received security assurances for the assessment from the same Taliban authorities who had allowed the ICRC to collect two French hostages released by their captors in Maiwand district just a few weeks earlier. That operation then marked the first time that the ICRC had travelled outside Kandahar by road since Ricardo's murder, raising optimism that the Lashkar Gah assessment trip might be the beginning of a broader programme to provide medical services to conflict-affected areas in the south. However, on reaching the spot where the hostage releases had taken place, the assessment team came under fire and bullets pierced the two cars. Miraculously, no-one was hurt, but confidence in the Taliban's ability to communicate with, and control, its fighters was shattered. Any thoughts at that time of taking on the hospital or moving around more widely in the field evaporated.

The fragmentation of opposition forces has only worsened since then, partly owing to the success of the International Security Assistance Force (ISAF) in assassinating mid-level Taliban commanders in night-time raids. New commanders have emerged who are often even less acquainted with the ICRC than the old ones, and some say more radical.⁹ The increased use of IEDs along the roads also significantly elevates the risk of travelling along them – the ICRC sticks to a tight schedule that it notifies to all relevant contacts when it drives anywhere, especially the 30 km route from Kandahar to the airport to pick up and drop off staff and supplies. During the hour-long drive it is better not to dwell on the organizational and technical competence of the bomb planters and the communication channels between them and those who order the IEDs to be activated and deactivated.

Criminality

The third threat is from criminal elements: narco-traffickers, would-be warlords, kidnappers, or local mafias who have a stake in the presence of international aid organizations in, or their absence from, a town or region. Opium producers might deter an international presence in certain areas by creating an 'incident', while

8 Interview in Kandahar, 25 November 2008.

9 G. Smith, above note 7, p. 194.

others might decide to rob an aid agency of its vehicle or communication equipment, or kidnap staff for ransom. Offering free medical or other services can undermine the interests of certain businesses in a town, giving an additional motive and potential source for a security problem. In a large number of cases, the perpetrator and rationale are never fully known, even for the most serious crimes, such as the murder of five staff of Médecins Sans Frontières (MSF) in Badghis Province in 2004. The Taliban claimed responsibility for those deaths although the evidence points to local government commanders and the motive remains unclear.¹⁰ Incidents involving private security companies are often no clearer, yet sometimes involve blatant violations of international humanitarian law (IHL), such as threatening and shooting at staff of a hospital in Wardak Province in July 2009, injuring several Afghans. In another, more recent, obscure event, two ICRC vehicles overtaking a stationary convoy on the road from Kabul to Ghazni drove into a fire-fight between a private security company and an unknown adversary, despite assurances from the armed opposition five minutes earlier that the road was safe. An investigation was unable to reveal whether the adversary was the Taliban, another armed opposition group, a rival security company/militia, or an attack staged by the company itself to justify its exorbitant fees.¹¹

This state of insecurity imposes enormous constraints on the ability of the ICRC and other aid organizations to even know what is really happening in many areas of Afghanistan, let alone provide assistance to those who need it. The ICRC is still able to travel and work with expatriate staff throughout most areas in the north, despite the rapidly deteriorating security situation that is forcing many aid agencies to leave. But in the south access is more difficult. Information on the plight of Afghans living there must be gained from secondary sources, including patients arriving at ICRC-supported medical facilities such as hospitals and prosthesis-fitting centres, Afghan staff of the ICRC health posts, families of detainees for whom the ICRC facilitates prison visits and the exchange of family news, and Afghan Red Crescent volunteers, who play a vital role assisting local communities. However, the ICRC's ability to respond to requests for assistance there is limited. To do so it must act by 'remote control', often through Afghan Red Crescent volunteers, conferring considerable responsibility on local contacts and employees who are acceptable to all and thus hopefully immune to attack.

10 MSF in Afghanistan, *MSF leaves country following staff killings and threats*, December 2004, available at: <http://www.doctorswithoutborders.org/news/country.cfm?id=2269> (last visited 2 December 2010).

11 One Afghan commander who is subcontracted under the US government's \$2.16 billion contract for support to the US supply chain in Afghanistan, for instance, charges a protection fee of \$1,500 per truck between Kabul and Kandahar. He guards around 3,500 trucks per month, generating a monthly revenue of some \$5.2 million. See the June 2010 report by the Majority Staff of the US Subcommittee on National Security and Foreign Affairs, John F. Tierney (Chair), *Warlord, Inc: Extortion and Corruption Along the US Supply Chain in Afghanistan*, Committee on Oversight and Government Reform, US House of Representatives, June 2010, p. 18.

Carving out some humanitarian space

Aid activities conducted from a distance are far from ideal. Few people are comfortable asking others to do what they themselves would not, and questions arise over the end-use of the aid when agencies are unable to monitor its distribution and impact. It is not just a question of trust in individuals and their ethics, but also in their ability to withstand local pressures that are unlikely to be experienced to the same extent by expatriate staff. The ICRC's system of evacuation, pre-hospital care, referral, and transport to hospital for war-wounded patients in six provinces (Helmand, Farah, Kandahar, Uruzgan, Zabul, and Ghazni) is run in this way, from a series of health posts positioned along main roads and through a network of taxi drivers trained in first aid and paid by the ICRC to drive the wounded to hospital. The names of the taxi drivers and their vehicle registration numbers are communicated to all parties to the conflict, and they carry ID cards and a letter stating that they are working on behalf of the ICRC when transporting the wounded to hospital. Although the project is far from perfect, it does offer a lifeline to the casualties of war, combatants and civilians alike, who might otherwise suffer and die on the spot. In many ways, this initiative takes the ICRC 'back to basics' – back to Henry Dunant's idea of saving the wounded on the battlefield regardless of the side on which they fought. But there is nothing basic about the challenges that the ICRC had to overcome to get even this far.

Resuming assistance to both sides

The first major challenge after Ricardo's death was to open dialogue with the re-emergent armed opposition to find out why the ICRC had been targeted, and to re-establish on both sides the ICRC's credentials as an effective, purely humanitarian, organization. The ICRC has long recognized that words and promises are not enough to promote acceptance within a community; that the organization has to have something concrete to offer. But how to resolve this Catch-22 situation in which security guarantees depend upon the effectiveness of operations, yet the possibility to operate depends upon security guarantees? The ICRC had to identify activities within its mandate that met a real need, could be safely carried out, and would open up avenues through which relationships could form. In Pakistan, the ICRC increased its family tracing services, the delivery of Red Cross messages between detainees and their relatives, orthopaedic services for amputees, and medical assistance to victims of clashes in Waziristan, which helped to raise the organization's profile. Slowly but surely the number of visitors to the ICRC's offices in Peshawar and Quetta grew and the ICRC was able to explain its role, neutrality, and ways of working to a broad audience.

An opportunity to restart assistance in opposition-controlled areas of Afghanistan came in early 2006. The relative of a detainee whom the ICRC visited at Bagram Air Base approached the ICRC to ask for medical supplies for wounded people in Helmand Province. Intensified fighting in the south had increased

medical needs among the civilian and combatant population at a time when government health services had withdrawn to safer areas, prompting the ICRC to experiment with giving limited medical supplies to a few medically trained persons living in opposition-held areas. As counter-insurgency operations were stepped up and casualties mounted, the number of requests to the Kandahar office rose and the demands became increasingly ambitious, including an ambulance service, first-aid posts, and even a possible field hospital. The ICRC preferred to keep the support to a modest scale, given that the possibilities for monitoring the use of supplies were extremely limited and co-ordination among the various contacts was almost impossible, since for security reasons no-one wanted their identity to be made known to anyone else.

This programme involved considerable risk. The ICRC could potentially be accused of having passed on intelligence if an opposition contact was arrested after leaving the office, or invite revenge from any contact whose involvement was terminated for not using the supplies as agreed: the ICRC office in Kandahar was an easy target. Fortunately, six of the longer-term contacts supported the ICRC's efforts to better control the aid and formed a health *shura* to facilitate and streamline the ICRC's contacts with the opposition, appointing four provincial health officers to receive supplies. In early 2007, the ICRC began first-aid training courses for persons aligned with, or living in areas controlled by, opposition groups – as it does in conflict zones around the world. This not only gave the ICRC greater exposure among these groups, but enabled it to convey messages about the need to respect IHL and distinguish between military and civilian targets. The health *shura*, at the ICRC's request, also played a vital role in obtaining security guarantees for Ministry of Health polio vaccination teams to travel in insecure areas. This initiative marked the first flicker of government recognition that the ICRC was in contact with the armed opposition, with President Karzai himself authorizing his Health Ministry to request the delegation's help in contacting the insurgents with regard to the vaccination campaign.

Managing perceptions of neutrality

This recognition – albeit behind closed doors – was an important step in overcoming the second major challenge for the ICRC, namely managing perceptions of its neutral role in assisting victims on all sides of the conflict. 'Terrorists are not entitled to be treated as combatants' was a common refrain in Afghanistan at that time, echoing the decision of the Bush Administration to deny the applicability of the Geneva Conventions to 'enemy combatants'. Viewed as 'terrorists', opposition forces were deemed to have few rights, if any, and the ICRC's attempts to assert them were therefore construed as siding with the enemy. 'We know you support the Taliban' were the opening words of a Western plain-clothed official to an ICRC team entering a field detention site near Kandahar for the first time in July 2008, before subjecting the team to an over-zealous search. Respect for the ICRC's traditionally neutral role was also denied by the civilian hierarchy: 'You cannot be neutral between a legitimate side and a reprehensible side', a senior UN

representative told me in Kabul.¹² He was more concerned about the legitimacy that might be bestowed on the Taliban through contact with the ICRC than with the need to expand the humanitarian space for the sake of the conflict's victims, wherever they happened to be. Even after the organization had played a vital role in several hostage release operations, including those of the twenty-three Korean missionaries captured in 2007 and of many international and Afghan aid workers, the 'international community' in Kabul was loath to admit the usefulness of a neutral intermediary in the conflict.

Various branches of the Afghan government, on the other hand, saw tangible benefits in the ICRC's engagement with the armed opposition from an early stage. As mentioned above, for several years the ICRC has obtained safe passage for polio vaccination teams on behalf of the Ministry of Public Health and the World Health Organization, and in August 2009 the ICRC negotiated a ceasefire between the armed opposition and US forces to allow government and ICRC medical personnel to safely treat and evacuate cholera victims from Shawalikot district in Kandahar Province. Contact with the Taliban has also made it possible to retrieve the mortal remains of police and government security officials from combat zones and of Taliban fighters from the hospital morgue, so as to return them to their families for proper burial in accordance with Islamic customs. The confidence developed by these activities led to a breakthrough in late 2009, when the ICRC was granted permission to visit persons captured and detained by the armed opposition for the first time and to bring news of their whereabouts to their families.

The local authorities in Kandahar have been well aware of the medical assistance given to people living in opposition-controlled zones from the outset, and grudgingly accept it. 'I don't interfere' said the head of the National Directorate for Security (NDS). Although commenting that he was personally against saving the lives of his opponents, he admitted that this engagement had its benefits: 'The ICRC has brought back the bodies of my men from a battle zone for proper burial. If they could bring out some live ones it would be even better'.¹³ The ICRC's first-aid training for the police force – whose men bear the brunt of field casualties among Afghan security forces, yet have no auxiliary medical service for evacuation or health care – has also helped all rank and file to realize that such training conducted on both sides does not amount to interference in the conflict. It teaches basic procedures that help stabilize a patient and keep him or her alive; their impact on the war is negligible, but they have an important humanitarian impact in reducing the suffering of injured civilians, police, and insurgents alike. It has also increased understanding by both sides that the ICRC's role to protect the life and dignity of people caught up in war does not prevent a patient from being arrested and prosecuted for crimes committed. The arrest can take place, but the

12 Interview with Deputy Special Representative of the Secretary-General (SRSG) for Afghanistan, UNAMA compound, Kabul, 18 November 2008.

13 Interview with Abdul Qayum, NDS Director, Kandahar, 24 November 2008.

armed forces have an obligation to facilitate timely medical care for that patient's injuries.

The perception of the ICRC as 'aiding the enemy' has lessened considerably within the international military over the last two years, owing in part to the change in the US administration, but mostly in recognition of the military strategy's failure to curb support for the insurgency and of the need to change tack. The suggestion in late 2008 by top Coalition officials, including the US Chairman of the Joint Chiefs of Staff, Admiral Mike Mullan, and Britain's Ambassador to Afghanistan, Sir Sherard Cowper-Coles, that a negotiated settlement might be the best way forward signalled the first cracks in the taboo on any mention of opening dialogue with 'the enemy'.¹⁴ Over the ensuing months, co-operation with the ICRC improved considerably, and ISAF commanders became more amenable to receiving, discussing, and investigating issues raised by the ICRC that related to their troops' conduct of hostilities. Some important changes occurred, including a new tactical directive on air strikes to reduce civilian casualties and new directives on entry to and use of force in medical facilities, following several incidents in which troops threatened and intimidated health staff thought to be treating insurgents. Health staff and structures have seen far fewer incidents since these directives were issued by the former ISAF Commander, General McChrystal, in October 2009.

There has also been a marked shift in acceptance of the ICRC's medical assistance to wounded insurgents: when Canadian troops found medical material marked with the ICRC logo in an arms cache in southern Afghanistan in October 2008, they assumed it had been stolen, and were shocked to learn (from the ICRC itself) that it had been given to the Taliban.¹⁵ Conversely, when another journalist a few months ago 'exposed' the ICRC's first-aid training for the Taliban,¹⁶ it aroused indignation among segments of the public but hardly raised an eyebrow among military personnel. Gauging the reaction to the story among Marines in a forward operating base in Helmand Province, a Fox News reporter seemed perplexed that those he spoke to were not surprised or incensed by the ICRC's actions.¹⁷ Instead, they explained that they too treat wounded Taliban, even evacuating them in medevac helicopters, in accordance with their obligations under the Geneva Conventions.

14 Julian Borger, 'Our man in Kabul says US strategy is failing', in *The Guardian*, 2 October 2008.

15 See Tom Blackwell, 'A big morale booster: Canadian, Afghan troops uncover arms, medical supplies in farmer's field', in *National Post*, 11 October 2008, and his subsequent article, 'We don't pick sides in war, Red Cross says: agency equips Taliban with first-aid supplies', in *National Post*, 14 October 2008.

16 Jon Boone from the *Guardian* read about this activity in a public ICRC newsletter yet called it a *Guardian* 'exclusive' and neglected to mention that such training has been going on for years. Jon Boone, 'Red Cross gives first aid lessons to Taliban', in *The Guardian*, 25 May 2010.

17 See <http://video.foxnews.com/v/4214695/red-cross-teaching-taliban-first-aid/> (last visited 23 December 2010).

Promoting respect for the Geneva Conventions

It is in trying to get the Taliban and other opposition groups to fight in accordance with these Conventions that the ICRC finds its greatest challenge. Suicide bombings in public places and the rampant use of IEDs that make no distinction between military and civilian targets are clear violations of IHL. The ICRC has voiced objections to these tactics in letters to and discussions with both the Taliban leadership and the Haqqani network, providing details of specific incidents and including the number of civilian casualties. But the impact of these approaches is difficult to assess. The Taliban has been receptive on paper by adding more IHL provisions to its 2009 Code of Conduct¹⁸ for its fighters than were present in the 2006 version, which also reflect its strategic decision to try to win local support. Article 59 states:

The mujahideen have the duty to behave well with people, and should try to win the normal Muslim's heart and mind. Good behaviour of one mujahid can represent the whole Islamic Emirate effectively. All fellow country people will welcome such mujahid, and be ready to assist and collaborate with him.

Similarly, Article 46 instructs the Taliban to avoid civilian casualties:

The provincial and district authorities, group leaders and all other mujahideen should take maximum measures to avoid civilian deaths and injuries, as well as the loss of their vehicles and other properties. In case of carelessness, each one will be held responsible according to their acts and position, and will be punished depending on the nature of their misconduct.

There is even a statement in Article 41(C) on planning suicide attacks, albeit with no concrete suggestions to back up the recommendation: 'In martyrdom attacks, much more care should be taken to prevent the deaths and injuries of civilians'.

But for all these instructions, attacks that harm and kill civilians and target medical staff and facilities continue to occur on a regular basis. The lack of improvements in this domain prompted the ICRC publicly to denounce the planting of IEDs by the armed opposition during Operation Moshtarak in Helmand Province in early 2010, emphasizing the impediments they cause to the free movement of the sick, wounded, and health staff.¹⁹ Public denunciations are never appreciated by the party condemned and risk upsetting important interlocutors, with consequences for the organization's ability to operate. But for the ICRC it was important to show that the legitimacy accorded to the Taliban movement through its contact with the ICRC comes with some strings attached, including the necessity to have progress on the most important issues raised. Just as the Taliban do not accept words without action, so the ICRC's dialogue aims to

18 Islamic Emirate Afghanistan, *Code of Conduct of the Mujahideen*, Quetta, May 2009.

19 'Afghanistan: mines prevent resumption of normal life in Marjah', ICRC News Release 10/34, 5 March 2010.

reap results. After all, the need to rescue victims only comes once attempts to prevent victims from being generated in the first place have failed.

Conclusion

The Afghan context has given rise to some of the toughest challenges ever faced by the ICRC, not so much from the instrumentalization of aid by donor governments – which is unfortunately nothing new – but in the rejection by both sides of a neutral stance in the ‘war on terror’/‘war on Islam’. The deliberate targeting of perceived symbols of the West raised questions whether neutrality was still an appropriate means to gain access to people in need, but, through a slow process of confidence-building and transparent dialogue with all parties, the ICRC has sought to reassert values that were rejected by both the Western and anti-Western camps. For many years the ICRC found itself out on a limb, alone among aid organizations in defending the rights of those violating IHL to continue to receive the protection and assistance it accords. In an otherwise excellent article, even the international legal expert Kenneth Anderson argues that any attempts to reach agreement with the Taliban or Al Qaeda would be ‘profoundly wrong’, claiming that ‘a private peace between aid agencies and terrorists or groups that systematically violate the laws of war is morally wrong, legally indefensible, and politically ill-advised’.²⁰

But, as the ICRC’s head of delegation, Reto Stocker, said to the Canadian journalist who found evidence of the ‘private peace’ the ICRC had indeed negotiated with the Taliban, ‘if we had given in to the language of good guys and bad guys, we would have had to leave Afghanistan in the 1980s’.²¹ The Afghanistan case has shown that, contrary to Anderson’s claim, it is the *refusal* to engage with these groups that is politically ill-advised if hoping to save the lives of conflict victims without becoming a target oneself. Although there is a long road ahead before the ICRC can travel freely in all conflict-affected areas of Afghanistan, the discreet perseverance in opening avenues for humanitarian dialogue, delivering humanitarian assistance, and influencing behaviour has slowly paid off as the ICRC continues to extend its reach. And this ‘peace’ is no longer so private, for the ICRC is using its privileged dialogue with the Taliban and others to expand the humanitarian space available to include other aid organizations, assisting MSF, for instance, in its return to Afghanistan in 2009, as well as several other NGOs seeking to work on both sides.

Over the past two decades, Afghanistan has been the scene of several attempts, whether labelled a ‘strategic framework’, ‘coherence agenda’, or ‘integrated mission’, to subsume humanitarian action into a broader political process aimed at achieving an internationally acceptable peace. Now, more than ever before, the

20 Kenneth Anderson, ‘Humanitarian inviolability in crisis: the meaning of impartiality and neutrality for U.N. and NGO agencies following the 2003–2004 Afghanistan and Iraq conflicts’, in *Harvard Journal of Human Rights*, Vol. 17, 2004, p. 63.

21 In T. Blackwell, ‘We don’t pick sides’, above note 15.

negative results of such strategies are clear. They show that humanitarian action must remain independent and strive for as neutral an image as possible if it is to reach those in need on all sides of a conflict. It is impossible to predict the future course of any war – although Afghan history should have at least cautioned against over-confidence in the ability of an outside force to quell the multiple divisions within the country and among its neighbours. By supporting one side, however legitimate it might have seemed, aid agencies tarnished their image in the eyes of opposing forces, and not only compromised their chances to help civilians in contested areas but also faced increasing difficulties even in ‘secure’ areas.

The onus is now on humanitarian aid organizations to try to position themselves differently: to open dialogue with the opposition and distance themselves from the excesses of all parties to the conflict. It is not the first time that aid organizations find themselves aligned with a side whose ideology or methods they no longer admire. The celebrated mujahideen ‘warriors’ who defeated the Soviet invaders became ‘warlords’ once they turned their guns on each other in the post-Soviet carve-up of the country, to the general dismay of the NGOs that had viewed the picture in black and white. Remaining neutral in conflict is not a moral position but simply the most effective basis found to date on which to negotiate access to people in need of humanitarian assistance, wherever they are. Expatriate jihadists, with no common basis on which to be approached, pose the biggest challenge to humanitarian action, but it is only by finding ways to engage with and influence the ideologues and leaders that progress can begin to be made.

Unfortunately, the fragmentation of armed groups and the rise of new ‘village defence committees’ and other ‘militias’ are multiplying the number of players with which the ICRC and other aid agencies must contend. There is a general fear that, once ISAF forces pull out of Afghanistan, the country will revert to civil war, predominantly along tribal and ethnic lines. If past experience is anything to go by, the next chapter in Afghanistan’s tragic history might be even more bloody than the present: it is sobering to remember that former allies in the fight against the Soviet-backed Najibullah regime wreaked more destruction on Kabul after the fall of the communist government than the city had suffered during the entire Soviet period.²² If government security forces, Taliban and other opposition groups, current and former warlords, local militias, and even private security companies turn their guns on one another to gain power and resources in a post-NATO Afghanistan, the already dire plight of the Afghan population will worsen and require ever larger pledges of humanitarian aid to ease their suffering.

Before we enter the next phase of Afghanistan’s history, aid organizations and donor governments would be wise to reflect long and hard upon the errors in assumptions and judgements that have led to the present state of affairs. As both the US government and the Taliban recognize, providing goods and services to populations in need of them can do much to ‘win the hearts and minds’ of local people and create environments conducive to peace and reconciliation. But if aid is

22 See William Maley, *The Afghanistan Wars*, Palgrave Macmillan, Basingstoke, 2009, pp. 168–172.

provided as part of a political or military strategy, it is treated as such, and the policy backfires when villages are ‘punished’ for having received it or aid agencies are attacked as agents of the enemy’s agenda. It is useful to hear how aid agencies are perceived today. On asking an anti-government tribal leader – whom he first met in the mountains of Afghanistan in 1987 – whether the ICRC could travel safely in the area under his control, a senior ICRC delegate received the following reply:

Today, like 20 years ago, a government and its international allies are trying to impose a model of society, with all the modernization, reconstruction, development and Western values that go with it. Today, like 20 years ago, I disagree and we all shed blood. Today, like 20 years ago, you come here to try and make sure prisoners are well treated, wounded taken care of, our families not bombed, or starved, or humiliated. We respect that. Now, be warned: just as we do not expect you to support our religious, social, political views and actions, so we expect you not to support – in any way – our enemies’. Know when so-called humanitarian action becomes a sword, or a poison – and stop there.²³

Today, the Afghan population at large would have difficulty in articulating what ‘humanitarian’ action is about. Many would say it is a tool to help win the war. Others would say it is the vector through which to establish a new model of society compatible with Western values. Most would denounce it as a cover for spending millions of dollars to buy the loyalty of former warlords, line the pockets of families of politicians, and meet the burn rate of donor budgets on poor-quality projects, and, most of all, as an easy way to obtain money that was pledged to Afghanistan but that ultimately ends up in foreign bank accounts of individuals and contractors of donor nations. Some, hopefully, would still say that it is about helping those who are hurt by war, whoever they are, and nothing else. But that view can only be promoted if humanitarian action is and remains neutral and independent of all extraneous influences.

23 Jacques de Maio, personal correspondence, October 2010.

SELECTED ARTICLE ON INTERNATIONAL HUMANITARIAN LAW

The protective scope of Common Article 3: more than meets the eye

Jelena Pejic*

Jelena Pejic is legal advisor in the Legal Division of the International Committee of the Red Cross.

Abstract

Non-international armed conflicts are not only prevalent today, but are also evolving in terms of the types that have been observed in practice. The article sets out a possible typology and argues that Common Article 3 to the Geneva Conventions may be given an expanded geographical reading as a matter of treaty law. It also suggests that there is a far wider range of rules – primarily of a binding nature, but also policy-based – that apply in Common Article 3 armed conflicts with regard to the treatment of persons in enemy hands and the conduct of hostilities.

: : : : : :

It is almost a platitude to point out that non-international armed conflict (NIAC) is the prevalent type of armed conflict today and that NIACs often cause civilian suffering on a scale surpassing that in international armed conflicts (IACs). While there is, unfortunately, no novelty in these observations, it may be argued that there has been a development in the types of NIAC that have occurred over the last decade. Not surprisingly, the expansion of the different kinds of NIAC has been followed by doubts about the sufficiency of the existing legal framework to cover some of the situations that have arisen. Two arguments have been raised most

* This article was written in a personal capacity and does not necessarily reflect the views of the International Committee of the Red Cross (ICRC). The exception, of course, is where public ICRC positions are referred to in the text.

often: first, that international humanitarian law (IHL) governing NIACs can be reduced to the few provisions of Common Article 3 of the 1949 Geneva Conventions. According to this view, the only ‘really’ legally binding IHL provisions are those of Common Article 3, beyond which NIAC falls into an unregulated IHL space. The second argument posited is that Common Article 3 is of limited use because, as treaty law, it is only applicable to NIACs taking place within the territory of a single state.

The aim of this article is to attempt to address the challenges identified above and provide a consolidated reading of the IHL legal and policy framework applicable, in particular, to detention and the conduct of hostilities in non-international armed conflicts meeting the Common Article 3 threshold. The consolidated reading proposed below is based primarily on international humanitarian law. While there is no doubt that human rights law serves as a complementary source of legal protection in NIACs (and has been relied on in drawing up some of the policy standards outlined below), it is generally accepted that this body of rules does not bind non-state parties. Given that the existence of a non-state party is one of the prerequisites for the very existence of a NIAC, it would be of little use in this review to rely on rules that unquestionably bind only the state party to a NIAC. Armed conflicts meeting the Additional Protocol II standard¹ are not dealt with, both because they are much less frequent and because inadequacy of legal protection has not been claimed to the same degree when that treaty is applicable.

This article is divided into sections that examine:

- the definition of Common Article 3 armed conflicts;
- the typology of non-international armed conflicts;
- the binding force of Common Article 3;
- the territorial scope of application of Common Article 3; and
- the legal and policy framework applicable to detention and the conduct of hostilities in Common Article 3 armed conflicts.

1 Additional Protocol II to the Geneva Conventions has a higher threshold of applicability than Common Article 3, even though the ICRC had initially hoped, before and at the Diplomatic Conference of 1974–1977, that their scope of applicability would be the same. Concerns about the impact of the treaty on state sovereignty resulted in a text that offers more clarity but is also more restrictive than originally envisaged. The Protocol’s applicability is tied to an armed conflict in which the non-state party must ‘exercise such control over a part of the territory of a state party as to enable it ‘to carry out sustained and concerted military operations and to implement this Protocol’. Just as importantly, Additional Protocol II expressly applies only to armed conflicts between state armed forces and dissident armed forces or other organized armed groups, and not to conflicts between such groups themselves. The scope of application of Protocol II is thus narrower than that of Common Article 3, with Article 3 maintaining a separate legal significance even when Protocol II is also applicable. The relationship between the respective sets of rules is expressly provided for in Article 1(1) of Protocol II, pursuant to which the Protocol ‘develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application’.

The definition of non-international armed conflict under Common Article 3

Despite the lack of a legal definition, it is widely accepted that non-international armed conflicts governed by Common Article 3 are those waged between state armed forces and non-state armed groups or between such groups themselves. IHL treaty law allows a distinction to be made between NIACs within the meaning of Common Article 3 and those meeting the higher, Additional Protocol II, threshold.² It should, however, be recalled that the International Committee of the Red Cross (ICRC)'s 2005 *Study on Customary International Humanitarian Law*³ did not distinguish between the two categories of non-international armed conflict because it was found that states did not make such a distinction in practice.

The lack of a general legally binding IHL definition of a Common Article 3 conflict means that the facts of a given situation must be analysed based on criteria that have been developed in state practice,⁴ by international judicial bodies (see further below), and in the legal literature.⁵ At least two criteria are considered indispensable for classifying a situation of violence as a Common Article 3 armed conflict, thus distinguishing it from internal disturbances or tensions that remain below the threshold.

The first is the existence of parties to the conflict. Common Article 3 expressly refers to 'each Party to the conflict', thereby implying that a precondition for its application is the existence of at least two 'parties'. While it is usually not difficult to establish whether a state party exists, determining whether a non-state armed group may be said to constitute a 'party' for the purposes of Common Article 3 can be complicated, mainly because of lack of clarity as to the precise facts and, on occasion, because of the political unwillingness of governments to acknowledge that they are involved in a NIAC. Nevertheless, it is widely recognized that a non-state party to a NIAC means an armed group with a certain level of

2 See note 1 above.

3 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, Cambridge, 2005 (hereafter *Customary Law Study*).

4 By way of reminder, the ICRC Commentaries to Common Article 3 contain a summary of the criteria that were put forward by some states at the Diplomatic Conference but were eventually rejected. See, for example, J. Pictet (ed.), *Commentary to the Third Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, p. 23. The list, as has been rightly pointed out, sets a 'far higher threshold of application than is actually required by the Article itself'. See Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p. 35.

5 Schindler provides a succinct outline of most of the factual criteria: 'Practice has set up the following criteria to delimit non-international armed conflicts from internal disturbances. In the first place, the hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be of a collective character, that is, they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organisation. Their armed forces should be under a responsible command and be capable of meeting minimal humanitarian requirements. Accordingly, the conflict must show certain similarities to a war, without fulfilling all conditions necessary for the recognition of belligerency'. Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, *Recueil des cours*, Martinus Nijhof, Brill, 1979, Vol. 163/ii, p. 147.

organization that would essentially enable it to implement international humanitarian law.⁶ International jurisprudence has developed indicative factors on the basis of which the ‘organization’ criterion may be assessed. They include the existence of a command structure and disciplinary rules and mechanisms within the armed group; the existence of headquarters; the ability to procure, transport, and distribute arms; the group’s ability to plan, co-ordinate, and carry out military operations, including troop movements and logistics; its ability to negotiate and conclude agreements such as ceasefire or peace accords; and so forth.⁷ Put differently, even if the level of violence in a given situation is very high (in a situation of mass riots, for example), unless there is an organized armed group on the other side, one cannot speak of a non-international armed conflict.

The second criterion commonly used to determine the existence of a Common Article 3 armed conflict is the intensity of the violence involved. This is also a factual criterion, the assessment of which depends on an examination of events on the ground. Pursuant to international jurisprudence, indicative factors for assessment include:

the number, duration and intensity of individual confrontations, the type of weapons and other military equipment used, the number and calibre of munitions fired, the number of persons and types of forces partaking in the fighting, the number of casualties, the extent of material destruction, and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.⁸

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has deemed there to be a NIAC in the sense of Common Article 3 ‘whenever there is ... *protracted* armed violence between governmental authorities and organized armed groups or between such groups within a State’.⁹ The Tribunal’s subsequent decisions have relied on this definition, explaining that the ‘protracted’ requirement is in effect part of the intensity criterion.

A similar definition is contained in the Statute of the International Criminal Court (ICC), which, in addition to proscribing as war crimes serious violations of Common Article 3, contains a list of other serious violations of the laws and customs applicable in armed conflicts not of an international character, namely armed conflicts ‘that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups’ (Article 8(2)(f)). There is some debate in the legal literature as to whether the ICC Statute in fact created three different types of NIAC

⁶ *Ibid.*, p. 36.

⁷ See Fatmir Limaj *et al.*, International Criminal Tribunal for the Former Yugoslavia (ICTY), Trial Chamber II, Judgment of 30 November 2005, Case No. IT-03-66-T, para. 90; Ramush Haradinaj *et al.*, ICTY, Trial Chamber I, Judgment of 3 April 2008, Case No. IT-04-84-T, para. 60.

⁸ R. Haradinaj *et al.*, above note 7, para. 49.

⁹ ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70, emphasis added.

as a result of the wording mentioned above;¹⁰ an ICC Pre-trial Chamber decision seemed to suggest that this was the case.¹¹ It is submitted that the better view is that the NIAC referred to in Article 8(2)(f) has the same threshold of applicability as Common Article 3, and that the Statute did not intend to infer a different trigger. Based on this reading, a 2008 public ICRC opinion paper on the definition of armed conflict under IHL defines non-international armed conflicts as

protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State (party to the Geneva Conventions). The armed confrontation must reach a *minimum level of intensity* and the parties involved in the conflict must show a *minimum of organization*.¹²

The typology of non-international armed conflicts

It may be observed that non-international armed conflicts falling within the Common Article 3 threshold have taken different forms over the past decade. Provided below is a brief typology of current or recent Common Article 3 NIACs. While the first five types of NIAC listed may be deemed uncontroversial, the last two continue to be the subject of legal debate. It should also be noted that some factual situations will fall into two categories at the same time.

First, there are ongoing traditional or ‘classical’ Common Article 3 NIACs, in which government armed forces are fighting against one or more organized armed groups within the territory of a single state. These armed conflicts are governed by Common Article 3, as well as by rules of customary international humanitarian law.

Second, an armed conflict that pits two or more organized armed groups against each other may be considered a subset of ‘classical’ NIAC when it takes place within the territory of a single state. Examples include both situations where there is no state authority to speak of (i.e. the ‘failed’ state scenario) and situations

10 For one view see Theodor Meron, ‘The humanization of humanitarian law’, in *American Journal of International Law*, Vol. 94, 2000, p. 260; Michael Bothe, ‘War crimes’, in A. Cassese, P. Gaeta, and J. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, p. 423; Anthony Cullen, ‘The definition of non-international armed conflict in the Rome Statute of the International Criminal Court’, unpublished PhD thesis, Irish Centre for Human Rights, 2007, p. 22. For the opposing view, see A. Bouvier and M. Sassòli, (eds), *How Does Law Protect in War?*, ICRC, Geneva, Vol. 1, 2006, p. 110; René Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002, p. 268; William Schabas, *An Introduction to the International Criminal Court*, 3rd edn, Cambridge University Press, Cambridge, 2007, p. 116. See also Eric David, who believes that para. 2(f) did not create a third category of NIAC but that this ‘expanded notion’ of armed conflict replaces that of Additional Protocol II by operation of the *lex posterior* principle (Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2002, p. 119).

11 Affaire Lubanga Dyilo, Chambre préliminaire I, Décision sur la confirmation des charges, 29 janvier 2007, paras. 229–237.

12 See *How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?* ICRC Opinion Paper, March 2008, available at: <http://www.icrc.org> (last visited 9 March 2011), emphasis in original.

where there is the parallel occurrence of a non-international armed conflict between two or more organized armed groups alongside an international armed conflict within the confines of a single state. Here, too, Common Article 3 and customary IHL are the relevant legal regime for the NIAC track.

Third, certain NIACs originating within the territory of a single state between government armed forces and one or more organized armed groups have also been known to ‘spill over’ into the territory of neighbouring states. Leaving aside other legal issues that may be raised by the incursion of foreign armed forces into neighbouring territory (violations of sovereignty and possible reactions of the armed forces of the adjacent state that could turn the fighting into an international armed conflict), it is submitted that the relations between parties whose conflict has spilled over remain at a minimum governed by Common Article 3 and customary IHL. This position is based on the understanding that the spill over of a non-international armed conflict into adjacent territory cannot have the effect of absolving the parties of their IHL obligations simply because an international border has been crossed. The ensuing legal vacuum would deprive of protection both civilians potentially affected by the fighting and persons who fall into enemy hands.

Fourth, the last decade, in particular, has seen the emergence of what may be called ‘multinational NIACs’. These are armed conflicts in which multinational armed forces are fighting alongside the armed forces of a ‘host’ state – in its territory – against one or more organized armed groups. As the armed conflict does not oppose two or more states (i.e. as all the state actors are on the same side), the conflict must be classified as non-international, regardless of the international component, which can at times be significant. A current example is the situation in Afghanistan (even though that armed conflict was initially international in nature¹³). The applicable legal framework is Common Article 3 and customary IHL.

Fifth, a subset of multinational NIACs is one in which UN forces, or forces under the aegis of a regional organization such as the African Union, are sent to help stabilize a ‘host’ government involved in hostilities against one or more organized armed groups in its territory. There are cases in which it may be argued that the international force has become a party to the non-international armed conflict. This scenario raises a range of legal issues, among which is the legal regime governing multinational force conduct¹⁴ and the applicability of the 1994 Convention on the Safety of UN Personnel.¹⁵ It is submitted that if and when UN

13 The international armed conflict in Afghanistan that started in October 2001 was re-classified by the ICRC as a NIAC in June 2002 when the present Afghan government was established. Since then, the US and NATO forces have been acting in support of the government against the Taliban and Al Qaeda. Similarly, the international armed conflict that started in Iraq in March 2003 ended in June 2004, after which foreign troops were acting in Iraq with the consent of the interim Iraqi government.

14 The UN as an entity is not bound by human rights treaties.

15 Convention on the Safety of United Nations and Associated Personnel, available at: <http://www.un.org/law/cod/safety.htm> (last visited 3 March 2011). The 1994 Convention does not envisage UN forces becoming a party to a non-international armed conflict and thus by implication grants them immunity from attack even when they do in fact take a direct part in hostilities in those circumstances.

or forces belonging to a regional organization become a party to a NIAC such forces are bound by the rules of IHL, that is, Common Article 3 and customary law.

Sixth, it may be argued that a 'cross border' non-international armed conflict exists when the forces of a state are engaged in hostilities with a non-state party operating from the territory of a neighbouring host state without that state's control or support. The 2006 war between Israel and Hezbollah presented a particularly challenging addition to the expanding typology of (non-international) armed conflicts. There was a range of opinion on the legal classification of the hostilities that occurred, which may be encapsulated in three broad positions: that the fighting was an international armed conflict, that it was a non-international armed conflict, or that there was a parallel armed conflict going on between the different parties at the same time: an IAC between Israel and Lebanon and a NIAC between Israel and Hezbollah. The aim of the 'double classification' approach was to take into account the reality on the ground, which was that the hostilities for the most part involved an organized armed group whose actions could not be attributed to the host state fighting across an international border with another state. Such a scenario was hardly imaginable when Common Article 3 was drafted and yet there is no doubt that this Article, as well as customary IHL, was the appropriate legal framework for that parallel track.

A final, seventh type of NIAC (this time 'transnational') believed by some – almost exclusively in the US – to currently exist is an armed conflict between 'Al Qaeda and its affiliates' and the United States.¹⁶ The Bush Administration had designated this conflict a 'global war on terror' and determined that it was neither an international armed conflict governed by the Geneva Conventions – because Al Qaeda was not a state party – nor a non-international armed conflict – because it exceeded the territory of one state.¹⁷ That view was domestically superseded by the US Supreme Court, which ruled in the 2006 *Hamdan* case that the armed conflict in question was at least governed by Common Article 3 as a matter of US treaty obligation,¹⁸ thereby implying that it was non-international in nature. It is not clear whether the Obama Administration considers the war with Al Qaeda and its affiliates to be global and/or non-international, although there are indications to that effect.¹⁹

16 While the designation 'global war on terror' has been retired by the Obama Administration, President Obama has nevertheless stated that the US remains 'at war with Al Qaeda and its affiliates'. See 'Remarks by the President on national security', National Archives, Washington DC, May 21, 2009, available at: http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (last visited 3 March 2011).

17 See White House Memorandum of February 7, 2002 on the 'Humane treatment of Taliban and Al Qaeda detainees', available at: http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (last visited 10 March 2011).

18 See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (hereafter, the *Hamdan* case), pp. 628–631, available at <http://www.supremecourt.gov/opinions/boundvolumes/548bv.pdf> (last visited 3 March 2011).

19 See for example 'Report of the United States of America submitted to the U.N. High Commissioner for Human Rights in conjunction with the Universal Periodic Review', p. 21, available at: <http://www.state.gov/documents/organization/146379.pdf> (last visited 3 March 2011).

By way of reminder, the ICRC has publicly stated on numerous occasions that it does not believe that there was, or is, an armed conflict of global dimensions of any kind taking place.²⁰ Since the 11 September 2001 terrorist attack on the United States, the ICRC has spoken of a multifaceted ‘fight against terrorism’. This effort involves a variety of counter-terrorist activities on a spectrum that starts with purely peaceful/non-violent measures – such as intelligence gathering, financial sanctions, judicial co-operation, and others – at one end, and concludes with the use of force at the other. Regarding the latter, the ICRC has taken a case-by-case approach to legally analysing and classifying the various situations of violence that have occurred in the fight against terrorism. Some situations have been classified as an international armed conflict, other contexts have been deemed to be non-international armed conflicts, while various acts of terrorism taking place in the world have been assessed as being outside any armed conflict.

There is no doubt, for example, that the armed conflict in Afghanistan between October 2001 and June 2002 was an international armed conflict governed by the 1949 Geneva Conventions and rules of customary IHL. However, this conflict has been of a non-international character since June 2002 – when the new Afghan government was established and recognized by the international community – until the present day. (The ICRC’s legal reading of the armed conflict in Iraq followed a similar logic.) This is because, in the ongoing armed conflict, multinational forces are fighting with the consent of and in support of the Afghan government against the Taliban and other organized non-state armed groups, including Al Qaeda; there is thus no international armed conflict between two or more states. The relevant legal framework is Common Article 3, customary IHL, human rights law, and domestic law. There are other discrete situations of violence around the world that may be regarded as NIACs and are colloquially associated with the fight against terrorism (the fighting in Somalia, to name just one example). The point being made is that each situation of organized armed violence must be analysed on its own merits: where the threshold of armed conflict, based on the facts, is reached, the conflict is classified as international or non-international and IHL is considered to be the applicable legal framework.

The approach that has just been outlined raises the question of the legal classification of individual acts of terrorism that have been occurring around the world, in Mumbai, London, Madrid, Casablanca, Glasgow, or Bali, to name just a few places. Can they be attributed to one and the same party to an armed conflict within the IHL meaning of that term? Based on available facts, as submitted above, this would appear not to be the case. Can it furthermore be claimed that the level of violence reached in each of the respective countries amounts to an armed conflict

20 See, among others, ‘International humanitarian law and the challenges of contemporary armed conflicts’, ICRC Report presented at the 28th International Conference of the Red Cross and Red Crescent, 2–6 December 2003, 03/IC/09, ICRC, Geneva, p. 18; and ‘International humanitarian law and the challenges of contemporary armed conflicts’, ICRC Report presented at the 30th International Conference of the Red Cross and Red Crescent, 26–30 November 2007, 30IC/07/8.4, ICRC, Geneva, p. 7.

in their territories? Or that the governments in question responded to the attacks by resorting to law of war rules? This would also appear not to be the case.

To sum up, each situation of violence needs to be examined in the specific context in which it takes place and should be legally classified as armed conflict, or not, based on the factual circumstances. The law of war was tailored for situations of armed conflict, from both a practical and a legal standpoint. It bears remembering that IHL rules on governing the taking of life or on detention for security reasons allow for more flexibility than the rules applicable outside of armed conflicts governed by other bodies of law, such as human rights law. In other words, it is both dangerous and unnecessary, in practical terms, to apply IHL to situations that do not amount to war, including a global war.

The binding force of Common Article 3

There is little doubt about the binding force of Common Article 3 as treaty law given that all states are today party to the Geneva Conventions.²¹ The very language used also makes clear that it binds the non-state party, as it lists obligations incumbent on 'each party to the conflict'. A variety of legal theories may be advanced to explain why non-state armed groups are bound by IHL. Some of them have aptly been summed up as follows:

Either there is a rule of customary international law according to which [non-state armed groups] are bound by obligations accepted by the government of the state where they fight, or the principle of effectiveness implies that any effective power in the territory of a state is bound by the state's obligations, or they are bound via the implementation or transformation of international rules into national legislation or by the direct applicability of self-executing international rules.²²

It is also widely accepted that, with the exception of the territorial clause discussed below, the substantive provisions of Common Article 3 reflect customary international humanitarian law. This has, *inter alia*, been confirmed by the ICTY. In a well-known 1995 pronouncement the ICTY stated that:

The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallized, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have

21 194 states parties as of 1 September 2010. See ICRC IHL treaty database available at: [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) (last visited 3 March 2011).

22 Marco Sassòli, 'Transnational armed groups and international humanitarian law', HPCR Occasional Paper Series, Winter 2006, No. 6, p. 12, available at: [http://www.reliefweb.int/rw/lib.nsf/db900sid/EVOD-6WQFE2/\\$file/OccasionalPaper6.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/EVOD-6WQFE2/$file/OccasionalPaper6.pdf?openelement) (last visited 10 March 2011).

gradually become part of customary law. This holds true for Common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (Nicaragua Case, para. 218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and, as we shall show below (para. 117), to the core of Additional Protocol II of 1977.²³

By way of reminder, the International Court of Justice affirmed in the *Nicaragua* case 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...'²⁴

The Court reiterated this position in relation to the dispute at hand by also stressing that:

Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in each Convention, expressly refers to conflicts not having an international character.²⁵

The International Criminal Tribunal for Rwanda has likewise affirmed the customary law nature of Common Article 3.²⁶ As will be seen below, the ICRC's *Customary Law Study* also confirmed that the substantive provisions of Common Article 3 are binding as customary law.

In sum, there is no doubt that the substantive provisions of Common Article 3 apply as a matter of customary law to all parties to an armed conflict, regardless of its formal classification or geographical reach.

23 ICTY, *The Prosecutor v. Dusho Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 98. Similar formulations are to be found in subsequent ICTY cases as well. For example, the Tribunal reiterated that: 'It is ... well established that Common Article 3 has acquired the status of customary international law' in para. 228 of *The Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T (Trial Chamber), 31 March 2003.

24 International Court of Justice (ICJ), *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, Judgment, para. 218.

25 *Ibid.*, para. 219.

26 See International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Trial Chamber), September 2, 1998, paras. 608–609.

The territorial scope of application of Common Article 3

The *chapeau* of Common Article 3 provides that it applies to conflicts ‘not of an international character occurring in the territory of one of the High Contracting Parties’. Based on this formulation, there is a body of commentary²⁷ and judicial opinion²⁸ that posits that the territorial reach of Common Article 3 is limited to an armed conflict taking place within the territory of a single state (whether between its armed forces and one or more organized non-state armed groups or between such groups themselves).

This limited reading of the territorial scope of Common Article 3 may be defended based on the plain language of the text. It is submitted, however, that the text can also be given a different interpretation and that, in any event, its provisions may nowadays be evolutively interpreted to apply to any situation of organized armed violence that has been classified as a non-international armed conflict based on the criteria of organization and intensity, therefore also to a NIAC that exceeds the boundaries of one state as described in the typology above (with the exception of the first two scenarios).²⁹ The reasons are set out in the following subsections.

Drafting history

There is nothing in the drafting history of Common Article 3 on the basis of which it may be concluded that the territorial clause was *deliberately* formulated to limit its geographical application to the territory of a single state. The draft text submitted by the ICRC to the XVII International Red Cross Conference in Stockholm and then to the Diplomatic Conference in Geneva read:

In all cases of armed conflict not of an international character, especially cases of civil war, colonial conflicts or wars of religion, *which may occur on the territory of one or more of the High Contracting Parties*, the implementing

27 A major source cited in support of this view is the ICRC’s Commentaries to the Geneva Conventions, in which Jean Pictet unequivocally states that the Article applies to a NIAC occurring within the territory of a single state. See, for example, J. Pictet (ed.), *Commentary to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War* (hereafter *GC IV Commentary*), ICRC, Geneva, 1958, p. 36: ‘Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities – conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country’.

28 For example, the ICTR has stated that a non-international armed conflict is one in which the ‘government of a single state (is) in conflict with one or more armed factions within its territory’. *Prosecutor v. Musema*, Case No. ICTR-96-13-A (Trial Chamber), January 27, 2000, paras. 247–248. It must be noted that this pronouncement is confusing given that the ICTR Statute clearly indicates in Article 1 that the Tribunal has jurisdiction over the spill-over aspects of the Rwandan conflict into neighboring states, as mentioned further below.

29 This position does not endorse a ‘global war’ (trans-national armed conflict) approach, as already explained above.

principles of the present Convention shall be obligatory on each of the adversaries.³⁰

This proposal was examined against the backdrop of discussions on the extent of regulation to which Common Article 3 non-international armed conflicts should be subject. One option was essentially to make a broader range of norms – that is, the totality of the Geneva Conventions – applicable to a limited number of NIACs, whereas the other was to codify a limited number of protections that would be applicable to all types of NIAC, even those that could not necessarily be deemed high-intensity civil wars. The second option was adopted essentially because states feared that the extension of Geneva Conventions protections to non-state adversaries would be perceived as a signal of legitimization and that they would be expected to grant prisoner-of-war treatment to captured rebels.³¹ The drafting history does not indicate that the current wording of Common Article 3 is to be attributed to the express willingness of states to limit its application to the territory of a single country.³² It only allows the conclusion that the existing text was the result of negotiations in which the focus of debate was elsewhere.³³

It has thus been argued, based on the *travaux préparatoires*, that because the applicability of Common Article 3, as opposed to Common Article 2, ‘does not require the involvement of a contracting state as a party to the conflict’ it is only logical that this criterion was replaced by the prerequisite of a territorial link to a contracting state:

The legislative novelty of Article 3 GC I to IV was that each contracting State established binding rules not only for its own conduct, but also for that of the involved non-State parties. The authority to do so derives from the contracting State’s domestic legislative sovereignty, wherefore a territorial requirement was incorporated in Article 3 GC I to IV. This is not say, however, that a conflict governed by Article 3 GC I to IV cannot take place on the territory of more than one contracting State. From the perspective of a newly drafted treaty text, it appears more appropriate to interpret the phrase in question simply as

30 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B (Berne, Federal Political Department, 1950–1951), p. 122, italics in original, additional emphasis added.

31 *GC IV Commentary*, above note 27, p. 31.

32 For a detailed overview of the drafting history of Common Article 3, see Anthony Cullen, *The Concept of Non-international Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010.

33 The upshot of the adoption of the second option was that no specific features of a NIAC – as a precondition for the application of Common Article 3 – were included in the text of the Article itself. The conditions listed in the Commentaries to the Geneva Conventions – for example that the *de iure* government has recognized the insurgents as belligerents or that the insurgent civil authority exercises *de facto* authority over persons within a determinate portion of the national territory – are clearly stated to provide useful guidance, but no more than that. Pictet’s exhortation that the ‘the scope of the application of the Article must be as wide as possible’ has become part of international practice, and the provisions of Common Article 3 have been deemed binding in armed conflicts that do not meet the highly structured indicative requirements listed in the Commentaries. The criteria that have to be met, as explained above, are the existence of organized parties and a certain level of hostilities, without which there can be no non-international armed conflict in the first place.

emphasizing that Article 3 GC I to IV could apply only to conflicts taking place on the territory of States which had already become party to the new Conventions.³⁴

This interpretation is further supported by a comparison of the relevant provisions of Common Article 3 and Additional Protocol II. The first refers to a NIAC occurring in the territory of *one* of the High Contracting Parties, whereas – by contrast – the wording of Article 1 of Additional Protocol II refers to armed conflicts that ‘take place’ in the territory of *a* High Contracting Party between *its* armed forces and dissident armed forces or other organized armed groups. The territorial clause of Common Article 3 thus clearly allows a reading according to which it will apply so long as a non-international conflict originated in the territory of one of the High Contracting Parties. The same conclusion cannot be reached with respect to Additional Protocol II.

Jurisprudence and doctrine

As underlined above, the International Court of Justice has opined that the substantive provisions of Common Article 3 reflect elementary considerations of humanity that are binding regardless of the character of an armed conflict (non-international or international). For the purposes of this discussion it must be stressed that the Court thereby implied that the application of Common Article 3 was not restricted to the territory of a single state.³⁵

Other international authorities have also classified hostilities as non-international even though they exceeded the territory of a single state. The Statute of the Rwanda Tribunal, adopted by the UN Security Council, explicitly acknowledges the spill-over nature of the 1994 Rwandan conflict by providing in Article 1 that the Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations ‘committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994’.³⁶ The Statute expressly provided the Tribunal with jurisdiction over violations of Common Article 3 – and Additional Protocol II – to the Geneva Conventions,³⁷ thus accepting that they can have extraterritorial effect.

As briefly mentioned above, the United States Supreme Court determined in the 2006 *Hamdan* case that Common Article 3 is to be given extraterritorial effect as treaty law. While, as already submitted, there is not – nor has there been – a global (transnational) armed conflict since 9/11, the Supreme Court’s reasoning is worth mentioning because of the extraterritorial effect that it read into Common Article 3. The Court of Appeals and the US government had argued that

34 Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, p. 258.

35 See note 24 above.

36 ICTR Statute, Article 1, available at: <http://www.un.org/ict/statute.html> (last visited 11 March 2011).

37 *Ibid.*, Article 4.

Common Article 3 did not apply to *Hamdan* because the conflict with Al Qaeda was international in scope (albeit not covered by the Geneva Conventions) and thus did not qualify as a ‘conflict not of an international character’. The Court stated that it did not need to decide the merits of this argument ‘because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not between signatories’³⁸ – that provision being Common Article 3. The Court specified that the term ‘conflict not of an international character’ is to be used ‘in contradistinction to a conflict between nations’, based on the ‘fundamental logic [of] the Convention’s provisions on its application’.³⁹ According to the Court, a Common Article 3 conflict ‘is distinguishable from the conflict described in Common Article 2 [of the Geneva Conventions] chiefly because it does not involve a clash between nations’. It concluded that the phrase “not of an international character” bears its literal meaning’.⁴⁰ The Court’s interpretation of the applicability of the Common Article 3 to the US’s conflict with Al Qaeda was thus based on the quality of the parties involved and not on its geographical reach.

Commentators, too, have recognized the need to provide a different interpretation of the territorial clause of Common Article 3. It has, for example, been said that:

There is no substantive reason why the norms that apply to an armed conflict between a state and an organized armed group within its territory should not also apply to an armed conflict with such a group that is not restricted to its territory. It therefore seems ... that to the extent that treaty provisions relating to non-international armed conflicts incorporate standards of customary international law these standards should apply to all armed conflicts between a state and non-state actors. This means that, at the very least, Common Article 3 will apply to such conflicts.⁴¹

Pursuant to a similar view, Common Article 3 not only governs ‘civil wars’ but can be viewed as ‘covering all conflicts not covered by the rest of the Geneva Conventions, that is, all those other than between states’.⁴²

Finally, it should be mentioned that the 2006 armed conflict between Israel and Hezbollah was deemed by some commentators and organizations to be purely non-international in nature, regardless of the fact that it was waged across an international border between the armed forces of a state and a non-state armed group based in another country’s territory.⁴³

38 *Hamdan case*, above note 18, p. 629.

39 *Ibid.*, p. 630.

40 *Ibid.*

41 David Kretzmer, ‘Targeted killings of suspected terrorists: extra-judicial executions or legitimate means of defense?’, in *European Journal of International Law*, Vol. 16, No. 2, 2005, p. 195.

42 Steven R. Ratner, ‘Predator and prey: seizing and killing suspected terrorists abroad’, in *Journal of Political Philosophy*, Vol. 15, No. 3, 2007, p. 261.

43 See Kenneth Anderson, ‘Is the Israel–Hezbollah conflict an international armed conflict?’ 14 July 2006, available at: <http://kennethandersonlawofwar.blogspot.com/2006/07/is-israel-hezbollah-conflict.html> (last visited 3 March 2011). See, also, Human Rights Watch, ‘Q and A on hostilities between Israel

Humanitarian considerations

It is almost unnecessary to point out that humanitarian considerations strongly militate in favour of an expanded geographical reading of the territorial clause of Common Article 3 as a matter of treaty law. Such an interpretation is required in order to dispel any doubt about the binding nature of the basic protections – the prohibitions, *inter alia*, of murder, torture and other ill-treatment, hostage-taking, and unfair trial – that parties to an armed conflict not of an international character are obliged to afford persons in their power. The notion that persons captured in a Common Article 3 NIAC could be deprived of the Article's safeguards because its application as treaty law must cease at a border is inconceivable from the perspective of ensuring the protection of victims of war. To claim that the substantive provisions of Common Article 3 are extraterritorially applicable as customary law but not as treaty law is to make an argument without practical effect and begs the question of why it is being made at all.

The gap theory

Despite the customary law nature of the substantive provisions of Common Article 3, its territorial clause has given rise to what may be called the 'gap theory'. According to proponents of this view, because there are no IHL *treaty* rules applicable to an armed conflict involving states and non-state armed groups with extraterritorial effect, such a conflict is either: governed only by customary law, including Common Article 3; or would require the development of a new legal framework.

The first position was outlined by a former government legal adviser as follows:

I must note ... that it was not always clear to our government that Common Article 3 applied as a treaty-law matter to a conflict between a state and non-state actors that transcended national boundaries. While the U.S. Supreme Court decision in *Hamdan v. Rumsfeld* held that the conflict with al Qaida, as one not between states, is a non-international conflict covered by Common Article 3, I think many international legal scholars would question that conclusion. Textually the provision is limited to armed conflict 'not of an international character' occurring 'in the territory of one of the High Contracting Parties', suggesting the scope of the provision is limited to conflicts occurring in the territory of a single state. Indeed, other states, such as Israel, have concluded that conflicts with terrorist organizations outside the state's borders are international armed conflicts not falling within the scope of Common Article 3. I make these points not to re-litigate the *Hamdan* case, or to disregard the view of many that Common Article 3 is customary international law, but

and Hezbollah', 1 August 2006, available at: <http://www.hrw.org/en/news/2006/08/01/questions-and-answers-hostilities-between-israel-and-hezbollah> (last visited 3 March 2011).

rather to note that in some cases, not even Common Article 3 may apply as a treaty-law matter to conflicts with transnational terrorist groups.⁴⁴

The second view posits that ‘extra-state hostilities’ with non-state actors are hostilities that take place, at least in part, outside the territory of a state and thus cannot or should not be placed in either of the two traditional categories of the laws of war (international or non-international armed conflicts).⁴⁵ It argues that this new category of armed conflict is governed by ‘specific rules that are derived from an interpretation of the general principles of international humanitarian law in the specific context of extra-state armed conflicts’.⁴⁶ The crux of the proposed legal framework is that the protection of non-combatants in an extra-state armed conflict should be in line with that afforded to non-combatants in international armed conflicts, while the protection of combatants in extra-state armed conflicts should be more in line with the protection afforded to them in intra-state armed conflicts (meaning, *inter alia*, no prisoner-of-war status upon capture). This view rejects the idea that an extra-territorial conflict between a state and a non-state armed group should be deemed non-international, explaining that ‘it is preferable to recognize that a gap exists in the Geneva Conventions and to focus academic discussions on what should be done about this gap’.⁴⁷

In relation to the first position it is submitted that to deny the applicability of Common Article 3 as *treaty* law based on the territorial clause but to accept its substantive application as customary law regardless of the type of conflict involved is basically a legal-technical argument with no practical consequences, as stated above. As regards the second view, to posit that a new legal regime for extra-territorial armed conflicts is necessary, but to propose substantive protections mostly identical to those that already exist under IHL treaty and customary law for NIACs, seems to suggest theoretical repackaging rather than the true identification of a major gap in IHL regulation of this type of conflict. While it cannot be claimed that Common Article 3 or customary law provide a detailed answer to all the legal and protection issues that arise in practice (a question that will be addressed below), it would appear that the creation of a new armed conflict classification for what are still NIACs – albeit with an expanded geographical scope – is superfluous.⁴⁸

It is submitted, in sum, that the *chapeau* of Common Article 3 may nowadays be evolutively interpreted as a matter of treaty law to apply not only to

44 See lecture of the former US State Department Legal Adviser John B. Bellinger III at the University of Oxford on 10 December 2007, available at: <http://insct.syr.edu/uploadedFiles/insct/uploadedfiles/PDFs/Bellinger%20Prisoners%20In%20War%20Contemporary%20Challenges%20to%20the%20Geneva%20Conventions.pdf> (last visited 3 March 2011).

45 See Roy S. Schondorf, ‘Extra-state armed conflicts: is there a need for a new legal regime?’, in *New York University Journal of International Law and Politics*, Vol. 37, No. 1, 2004.

46 *Ibid.*, p. 8.

47 *Ibid.*, p. 51 n. 131.

48 See also C. Kress, ‘Some reflections on the international legal framework governing transnational armed conflicts’, in *Journal of Conflict and Security Law*, 2010, p. 258, available at: <http://www.uni-koeln.de/jur-fak/kress/Materialien/Chef/HP882010/Final.pdf> (last visited 3 March 2011).

non-international armed conflicts occurring wholly within the territory of a state but also to armed conflicts involving state and non-state parties initially *arising* in the territory of a state. Due to the fact that all states today are parties to the Geneva Conventions, a NIAC will be governed by Common Article 3 as long as there is a 'hook' to a national territory. In practice this means that Common Article 3 may be considered the governing legal framework in all NIACs currently taking place around the world. The (still) hypothetical exception as treaty law would be hostilities occurring on the territory of a non-state party to the Conventions. In that case, Common Article 3 would apply as customary law.

While it cannot simultaneously be claimed that an expanded reading of the territorial clause of Common Article 3 may at this point in time be considered to reflect customary law, some of the developments outlined above seem to point in that direction.

The legal and policy framework applicable to Common Article 3 conflicts

The express wording of Common Article 3 states that each party to the conflict shall be bound to apply its provisions 'as a minimum'. The Article thus provides a set of basic guarantees that are absolutely fundamental in nature, but does not provide anywhere near sufficient guidance for the myriad legal and protection issues that arise in conflicts not of an international character. Moreover, the wording itself suggests that the parties will need to rely on additional norms if they are to meet more than the minimum obligations. Provided below is a consolidated account of IHL rules – in two key domains – believed to be applicable in NIACs governed by Common Article 3 (in addition to the provisions of that Article), based either on law or on law and policy combined. The protection of persons in enemy hands, which is what Common Article 3 deals with, is the focus of the consolidated reading (under 'Treatment of persons in enemy hands'). Also outlined are rules on the conduct of hostilities in non-international armed conflicts meeting the threshold of Common Article 3 (under 'Conduct of hostilities'). It is submitted that the proposed framework applies or should apply whenever there is in fact a non-international armed conflict, or when a state classifies an armed conflict as such.

Treatment of persons in enemy hands

Customary international humanitarian law

A legally binding source of additional rules applicable in non-international armed conflicts meeting the threshold of Common Article 3 is, of course, customary international humanitarian law. The ICRC's 2005 *Study* on customary IHL made a significant contribution to identifying the scope of protection in this type of armed conflict by concluding that 148 out of a total of 161 rules formulated are applicable

regardless of whether international or non-international conflict is involved.⁴⁹ Given the large number of rules that were found to be binding as a matter of customary law in non-international armed conflicts as such, the results of the *Study* dispel the notion that IHL protection in this type of situation is weak owing to the fairly small number of treaty rules. When both sources of law are combined – the treaty and customary law rules – a far stronger regime of obligations of the parties emerges. While it is not the purpose of this note to summarize the results of the *Customary Law Study*, a few reminders of its findings and structure are nevertheless useful in highlighting the expansion of legal protection achieved.

The *Customary Law Study* confirms – in a section entitled ‘Fundamental guarantees’ – that the substantive provisions of Common Article 3 do indeed reflect customary law. It reiterates that humane treatment is a cornerstone of IHL and that adverse distinction in its application is prohibited. The *Study* repeats and elaborates on the Common Article 3 prohibitions of violence to life, including murder, mutilation, cruel treatment, and torture, as well as on the prohibition of outrages upon personal dignity. The prohibition on the taking of hostages is likewise reiterated, as is the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court (phrased in the *Study* as the right to a fair trial). The ‘Fundamental guarantees’ section identifies numerous other rules binding on parties to armed conflicts. Among them are the prohibition of slavery and the slave trade, rape and other forms of sexual violence, enforced disappearance, collective punishment, retroactive application of penal law, arbitrary deprivation of liberty, and others.

The *Study*’s wider heading on the ‘Treatment of civilians and persons *hors de combat*’ also contains rules on the protection of the wounded, sick, and shipwrecked (thus reiterating a similar norm in Common Article 3), on missing persons, and on the dead, as well a series of norms additionally applicable to persons deprived of liberty (in which the ICRC’s right to offer its services to parties involved in a NIAC, contained in Common Article 3, is reiterated). There are likewise provisions on displaced persons, and on persons who enjoy specific protection, including women and children.

The *Study* collected a wide range of state and other practice regarding the treatment of persons in enemy hands. The norms of customary IHL thus identified form part of the consolidated reading of IHL applicable in NIACs fulfilling the Common Article 3 threshold.

Procedural safeguards in internment/administrative detention

As noted above, arbitrary deprivation of liberty is prohibited under customary international humanitarian law. This prohibition, like most other norms of

49 As already mentioned, the *Customary Law Study* determined that states did not in practice make a clear distinction between the two types of NIAC that exist under treaty law: those reaching the threshold of Common Article 3 and those meeting the requirements of Additional Protocol II.

customary law, is necessarily general in nature and does not provide guidance that would allow an assessment of when a deprivation of liberty may be deemed 'arbitrary'. In practice, two types of detention related to a NIAC may occur: detention for security reasons (internment)⁵⁰ and detention in conjunction with a criminal process.

Internment is defined as the deprivation of liberty of a person that has been ordered by the executive branch – not the judiciary – without criminal charges being brought against the internee.⁵¹ Under IHL applicable in international armed conflict, internment (and assigned residence) is the most severe 'measure of control' that a detaining authority may take with respect to persons against whom no criminal proceedings are initiated.⁵²

The fact that Common Article 3 neither expressly mentions internment nor elaborates on permissible grounds or process has become a source of different positions on the legal basis for internment in NIAC. In this context, it must be recalled that Additional Protocol II refers explicitly to internment in Articles 5 and 6. In the ICRC's view, both treaty and customary IHL contain an inherent power to intern and may thus be said to provide a legal basis for internment in NIAC. However, a valid domestic and/or international legal source (depending on the type of NIAC involved), setting out the grounds and process for internment, must exist or be adopted in order to satisfy the principle of legality.

The paucity of clear IHL treaty rules in NIAC, as well as the fairly rudimentary nature of procedural safeguards in situations of international armed conflict, led the ICRC in 2005 to develop an institutional position⁵³ on the minimum procedural rules that should be applied in all situations of internment/administrative detention,⁵⁴ whether within or outside armed conflict. The rules are based primarily on IHL, but also on human rights law, as well as policy, and are meant to be implemented in a manner that takes into account the specific situation at hand. Non-state armed group adherence to the rules will necessarily be contextual given the practical and other circumstances in which they most often operate.

Provided below is a list of the rules that are formulated as 'general principles' and as specific 'procedural safeguards'.

50 Prisoner of war internment is subject to a different legal regime and is not the subject of this section.

51 See *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, Commentary on Additional Protocol I, Art. 75(3), para. 3063.

52 GC IV, Arts. 41(1) and 78(1).

53 The institutional position is set out in Jelena Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence'. It was published as Annex 1 to the ICRC's Report on 'International humanitarian law and the challenges of contemporary armed conflicts' presented to the 30th International Conference of the Red Cross and Red Crescent held in Geneva in 2007. It is also published in *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 375–391, available at: http://www.icrc.org/eng/assets/files/other/irrc_858_pejic.pdf (last visited 3 March 2011).

54 The terms 'internment' and 'administrative detention' are used interchangeably.

General principles applicable to internment/administrative detention:

- internment/administrative detention is an exceptional measure;
- internment/administrative detention is not an alternative to criminal proceedings;
- internment/administrative detention can only be ordered on an individual, case-by-case basis, without discrimination of any kind;
- internment/administrative detention must cease as soon as the reasons for it cease to exist;
- internment/administrative detention must conform to the principle of legality.

Procedural safeguards:

- right to information about the reasons for internment/administrative detention;
- right to be registered and held in a recognized place of internment/administrative detention;
- foreign nationals in internment/administrative detention have the right to consular access;
- a person subject to internment/administrative detention has the right to challenge, with the least possible delay, the lawfulness of his or her detention;
- review of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body;
- an internee/administrative detainee should be allowed to have legal assistance;
- an internee/administrative detainee has the right to periodical review of the lawfulness of continued detention;
- an internee/administrative detainee and his or her legal representative should be able to attend the proceedings in person;
- an internee/administrative detainee must be allowed to have contacts with – to correspond with and be visited by – members of his or her family;
- an internee/administrative detainee has the right to the medical care and attention required by his or her condition;
- an internee/administrative detainee must be allowed to make submissions relating to his or her treatment and conditions of detention;
- access to persons interned/administratively detained must be allowed.

The lack of sufficient procedural rules in NIAC has become a legal and protection issue over the past several years in the different types of non-international conflicts described above. Certain issues have nevertheless emerged as common and are briefly outlined below.

Grounds for internment. As already mentioned, IHL applicable in NIAC does not specify permissible grounds for internment. The ICRC has relied on ‘imperative reasons of security’ as the minimum legal standard that should inform internment decisions in NIAC. This policy choice – drawn from the

identical language in the Fourth Geneva Convention⁵⁵ – was adopted because the wording was meant to emphasize the exceptional nature of internment. It is believed that the ‘imperative reasons of security’ standard strikes a workable balance between the need to protect personal liberty and the detaining authority’s need to protect against activity seriously prejudicial to its security.

The exact meaning of ‘imperative reasons of security’ has not been sufficiently elaborated in international or domestic law to enable a determination of the specific types of conduct that would meet that threshold. As noted in the *Commentary to the Fourth Geneva Convention*:

It did not seem possible to define the expression ‘security of the State’ in a more concrete fashion. It is thus left very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the State which justifies internment or assigned residence.⁵⁶

The *Commentary* nevertheless adds that: ‘In any case such measures can only be ordered for real and imperative reasons of security; their exceptional character must be preserved.’⁵⁷

While states are therefore left a margin of appreciation in deciding on the specific activity deemed to represent a serious security threat, there are pointers in terms of what activity would or would not meet that standard. It is uncontroversial that direct participation in hostilities is an activity that would meet the imperative reasons of the security standard. The key issue, of course, is what direct participation in hostilities is, an issue that will be dealt with further in this text.

Conversely, internment cannot be resorted to for the sole purpose of interrogation or intelligence gathering, unless the person in question is deemed to represent a serious security threat based on his or her own activity. Similarly, internment cannot be resorted to either to punish a person for past activity or to act as a general deterrent to the future activity of another person. It is often observed in practice that internment is used to delay or prevent criminal proceedings, even though internment is not meant to serve as substitute for criminal process where such process is feasible under the circumstances.

The internment review process. The Fourth Geneva Convention provides a basic outline of the process of internment review in IAC. It stipulates that an internee has the right to request that an internment decision be reconsidered/appealed,⁵⁸ that such review may be carried out by a court or administrative board,⁵⁹ and that there must be automatic, periodic review of internment if the initial decision is maintained on appeal.⁶⁰

55 GC IV, Art. 78(1).

56 *GC IV Commentary*, above note 27, p. 257.

57 *Ibid.*, p. 368.

58 GC IV, Arts. 43(1) and 78(2).

59 GC IV, Art. 43(1).

60 GC IV, Arts. 43(1) and 78(2).

The fact that IHL applicable in NIAC does not provide details on the internment review process was an additional reason that prompted the ICRC to publish the institutional position on procedural safeguards for internment mentioned above. The document provides, *inter alia*, that a person subject to internment has the right to challenge, with the least possible delay, the lawfulness of his or her detention (by way of reminder, in international armed conflicts the Fourth Geneva Convention provides for a detainee's ability to request 'reconsideration' or to 'appeal' the internment decision). The purpose of the challenge is to enable the review body to determine whether the person was deprived of liberty for valid reasons and to order his or her release if that was not the case. Mounting an effective challenge presupposes the fulfilment of several procedural and practical steps, including: i) providing the internee with sufficient information about the reasons for detention, as mentioned above; ii) providing the internee with evidence supporting the allegations against him or her so as to enable him or her to rebut them; iii) ensuring that procedures are in place to enable a detainee to seek and obtain evidence on his or her behalf, with such procedures being explained; and iv) making the internment review process and its various stages known and understood.

Automatic, periodic review of internment is a further safeguard identified in the position on procedural safeguards.⁶¹ Periodic review obliges the detaining authority to ascertain whether the detainee continues to pose an imperative threat to security and to order release if that is not the case. The safeguards that apply to initial review are also to be applied at periodic review. Internees should also benefit from appropriate legal assistance in the internment review process.

Internment review must be carried out by an independent and impartial review body (which must be distinct from the authority that initially deprived the person involved of liberty, if the challenge is to be effective). Where internment review is administrative rather than judicial in nature, ensuring the requisite independence and impartiality of the review board represents a particular challenge. Elements relevant to safeguarding independence and impartiality include: i) the composition of the review board, including the process of selection and appointment of its members; ii) board members' qualifications and training; iii) the terms and tenure of their function; iv) their insulation from outside influence; and v) their final decision-making authority.

End of internment. No body of international law permits indefinite internment as such. The general IHL rule governing the duration of internment is that internment must end as soon as the reasons justifying it cease to exist. In view of the rapid progression of events in armed conflict, a person considered to be a threat at the time of capture might not pose the same threat after a change of circumstances on the ground. Thus, the longer the internment lasts, the greater the burden on the detaining authority to show that the concerned person remains an

61 Periodic review is provided for in GC IV with respect to internees in a state's own territory and in occupied territory. See Articles 43(1) and 78(2), respectively.

imperative threat to security. As regards the outer temporal limit of internment, the general IHL rule is that internment must cease at the end or close of active hostilities in the armed conflict in relation to which a person was interned. The close of hostilities is a factual matter that is determined on a case-by-case basis.

Judicial guarantees

Judicial guarantees are a set of internationally recognized norms aimed at ensuring the proper administration of justice. Also known as fair trial rights, they can be said to make up the ‘package’ of safeguards that must be afforded to a person suspected or accused of having committed a criminal offence, particularly when deprived of liberty.

International law provides for judicial guarantees because of, *inter alia*, the extremely serious consequences that a finding of guilt for a criminal offence may have. Depending on the gravity of the crime involved, a determination of guilt may lead to the deprivation of a fundamental human right: that of personal liberty. Where domestic law provides for the death penalty, a finding of guilt may also lead to the deprivation of the most basic human right: the right to life. Judicial guarantees aim to ensure: i) that an innocent person is not subject to criminal sanctions; ii) that the process by which someone’s innocence or guilt is determined is basically fair; and iii) that a person’s other rights, such as the right to be free from torture or other forms of ill-treatment, are also respected in the administration of justice. Judicial guarantees thus comprise a ‘safety net’ that must be respected in order to ensure that any deprivation of liberty as the result of criminal proceedings is lawful and non-arbitrary.

The right to a fair trial is a basic norm of both treaty and customary international humanitarian law. Common Article 3(1)(d) prohibits ‘The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples’. The ICRC’s *Customary Law Study* also identifies the right to a fair trial as a norm of customary law: ‘No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees’.⁶² However, it should be noted that neither the text of Common Article 3 nor customary IHL elaborates a list of what may be considered essential judicial guarantees.

The provisions of Common Article 3(1)(d) were further elaborated in Article 6 of Additional Protocol II with respect to non-international armed conflicts meeting the requisite threshold and are considered to reflect customary law. Meanwhile, Article 75 of Additional Protocol I contains a separate list of fair

62 *Customary Law Study*, Rule 100.

trials rights for any person detained by the adversary in relation to an international armed conflict. It was drafted as a ‘safety net’⁶³ covering individuals ‘who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Geneva Conventions or this Protocol’.⁶⁴ The list is referred to here because it is widely considered to reflect customary IHL regardless of the type of conflict involved. The fact that Article 75 represents a minimum benchmark of protection in international armed conflict is confirmed by the last clause of the Article, pursuant to which: ‘No provision of this Article may be construed as limiting or infringing any other more favorable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1’.⁶⁵ The applicable rules of international law include human rights law.

The right to a fair trial is a fundamental guarantee of human rights law of both a binding and a non-binding nature (‘soft law’). Fair trial rights are, *inter alia*, provided for in Articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR). A state party may derogate from (modify) its obligations under those provisions of the treaty under very strict conditions, one of which is the existence of a public emergency threatening the life of the nation.⁶⁶ While armed conflict is an example of such a public emergency, it is important to note that measures derogating from states’ obligations under the ICCPR may ‘not (be) inconsistent with their other obligations under international law’.⁶⁷ Simply put, this means that states parties to the ICCPR may not derogate from the right to a fair trial in situations of armed conflict, as this would be ‘inconsistent’ with their obligation to respect judicial guarantees under humanitarian law treaties and customary international humanitarian law.

A compelling argument may be made that it makes little sense that judicial guarantees must be observed in the exceptional circumstances of armed conflict and yet may be suspended in peacetime. It is therefore submitted that right to a fair trial under Articles 9 and 14 of the Covenant, even though textually derogable, must be considered *de facto* non-derogable even outside armed conflict.⁶⁸

63 In international armed conflicts, the judicial guarantees of prisoners of war and civilians are provided for in the Third and Fourth Geneva Conventions, respectively.

64 AP I, Art. 75(1).

65 AP I, Art. 75(8).

66 ICCPR, Art. 4.

67 *Ibid.*

68 The UN Human Rights Committee has stated: ‘As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant’. UN Human Rights Committee General Comment No. 29: States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

Regional human rights treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African Charter on Human and People's Rights also provide for the right to a fair trial.

It may be concluded that the right to a fair trial is a fundamental guarantee provided for in both IHL and human rights law, which are, in this area, undoubtedly complementary.⁶⁹ Just as important, a closer examination of the respective provisions – particularly of Article 75 of Additional Protocol I and of Article 14 of the ICCPR – demonstrates that the specific guarantees listed are nearly identical. Based on the overlapping nature of the fair trial standards applicable both in situations of armed conflict and in peacetime and the common aim of the respective provisions, it is possible to identify a list of judicial guarantees that are binding in armed conflict (as well as outside it). Given that Common Article 3 lacks an elaboration of specific judicial guarantees, the list provided below may serve to fill the gap.

The list is divided into three parts. Part A contains judicial guarantees of general application that must underlie the totality of any criminal process; part B provides judicial guarantees applicable to the pre-trial phase of criminal proceedings; and part C lists judicial guarantees applicable in the trial phase proper of a criminal process. It must be remembered, however, that any division of judicial guarantees according to the pre-trial or trial phase is inherently arbitrary, as the guarantees themselves overlap and most must be observed throughout criminal proceedings, until a final judgment is rendered on appeal.

69 The complementary relationship between humanitarian and human rights law has been confirmed by the International Court of Justice. In a July 2004 Advisory Opinion, the Court stated that humanitarian and human rights law are not mutually exclusive. According to the Court, some rights are only protected by human rights law, some are protected only by humanitarian law, and 'yet others may be matters of both these branches of international law'. (ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106.) The rights of persons suspected of having committed a criminal offence – whether detained in IAC or NIAC – may be said to fall into the category of rights that, pursuant to the ICJ's wording, are 'matters' of both branches of law. Reliance on human rights law as a legal regime that is complementary to humanitarian law is also explicitly recognized in both Additional Protocols to the Geneva Conventions. According to Article 72 of Additional Protocol I: 'The provisions of this Section [Treatment of Persons in the Power of a Party to the Conflict] are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict' (emphasis added). This article therefore permits resort to human rights law as an additional frame of reference in regulating the judicial guarantees of criminal suspects who belong to 'persons in the power of a party to the conflict'. (See AP I Commentary, above note 51, paras. 2927–2935.) Preambular paragraph 2 of the Second Additional Protocol establishes the link between that Protocol and human rights law by providing that 'international instruments relating to human rights offer a basic protection to the human person'. The Commentary to the Protocol specifies that the reference to international instruments includes treaties adopted by the UN, such as the ICCPR, as well as regional human rights treaties. See *Commentary on the Additional Protocols*, above note 51, Commentary on Additional Protocol II, paras. 4427–4428.

A. Rules of general application

- Individual criminal responsibility;
- Presumption of innocence;
- Right not to be compelled to testify against oneself or confess guilt.

B. Pre-trial rights

- Right to liberty and prohibition of arbitrary arrest and detention;
- Right to information;
- Right to legal counsel before trial;
- Right to contacts with the exterior;
- Right to judicial or equivalent supervision of detention;
- Right to trial within a reasonable time.

C. Rights at trial

- Right to a fair and public trial by a regularly constituted, independent, and impartial tribunal;
- Right to be informed of the charge(s);
- Right to adequate time and facilities for the preparation of defence;
- Right to be tried without undue delay;
- Right to be tried in one's presence;
- Right to defend oneself in person or through counsel;
- Right to call and examine witnesses;
- Right to the free assistance of an interpreter;
- Right to a public judgment;
- Right to appeal;
- Right not to be re-tried for the same offence;
- Prohibition of retroactive application of criminal laws.

In this context, it should be recalled that the administration of justice is a state function par excellence. Therefore, most of the guarantees listed above will in the majority of cases be applicable to states, as only they will have the capacity to implement them in practice. Humanitarian law nevertheless obliges organized armed groups to respect certain judicial guarantees in situations of non-international armed conflict. Even though the political and policy challenges involved in getting armed groups to implement judicial guarantees are outside the scope of this article, it has to be noted that armed groups' factual compliance with most of the guarantees outlined will be highly contextual.

Treatment and conditions of detention

The obligation of humane treatment expressly enunciated in Common Article 3, and confirmed by the ICRC's *Customary Law Study*, underlies all international humanitarian law rules governing the protection of persons in enemy hands. It is

an overarching concept that, like other cardinal concepts of international law, defies a neat legal definition. This is probably just as well, given that its meaning has evolved and will continue to further develop over time.

Common Article 3 gives specific expression to the obligation of humane treatment in, *inter alia*, provisions prohibiting ‘violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’, as well as ‘outrages upon personal dignity, in particular humiliating and degrading treatment’ (the prohibition of trial without essential judicial guarantees has been discussed above). It is beyond the scope of this article to elaborate on the precise legal definitions ascribed to these terms in international humanitarian law. Suffice it to say that conduct in contravention of the respective norms may constitute a serious violation of the laws and customs of war, or a grave breach of the Geneva Conventions in international armed conflicts, as the case may be.

It must be stressed that, when applied to conditions of detention – which Common Article 3 does not address – the concept of humane treatment should not be understood as being limited to the preservation of physical or mental health. It is a broader notion that incorporates the preservation of the dignity of detained persons as human beings, in addition to the protection of their physical and mental integrity. While the concept of dignity is also difficult to define, it essentially means that a human being has an innate right to respect and to ethical treatment; it is a value linked to the inalienable humanity of all human beings. Persons deprived of liberty are vulnerable to violations of their dignity and integrity because they are no longer in a position to make autonomous decisions affecting many aspects of their lives. They may be said to be (and in many cases, unfortunately, are) at the mercy of their captors and of the captors’ willingness to treat them humanely and with respect.

It is not possible to translate the obligation to respect the dignity of detained persons into a definitive list of concrete measures and safeguards that must be implemented in a detention setting, given that human dignity means different things to different people and that its constituent elements are dependent, among other things, on a person’s cultural and religious background. At a minimum, humane treatment means that the detaining authorities must provide a response to both detainees’ physical needs (accommodation, food, health, hygiene, etc.) and their psychological needs (contacts with the outside world, relations with the captors and with other inmates, etc.).

Whenever possible, the parties to a NIAC should try to hold themselves and each other to higher standards than those contained in Common Article 3. As respect for IHL is not dependent on reciprocity, each party should strive to provide the best detention conditions and treatment that it can. The inability of some organized non-state armed groups to ensure conditions of detention comparable to those that may be afforded by states cannot serve as an excuse for the latter to lower detention standards.

Provided below are a number of basic rules that are sufficiently general to be applicable – it is believed – in situations of armed conflict. The list is drawn

from rules of customary IHL, from specific provisions of IHL treaties, and from existing soft law human rights standards on detention.⁷⁰ It also includes best practice standards. The rules are by no means exhaustive and do not purport to define the parameters of humane treatment in detention as stipulated in Common Article 3. They must be read in conjunction with Common Article 3, not in lieu of it.

Physical and mental integrity

- Torture or other cruel, inhuman, or degrading treatment or punishment of detainees is prohibited in all circumstances. Violations of this prohibition must be investigated and, if appropriate, prosecuted and punished.
- Enforced disappearance is prohibited.
- Extra-judicial killings are prohibited.

Dignity, respect

- Detention regimes for particular detainee populations should take due account of the customs and social relations of the communities to which the detainees belong.
- Detention regimes and conditions of detention must be adapted to a detainee's age, sex, and health status.

Safety

- No detainee may at any time be sent to, or detained in areas where he or she may be exposed to the dangers of the combat zone, nor may his or her presence be used to render certain points or areas immune from military operations. Detainees must benefit from all available protective systems, such as shelters against aerial bombardment.
- Detainees are under the protection of the detaining authority. Detainees must be protected from other inmates or from external attacks that may be directed against them.

Food, drinking water

- Detainees must be provided with adequate food and drinking water; consideration shall also be given to the detainees' customary diet, with expectant and nursing mothers and children being given additional food.

70 E.g. 'Standard minimum rules for the treatment of prisoners', and the 'Body of principles for the protection of all persons under any form of detention or imprisonment'.

Hygiene, clothing

- Detainees must be provided with adequate clothing to preserve their dignity and be protected from the adverse effects of the climate and/or be allowed to keep their own clothing. They shall be provided with the means to maintain personal hygiene, as well as to wash and dry their clothes.
- Access to sanitary facilities must be available to detainees at all times and organized in a way that ensures respect for dignity.

Personal belongings

- Pillage of the personal belongings of detainees is prohibited.

Accommodation

- Detainees must be provided with adequate accommodation: sleeping and living accommodation shall meet all the requirements of health, with due regard being paid to climatic conditions.

Medical care

- Detainees must be provided with adequate medical care, in keeping with recognized medical ethics and principles; patients should be provided with all relevant information concerning their condition, the course of their treatment, and the medication prescribed for them. Every patient is free to refuse treatment or any other intervention.

Humanitarian relief

- Detainees must be allowed to receive individual or collective relief.

Religion

- The personal convictions and religious practices of detainees must be respected.

Open air and exercise

- Detainees must have sufficient access to the open air daily in order to practice suitable exercise if they so wish.

Women

- Women must be held in quarters separate from those of men, except where families are accommodated as family units. Women must be under the immediate supervision of women and benefit from treatment and facilities appropriate to their specific needs.

Minors

- Children under 18 must be held in quarters separate from those of adults, except where families are accommodated as family units.

Work, recruitment

- No detainee shall be forced/requested to take part in military operations, directly or indirectly, or to contribute through his/her work to the war effort.
- Detainees must, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

Family contact

- Detainees must, subject to reasonable conditions, be allowed to be in contact with their family, through correspondence, visits, or other means of communication available.

Discipline, punishment

- Disciplinary proceedings must be clearly established for defined disciplinary offences and be limited in time. No more restriction than is necessary to maintain order and security in the place of detention shall be applied. In no circumstances may disciplinary measures be inhuman, degrading, or harmful to the mental and physical health and integrity of the detainees. Account must be taken of, *inter alia*, a detainee's age, sex, and state of health.
- Punishment may be imposed only on detainees personally responsible for disciplinary offence(s) and be limited in time.
- Solitary confinement is an exceptional and temporary disciplinary measure of last resort that must never be applied for periods exceeding thirty days.
- Instruments of restraint such as shackles, chains, and handcuffs may be used only in exceptional circumstances and may never be applied as punishment.

Transfer

- No detainee may be transferred or handed over to another detaining authority if there is a risk of arbitrary deprivation of life, torture, or other forms of ill-treatment or persecution upon transfer or handover.

Records

- The personal details of detainees must be properly recorded.

Public curiosity

- Detainees may not be exposed deliberately or through negligence to public curiosity or to insults, or condemnation on the part of the public.

Death

- In case of death, the family of the deceased detainee must be informed of the circumstances and causes of death. Deceased detainees must be handed over to their next of kin as soon as practicable.
- Where handover to family is not practicable, the body is to be temporarily interred according to the rites and traditions of the community to which the deceased belonged; the grave must be respected, and marked in such a way that it can always be recognized.

Complaint mechanism

- A complaint process must be clearly established. Detainees must be allowed to present to the detaining authority any complaint on treatment or conditions of detention or express any specific needs they may have.

Release

- Detainees must be released as soon as the reasons for the deprivation of their liberty cease to exist or at the end of penal proceedings against them, which includes the expiration of any sentence that may have been imposed.
- If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety must be taken by those so deciding.

Foreigners

- Foreign nationals must be allowed to inform the diplomatic and consular representatives of the state to which they belong of their detention. Such information may also be conveyed through intermediaries such as the ICRC.

Oversight

- Independent monitoring bodies, such as the ICRC, must be given access to all detainees in order to monitor treatment and conditions of detention and perform other tasks of a purely humanitarian nature.

Conduct of hostilities

Common Article 3 provides rules on the protection of persons in enemy hands but does not include specific rules on the conduct of hostilities. It is in this area, too, that the results of the ICRC's *Study on Customary International Humanitarian Law* are important, for they confirm that a number of conduct of hostilities rules apply

in any type of armed conflict, including those meeting the Common Article 3 threshold.⁷¹

While an exhaustive overview of the *Customary Law Study*'s rules on the conduct of hostilities is outside the purview of this article, the main ones bear repeating because they constitute minimum legally binding norms on both state and non-state parties. Pursuant to the *Study*, the parties to a conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants and must not be directed against civilians. Acts or threats of violence whose primary purpose is to spread terror among the civilian population are prohibited. The *Study* clarifies that civilians are persons who are not members of the armed forces and that the civilian population comprises all persons who are civilians. It determines that civilians are protected against attack, unless and for such time as they take a direct part in hostilities, an issue that will be examined further below.

It is a norm of customary IHL that the parties to a conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives and must not be directed against civilian objects. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose partial or total destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Civilian objects encompass all objects that are not military objectives. They are protected against attack, unless and for such time as they are military objectives. The *Study* confirms that indiscriminate attacks are prohibited, and defines such attacks.⁷²

Very importantly, the *Study* determines that the principle of proportionality must be observed in the conduct of hostilities in non-international armed conflict,⁷³ and that the parties must also adhere to IHL rules governing precautions

71 The absence of conduct of hostilities rules in Common Article 3 does not mean that there are no relevant international treaties whose coverage includes NIACs; the majority, however, are in the area of weapons. (See for example the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (CCW Amended Protocol II).) Similarly, the ICC Statute provides a list of war crimes that may be committed in the conduct of hostilities in NIAC, albeit not one as comprehensive as could have been wished. It should also be remembered that, under the terms of Common Article 3, the parties are encouraged to conclude special agreements extending the application of the Geneva Conventions (which in fact means IHL rules in general), as a way of mutually agreeing on rules regulating the conduct of hostilities. Unfortunately, such agreements have not been utilized as often or as efficiently as may have been anticipated.

72 Pursuant to Rule 12 of the *Customary Law Study*, 'indiscriminate attacks are those: (a) which are not directed at a specific military objective; (b) which employ a method or means of combat which cannot be directed at a specific military objective; or (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction'.

73 Pursuant to Rule 14 of the *Customary Law Study*, 'Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited'.

in attack or against the effects of attacks.⁷⁴ It contains a section on specifically protected persons and objects, including i) medical and religious personnel, ii) humanitarian relief personnel and objects, iii) personnel and objects involved in a peace-keeping mission, iv) journalists, v) protected zones, vi) cultural property, vii) works and installations containing dangerous forces, and viii) the natural environment.⁷⁵ In addition, the *Study* prescribes rules on specific methods of warfare⁷⁶ and on weapons.⁷⁷

The *Customary Law Study* also revealed a number of areas where practice is not clear. For example, it showed that in NIACs practice was ambiguous as to whether, for the purposes of the conduct of hostilities, members of armed opposition groups are considered members of armed forces (combatants) or civilians. A related area of uncertainty identified – in both IACs and NIACs – was the absence of a precise definition of the term ‘direct participation in hostilities’.

While only combatants are explicitly granted the right to participate directly in hostilities in international armed conflicts – with the relatively rare exception of the *levée en masse*⁷⁸ – it is a reality that civilians often take a direct part in hostilities in both international and non-international armed conflicts, in which case they are colloquially referred to as ‘unlawful combatants’ or ‘unprivileged combatants/belligerents’. The general IHL rule that civilians are entitled to protection against the dangers arising from military operations⁷⁹ and that they may not be made the object of attack⁸⁰ is thus modified if they directly participate in hostilities. IHL expressly provides that civilians are protected from direct attack – meaning that they may not be targeted – ‘unless and for such time as they take a direct part in hostilities’.⁸¹

As opposed to combatants who may not be prosecuted by a capturing state for direct participation in hostilities (combatant’s privilege), civilians who take a direct part in hostilities may be prosecuted for having taken up arms and for all acts of violence committed during such participation by the detaining state, as well as, of course, for any war crimes or other crimes under international law committed. This rule is the same in both IACs and NIACs. It is important to note, however, that civilian direct participation may be prosecuted under domestic law but does not constitute a violation of IHL and is not a war crime *per se* under treaty or customary IHL.⁸²

74 *Customary Law Study*, Rules 15–24.

75 *Ibid.*, Rules 25–45.

76 *Ibid.*, Rules 46–69.

77 *Ibid.*, Rules 70–86.

78 See GC III, Art. 4(6), which provides that prisoner of war status in an international armed conflict shall also be granted to: ‘Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war’. See also Article 2 of the 1907 Hague Regulations.

79 AP I, Art. 51(1).

80 AP I, Art. 51(2).

81 AP I, Art. 51(3); and AP II, Art. 13(3).

82 See, for example, the list of war crimes under Article 8 of the ICC Statute; and the *Customary Law Study*.

Given that civilians who directly participate in hostilities may be targeted by the adversary, the key question is how the notion of direct participation is to be interpreted for the purpose of the conduct of hostilities. It was with a view to clarifying the law that, in 2003, the ICRC initiated an expert process devoted to examining the notion of ‘Direct participation in hostilities under IHL’. In June 2009 the ICRC published an Interpretive Guidance on the subject,⁸³ enunciating the organization’s recommendations.

The Guidance addressed three questions:

(i) Who is considered a civilian for the purposes of the principle of distinction?

The answer to this question determines the scope of persons protected against direct attack unless and for such time as they directly participate in hostilities. For the purpose of the conduct of hostilities it is important to distinguish members of organized armed forces or groups (whose continuous function is to conduct hostilities on behalf of a party to an armed conflict) from civilians (who do not directly participate in hostilities, or who do so on a merely spontaneous, sporadic, or unorganized basis). For the purposes of the principle of distinction under IHL, only the latter qualify as civilians.

In international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Members of irregular armed forces (e.g. militia, volunteer corps, etc.) whose conduct is attributable to a state party to a conflict are considered part of its armed forces. They are not deemed civilians for the purposes of the conduct of hostilities even if they fail to fulfil the criteria required by IHL for combatant privilege and prisoner of war status. Membership in irregular armed forces belonging to a party to the conflict is to be determined based on the same functional criteria that apply to organized armed groups in non-international armed conflict.

In non-international armed conflict, all persons who are not members of state armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In NIAC, organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function it is directly to participate in hostilities. The decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving

83 See ‘ICRC interpretive guidance on the notion of direct participation in hostilities under IHL’, in *International Review of the Red Cross*, Vol. 90, No. 872, December 2008, pp. 991–1047, available at: <http://www.icrc.org/web/eng/siteeng0.nsf/html/review-872-p991> (last visited 3 March 2011).

his or her direct participation in hostilities ('continuous combat function'). Continuous combat function does not imply *de jure* entitlement to combatant privilege, which in any case is absent in NIAC. Rather, it distinguishes members of the organized fighting forces of a non-state party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative, or other non-combat functions.

Armed violence that does not meet the requisite degree of intensity and organization to qualify as an armed conflict remains an issue of law and order – that is, it is governed by international standards and domestic law applying to law enforcement operations. This is the case even when the violence takes place during an armed conflict, whether international or non-international, if it is unrelated to the armed conflict.

(ii) What conduct amounts to direct participation in hostilities?

The answer to this question determines the individual conduct that leads to the suspension of a civilian's protection against direct attack. The notion of direct participation in hostilities refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. It should be interpreted synonymously in situations of international and non-international armed conflict.

In order to qualify as direct participation in hostilities, a specific act must fulfil the following cumulative criteria:

1. The act must be likely to affect adversely the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (*threshold of harm*); and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a co-ordinated military operation of which that act constitutes an integral part (*direct causation*); and
3. the act must be specifically designed directly to cause the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*).

Applied in conjunction, the three requirements of *threshold of harm*, *direct causation*, and *belligerent nexus* permit a reliable distinction between activities amounting to direct participation in hostilities and activities that, although occurring in the context of an armed conflict, are not part of the conduct of hostilities and, therefore, do not entail loss of protection against direct attack.

In addition, measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.

(iii) What modalities govern the loss of protection against direct attack?

The answer to this question deals with the following issues: a) duration of loss of protection against direct attack, b) the precautions and presumptions in situations of doubt, c) the rules and principles governing the use of force against legitimate military targets, and d) the consequences of regaining protection against direct attack.

- a) Regarding the temporal scope of loss of protection, civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-state party to an armed conflict cease to be civilians (see ‘Who is considered a civilian?’ above) and lose protection against direct attack for as long as they assume their continuous combat function.
- b) In practice, direct civilian participation in hostilities is likely to entail significant confusion and uncertainty in the implementation of the principle of distinction. In order to avoid the erroneous or arbitrary targeting of civilians entitled to protection against direct attack, it is therefore of particular importance that all feasible precautions be taken in determining whether a person is a civilian and, if so, whether he or she is directly participating in hostilities. In case of doubt, the person in question must be presumed to be protected against direct attack.
- c) Loss of protection against direct attack, whether due to direct participation in hostilities (civilians) or to continuous combat function (members of organized armed groups), does not mean that no further legal restrictions apply. It is a fundamental principle of customary and treaty IHL that ‘[t]he right of belligerents to adopt means of injuring the enemy is not unlimited’.⁸⁴ Even direct attacks against legitimate military targets are subject to legal constraints, whether based on specific provisions of IHL, on the principles underlying IHL as a whole, or on other applicable branches of international law.

Thus, in addition to the restraints imposed by IHL on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force that is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

- d) Finally, as has been mentioned above, IHL neither prohibits nor privileges direct civilian participation in hostilities. When civilians cease to participate directly in hostilities, or when members of organized armed groups belonging to a non-state party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack; but

⁸⁴ See Article 22 of the Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention No. IV of 1907. See also Article 35 of Additional Protocol I: ‘In any armed conflict, the right of the Parties to the conflict to choose methods and means of warfare is not unlimited’.

they are not exempted from prosecution for violations of domestic and international law that might have been committed.

Conclusion

Non-international armed conflicts covered by Common Article 3 are not only the prevalent kinds of conflict today but are also evolving in terms of typology. While 'classical' civil wars waged on the territory of a single state between government forces and organized non-state armed groups used to be the norm, there have recently been a number of armed conflicts that are non-international in nature even though they do not fit that mould. This article has argued that Common Article 3 may today be given a different geographical reading as a matter of treaty law and that it applies to all situations of violence that can be classified as non-international armed conflicts, based on the quality of the parties involved.

It may also be observed that the adequacy of the existing international humanitarian law framework to deal with the variety of contemporary NIACs has been called into question, based both on the paucity of treaty provisions and on their content. It has been submitted that there is a far wider range of rules – primarily of a binding nature but also policy-based – that apply in Common Article 3 armed conflicts covering the treatment of persons in enemy hands and the conduct of hostilities. Given the fundamental nature of the standards proposed, it is believed that they apply or should apply to contemporary non-international armed conflicts and would offer important protections to persons affected by hostilities or detained as a result.

REPORTS AND DOCUMENTS

National implementation of international humanitarian law

Biannual update on national legislation and case law July–December 2010

: : : : : :

A. Legislation

France

Law No. 2010-819 on the elimination of cluster munitions, 20 July 2010

On 21 July 2010, Law No. 2010-819 of 20 July 2010 on the elimination of cluster munitions entered into force.¹ The law implements the Convention on Cluster Munitions of 30 May 2008 by incorporating into French legislation the prohibition on the development, manufacture, production, acquisition, stockpiling, conservation, supply, sale, import, export, trade, brokering, transfer, and use of cluster munitions and the bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft. Any person may still, however, participate in a defence or security operation, or in a multinational military operation, or within an international organization, with states not parties to the convention that might be engaged in activities prohibited by the convention. The law also provides that cluster munitions should be destroyed not later than eight years from entry into force of the Convention. A person guilty of offences under this law may be punished by imprisonment of ten years and fined.

Law No. 2010-930 adapting criminal law to the Statute of the International Criminal Court, 9 August 2010

Law No. 2010-930 adapting criminal law to the Statute of the International Criminal Court was adopted on 9 August 2010 and entered into force on 10 August

2010.² The new law mainly integrates the essential elements of the Rome Statute of 17 July 1998 into French law, without fully implementing all the provisions of the treaty.

The law amends the Penal Code by criminalizing direct and public incitement to commit genocide, broadening the definition of crimes against humanity to include certain acts listed in Article 7 of the Rome Statute. It also establishes the principle of command responsibility – opening the possibility of challenging the criminal liability of superior military and civilian personnel because of their passive complicity in relation to war crimes and crimes against humanity committed by a subordinate. France has also introduced into its legislation the definition and criminalization of war crimes under Article 8 of the Rome Statute.

On the other hand, the law sets the statute of limitations for war crimes to thirty years, reserving imprescriptibility only to crimes against humanity. It also amends the Code of Criminal Procedure by granting French courts jurisdiction to prosecute and try cases against a person who resides in the territory of France and who has committed abroad a crime within the jurisdiction of the International Criminal Court, if the conduct is punishable under the laws of the state where the crime is committed or where such state is party to the Rome Statute, or where such person is a national of a state party to the convention, and when no international or national jurisdiction require the surrender and extradition of the person concerned.

Israel

Military Order 1651, Order Regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651) 5770-2009, 1 November 2009

On 1 November 2009, the military authorities published a new military order, Order Regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651) 5770-2009 (MO 1651), consolidating twenty military orders that had hitherto formed the bulk of the security related military legislation applicable in the West Bank. The new consolidated order came into force on 2 May 2010. It contains 335 sections covering a broad range of issues pertaining to criminal as well as administrative law. Issues of substantial and procedural criminal law that are covered by MO 1651 include law enforcement procedures (e.g. concerning arrest, detention, and seizure and forfeiture of property), pre-trial criminal procedures, judicial procedures before military courts, rules concerning criminal liability, and the definition of acts constituting offences. Issues of administrative law addressed in MO 1651 include administrative detention, control orders and assigned residence, deportation of infiltrators, and other administrative authorities such as those relating to restrictions of movement and to the designation of closed military areas.

- 1 LOI N° 2010-819 du 20 juillet 2010 tendant à l'élimination des armes à sous-munitions, published in Official Journal No. 166 of 21 July 2010, p. 13245.
- 2 LOI N° 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale, published in Official Journal No. 183 of 10 August 2010.

Kosovo

Law No. 03/L – 179, Law on Red Cross of Republic of Kosovo, 10 June 2010

On 10 June 2010, the Assembly of Republic of Kosovo adopted Law No. 03/L – 179 on Red Cross of Republic of Kosovo. The law regulates the status, functions, and financial sources of the Red Cross of Kosovo. It recognizes the Red Cross of Kosovo as the only national society in the Republic of Kosovo, acting as an auxiliary to the government on humanitarian issues based on the fundamental principles of the International Red Cross and Red Crescent Movement. It outlines activities to be carried out by the national society in times of peace and armed conflict, according to the Geneva Conventions and their Additional Protocols, the Statutes of the International Red Cross and Red Crescent Movement, and the Statutes of the Red Cross of Kosovo.

Law No. 03/L – 180, Law on the Use and Protection of the Emblem of the Red Cross and other Distinctive Emblems and Signals, 10 June 2010

The Republic of Kosovo also adopted Law No. 03/L – 180 on 10 June 2010, which regulates the use and protection of the red cross, red crescent, and red crystal emblems, as well as the distinctive signals for identifying medical transports and units during armed conflict and in times of peace. The law defines the authorized usage of the emblems as protective and indicative devices. It provides penalties to be applied in the event of misuse, including perfidious use, in accordance with national legislation. It bestows upon the Ministry of Health and the Ministry of Kosovo Security Force the authority to oversee the application of the law and the issuance of instructions and other rules.

Peru

Code of Military Justice, Legislative Decree No. 1094, 1 September 2010

A new Code of Military Justice was enacted on 1 September 2010 in Peru.³ Book II, Title II of the Code provides for crimes against state of emergency and international humanitarian law. It lays down rules on persons protected under international humanitarian law. It also adopts the principle of command responsibility holding responsible commanders and superiors for violations committed by their subordinates, and the non-applicability of the defence of merely following superior orders. It also provides universal jurisdiction for war crimes and crimes against state of emergency as defined under the title.

Specific crimes that are committed in times of armed conflict include crimes against protected persons and their illegal confinement, prohibited methods

3 Código Penal Militar Policial, Decreto Legislativo No. 1094, 01 de setiembre de 2010.

of warfare such as targeting civilians and civilian objects, disproportionate attacks, using protected persons as shields, starvation of civilian population, declarations that no quarter shall be given and perfidious attacks, prohibited means of warfare such as the use of poisoned weapons, biological and chemical weapons, and bullets that expand or flatten easily in the body.

The Code also contains a number of controversial provisions such as the statutory limitations and amnesty for war crimes and defences that are broader than those permitted by customary international law. Finally, the Code provides for death penalty in exceptional cases.

Switzerland

Federal law amending federal statutes in view of the implementation of the Rome Statute of the International Criminal Court, 18 June 2010

On 18 June 2010, the Federal Assembly of the Swiss Confederation adopted the Federal law amending the federal statutes in view of the implementation of the Rome Statute of the International Criminal Court.⁴ The new law amends the Penal Code, the Military Penal Code, the Code of Criminal Procedure of 5 October 2007, the Act of 20 March 1981 on Mutual Assistance on International Crimes, and the Military Criminal Procedure of 20 March 1979, in order to implement the Rome Statute and provide for universal jurisdiction over genocide, crimes against humanity, and war crimes.

The law provides for penalties for war crimes, including, among others, grave breaches of the Geneva Conventions, attacks against civilians and civilian objects, misadministration of medical treatment, sexual violations and outrages upon personal dignity, recruitment and use of child soldiers, prohibited methods of war, use of prohibited weapons, breaking the armistice, and delay in the repatriation of prisoners of war.

It also provides Switzerland the duty to try a suspect before national courts in those cases of crimes committed abroad, regardless of the nationality of the perpetrator or the victim, when the suspect is found in Switzerland, and is neither extradited to another state nor surrendered to an international criminal court whose jurisdiction is recognized by Switzerland.

Uganda

Act 11, The International Criminal Court Act, 25 May 2010

The International Criminal Court (ICC) Act was enacted into law on 25 May 2010, and entered into force on 25 June 2010. The law gives effect to the Rome Statute

⁴ Loi fédérale portant modification de lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale du 18 juin 2010.

of the ICC, primarily by incorporating into national legislation the crimes of genocide, crimes against humanity, and war crimes. It also criminalizes acts and omissions against the administration of justice by the ICC. It likewise enables national courts to exercise jurisdiction over such crimes.

General principles of criminal law inscribed in the Rome Statute are made applicable along with the principles of Ugandan criminal law. These principles include those that relate to the responsibility of commanders and other superiors over crimes committed by their subordinates, and excludes any statutes of limitation.

The ICC Act allows Uganda to co-operate with the ICC, in terms of investigation and prosecution of persons accused of such crimes, their arrest and surrender to the ICC, and enforcement of sentences. In addition, it provides for various forms of requests for assistance to the ICC and enables the ICC to conduct proceedings in Uganda.

United States of America

Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009

On 24 May 2010, Public Law 111-172, or the Lord's Resistance Army (LRA) Disarmament and Northern Uganda Recovery Act of 2009, was enacted into law. The act seeks to support stabilization and lasting peace in northern Uganda through development of a regional strategy supporting multilateral efforts in successfully protecting civilians and eliminating the threat posed by the LRA. It also authorizes funds for humanitarian relief and reconstruction, reconciliation, and transitional justice.

Under Section 2 of the Act, Congress has qualified the situation in northern Uganda for over two decades as an armed conflict, which has led to internal displacement of two million Ugandans, mutilation, abduction, forcing of individuals into sexual servitude, and forcing an estimated number of over 66,000 children to fight as part of the rebel force.

The law provides the requirement of a strategy to support the disarmament of the LRA, and earmarks US\$ 20 million for humanitarian assistance for areas outside Uganda affected by the LRA and assistance for reconciliation and transitional justice in northern Uganda.

B. National Committees on International Humanitarian Law

Nigeria

On 23 July 2010, the National International Humanitarian Law (IHL) Committee of Nigeria was inaugurated by the Attorney-General of the Federation and the Minister of Justice. Chaired by the Solicitor-General of the Federation and the

Permanent Secretary in the Federal Ministry of Justice, the Committee is composed of representatives from the ministries of Justice, Foreign Affairs, Interior, Finance, Tourism, Culture and National Orientation, Defence, Health, Education, and Women Affairs and Social Development, as well as from the Defence Headquarters, the National Human Rights Commission, the National Commission for Refugees, the Office of the Secretary to the Government of the Federation, academia, and the Nigerian Red Cross Society.

Uganda

On 29–30 September 2010, an inaugural meeting reconstituting the Ugandan International Humanitarian Law (IHL) National Committee was held, following the 29 May 2009 Resolutions on IHL in the country and the 9 March 2010 work plan on the resolutions. Chaired by the Office of the Prime Minister, the group constitutes representatives from the Uganda Red Cross Society and the government, including from the parliament, the Ministry of Defence, the Ministry of Internal Affairs, the Ministry of Gender, Labour and Social Development, the Justice, Law and Order Sector, the Ministry of Justice and Constitutional Affairs, the Ministry of Finance, and the Uganda People's Defence Force. Aside from prioritizing the status and functions of the Committee, the group also works on pending IHL legislations in Uganda.

C. Selected case law

Chile

Prosecutor v. J. M. Contreras Sepúlveda, et al., *Chile Supreme Court*, 8 July 2010, Rol N° 2596-09

On 8 July 2010, the Chilean Supreme Court affirmed the decision of the Court of Appeals of Santiago in sentencing Mr. Juan Manuel Guillermo Contreras Sepúlveda and others for the murder of Mr. Carlos Prats Gonzales and his wife in Argentina on 30 September 1974. It was established that members of the national intelligence service headed by Mr. Contreras engaged in a project with joint criminal purpose of committing crimes against people considered enemies of the Chilean military regime, subsequently resulting in the killing of Mr. Prats.

Although the defendants were convicted of the common crime of murder, the court ruled that the defendants cannot avail themselves of amnesty, nor prescription, as these would violate the 1949 Geneva Conventions. The court explained that, when Chile ratified these treaties, it imposed upon itself a duty not to use measures to protect the wrongs committed by perpetrators while taking into account the principle that international agreements be performed in good faith. It ruled that Law Decree No. 2191 granting amnesty is an act of self-exoneration

from criminal responsibility in violation of Article 148 of the Fourth Geneva Convention.⁵

Colombia

Prosecutor v. Ramírez Ortega et al., *Tribunal Superior de Antioquia*, 10 May 2010

On 10 May 2010, the Antioquia High Court upheld the sentence of thirty-three years' imprisonment against Mr. Ramírez Ortega and two other members of the military for the murder of Mr. Gabriel Valencia Ocampo, on 5 October 2005 in Argelia. They were charged with 'murder of a protected person', an offence under international humanitarian law found in the Colombian Penal Code.

Mr. Ocampo, a farmer, was reported killed in the fighting between troops of the Fourth Brigade and the Fuerzas Armadas Revolucionarias de Colombia. The investigation conducted by a human rights and international humanitarian law prosecutor found that, a day before his death, Mr. Ocampo was detained by a military patrol. He managed to escape and sought help from the police. The patrol members insisted to the police that Mr. Ocampo was a soldier deserter. Without any verification, the police handed him over to the accused.

Croatia

Prosecutor v. Branimir Glavas, *Supreme Court of Croatia*, I Kt 84/10-8, 30 July 2010

The Supreme Court of Croatia, on 30 July 2010, affirmed the conviction of Mr. Branimir Glavas and his co-accused for war crimes committed during the Serbo-Croatian war, but reduced their sentences.

On 8 May 2009, the District Court of Zagreb convicted the accused for the criminal offences of war crimes against civilians in violation of Article 120(1) of the Basic Criminal Code of the Republic of Croatia. Within the period of July to December 1991, while Mr. Glavas was the Secretary of the Municipal Secretariat for National Defence in the town of Osijek, he failed to prevent the torture of the civilian population, inhumane treatment and causing injuries to bodily integrity of civilians, the application of unlawful detentions, and violations of the rules of international humanitarian law by a special military unit, of which he acted as the effective and formal commander, the unit being established, equipped, and armed by his office. He was also found to have ordered the killings of civilians, their

5 Article 148 of the Fourth Geneva Convention provides that no 'High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article'.

inhumane treatment, and unlawful confinement. Mr. Glavas was sentenced to ten years' imprisonment.

On appeal by both prosecution and defence, the Supreme Court reduced the sentence of Mr. Glavas to eight years. It held that it was legally correct for the accused to be sentenced only for one count of the criminal act of war crimes against civilians and not two, as earlier pronounced by the District Court of Zagreb. It ruled that the number of victims of war crimes does not influence the number of criminal acts that a perpetrator makes. Thus, there were no legal grounds for the verdict of Mr. Glavas to be divided into two separate criminal acts of war crimes against civilians.

Montenegro

Dubrovnik torture case, Montenegrin Court of Appeals, December 6, 2010

On 6 December 2010, the Court of Appeals in Montenegro quashed the decision of the Higher Court in Podgorica which had sentenced six members of the former Yugoslavia People's Army (JNA) to imprisonment ranging from eighteen months to four years for ordering and committing torture against 169 prisoners of war and civilians between October 1991 and August 1992 during an attack on the Adriatic city of Dubrovnik.

The court ordered the retrial of Mr. Mladjen Govedarica, Mr. Zlatko Tarle, Mr. Boro Gligic, Mr. Spiro Lucic, Mr. Ivo Menzalin (at large), and Mr. Ivo Gojnic at the High Court of Podgorica after an appeal based on the grounds that the case was political and that there was not enough evidence.

The atrocities took place in the Morinj detention centre. Some 160 people held in the Morinj camp had testified against the accused.

Norway

Prosecutor v. Mirsad Repak, Supreme Court, 3 December 2010

On 3 December 2010, the Norwegian Supreme Court reversed the conviction of Mr. Mirsad Repak for war crimes and crimes against humanity allegedly committed in the former Yugoslavia in 1992.

The District Court in Oslo had earlier sentenced Mr. Repak, a Bosnian and Norwegian national, to five years in prison on eleven counts of unlawful detention of civilians, falling under Section 103(h) of the Norwegian Criminal Code adopted in March 2008. He had been a member of the militia group Croatian Defence Forces (HOS) that operated a prison camp in Dretelj, Bosnia and Herzegovina. He was ordered to pay US\$ 57,000 for compensation and damages to eight plaintiffs. In April 2010, an appeals court reduced the sentence by six months' imprisonment.

Norway's Supreme Court cancelled the sentence outright, ruling that Norway's war crimes law, which came into force in 2008, could not be applied

retroactively to Repak's 1992 actions as it would violate the Norwegian Constitution. It held that the case should instead proceed on the basis of the law in effect at the time of the commission of the offence.

Serbia

Prosecutor v. Željko Đukić, War Crimes Department of the Higher Court in Belgrade, 22 September 2010

The trial chamber of the Belgrade War Crimes Department of the Higher Court sentenced Mr. Željko Đukić to twenty years' imprisonment for his involvement in a war crime against civilian population that took place in Podujevo, Kosovo-Metohija, on 28 March 1999.

The court found that Mr. Đukić was part of a group known as the Scorpions, involved in a shooting campaign against a group of nineteen women and children, taking the lives of fourteen civilians including seven children. There were five other children who were heavily wounded, yet survived the attack.

Mr. Đukić was placed under detention on 19 October 2007. This date has been considered as the beginning of his prison term for the crime of which he was convicted.

Prosecutor v. Branko Grujic and Branko Popovic, Belgrade Higher Court's War Crimes Department, 22 November, 2010

On 22 November 2010, the trial chamber for Belgrade Higher Court's War Crimes Department sentenced the former Zvornik mayor Branko Grujic to six years in prison and the former Zvornik local defence chief Branko Popovich to fifteen years in prison for the imprisonment, inhumane treatment, and death of around 700 Muslims in their hometown during the 1992–1995 Bosnian Civil War, and for the forcible displacement of over 1,600 civilians in the Zvornik area in 1992.

The indictment alleges that Mr. Grujic and Mr. Popovic, acting in a pre-meditated and synchronized manner, undertook a number of activities within their official competence aimed at the forcible separation of 1,624 Muslim civilians, who were either unlawfully taken hostage and mass murdered, or forcibly displaced.

The court said that the hostages were kept in inhumane conditions in a small room where twenty people suffocated. The bodies of 352 victims were later exhumed and identified. Mr. Grujic was sentenced for having knowledge of the crimes and failing to act to prevent them.

Prosecutor v. Ilija Jurišić, Appeals Court of Belgrade, 11 October 2010

On 11 October 2010, the Belgrade Appeals Court overturned a war crimes conviction and a twelve-year prison sentence for the former Bosnian security officer Mr. Ilija Jurišić. The court ordered a retrial and released Mr. Jurišić from detention, ruling that the previous proceedings provided insufficient evidence.

Mr. Jurišić was accused of co-ordinating an attack against a convoy consisting of members of the 92nd Motorized Brigade with the Yugoslavia National Army on 15 May 1992, at the time when he was a senior officer on duty in the operative headquarters of the Centre of Security Services in Tuzla. In September 2009, he was found guilty by the War Crimes Chamber of the District Court of Belgrade of violating Article 148 of the Socialist Federal Republic of Yugoslavia (SFRY) Criminal Act for using illicit means of warfare. As the former head of the Operational Group of the Tulza-based Public Security Centre, Mr. Jurišić allegedly ordered open fire on a JNA convoy of soldiers, which was in the process of peacefully withdrawing from Tulza, killing at least fifty-one and wounding fifty soldiers. Mr. Jurišić has been in custody since he was arrested in Belgrade in 2007.

United States of America

Mahmoad Abdah, et al. v. Barack H. Obama, et al., *United States District Court for the District of Columbia, Civil Action No. 04-1254 (HHK)*, 26 May 2010

The United States District Court for the District of Columbia granted the petition for a writ of *habeas corpus* of Mr. Mohammed Mohammed Hassan Odaini for the government's failure to demonstrate the lawfulness of his detention in the US Naval Base in Guantanamo Bay.

Mr. Odaini, a Yemeni national, was seized on 27 March 2002, along with several other men, in a raid on a guesthouse in Pakistan alleged to be a recruitment house for the Taliban or Al Qaeda. The US government based its authority to detain him on the Authorization for Use of Military Force (AUMF), which authorizes the President

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.⁶

The court said that the evidence, which included testimonies of those arrested with the petitioner and two classified reports by government agents finding that he is not part of Al Qaeda and that keeping him has no interrogation value, had been consistent in establishing that he was a mere student who had been invited to the house that night for dinner.

The evidence presented by the respondent was not enough to justify the petitioner's detention. This evidence included: his presence in the house with residents detainable pursuant to the AUMF; a Pakistani medical visa instead of a

⁶ Pub. L. No. 107-40, 115 Stat. 224 (2001).

student visa making him appear suspicious; a sole testimony from a co-arrested that the petitioner arrived weeks earlier in the house, contrary to the assertion of the petitioner and all others arrested with them; and evidence showing that members of Al Qaeda used Jama'at Al Tabligh, where the petitioner was a religious student, as cover for their true activities and purpose.

Using the preponderance of evidence standard and the principle of law that places the burden of proof on the detaining authority to prove lawful detention, Mr. Odaini's motion was granted and he was ordered released.

Hussain Salem Mohammad Almerfedi v. Barack Obama, et al., *United States District Court for the District of Columbia, Civil Action No. 05-1645 (PLF)*, 8 July 2010

The petition for writ of *habeas corpus* of Mr. Hussain Salem Mohammad Almerfedi, detained in the US Naval Base in Guantanamo Bay since 2002, was granted by the United States District Court for the District of Columbia, upon concluding that the government failed to meet its burden of showing by preponderance of evidence that his detention was lawful.

The government had alleged that the petitioner acted as an Al Qaeda facilitator helping fighters infiltrate Afghanistan while staying at an Al Qaeda guesthouse in Iran, and that he actively associated with an Islamic organization called Jama'at al Tablighi (JT), which, aside from performing missionary activities, provided logistical support and operational coverage to terrorist organizations and foreign fighters fleeing Afghanistan.

These assertions were held to have no evidentiary basis. First, the government relied on six reports based on statements made by another Guantanamo detainee who refers to a man named Hussain Al-Adeni, without the court being certain, absent further corroboration, that this other detainee refers to the petitioner. Second, the first four reports were inherently unreliable as they were hearsay evidence, coming from an unnamed group of detainees, for which the original source cannot be pinpointed. Third, although the last two reports relied on information that the detainee learned directly from the petitioner, their content did not describe the petitioner as facilitator, and even alleged that the petitioner was in a Tehran guesthouse in 2002 and 2003 when the petitioner had actually been arrested as early as January 2002. There was also no evidence to support the claim that the petitioner acted as a facilitator, or that, while staying in the JT centre, he actually provided financial or other support to terrorist groups. Thus, the court decided in the petitioner's favour.

Mohammed Al-Adahi and Miriam Ali Abdullah Al-Haj v. Barack Obama, et al., *United States Court of Appeals for the District of Columbia Circuit, No. 09-5333, Consolidated with 09-5339*, 13 July 2010

The United States Court of Appeals reversed the lower Court's decision and remanded the detainee with instructions to the District Court of Columbia to deny

the Guantanamo Bay Naval Base detainee Mr. Mohammed Al-Adahi's petition for writ of *habeas corpus*.

In the summer of 2001, this Yemeni petitioner took a six-month leave of absence from his job to move to Afghanistan, and stayed in Kandahar at the home of his brother-in-law, a close associate of Mr. Osama bin Laden, whom the petitioner had personally met twice. From Kandahar, he moved into a guesthouse used for Al Qaeda recruitment; attended Al Qaeda's Al Farouq training camp; travelled between Kabul, Khost, and Kandahar while American forces were launching attacks in Afghanistan; and, after sustaining injuries requiring hospitalization, crossed the Pakistani border on a bus carrying wounded Arab and Pakistani fighters. After being captured by the Pakistani authorities in late 2001, he was determined to be part of Al Qaeda by a Combatant Status Review Tribunal in 2004. In 2005, he had filed a petition for *habeas corpus*, which was later granted.

According to the Court, the lower Court that granted the petition committed a mistake in its evaluation of evidence by not considering conditional probability analysis, which means that, even if each individual piece of fact is not in itself sufficient to justify detention, one fact makes the occurrence of another more likely. Taking all these facts together, it then becomes clear that Mr. Al-Adahi was – at the very least (using the preponderance of evidence standard) – more likely than not to be a member of Al Qaeda. As such, he was justifiably detained under the Authorization for Use of Military Force.

BOOKS AND ARTICLES

Recent acquisitions of the Library & Research Service, ICRC

Air and sea warfare – books

Hazlitt, William and Roche, Henry Philip; with a new introduction by William E. Butler. *A manual of the law of maritime warfare, embodying the decisions of Lord Stowell and other English judges, and of the American courts, and the opinions of the most eminent jurists, with an appendix of the official documents and correspondence in relation to the present war.* Joseph Perkovich, general editor. Clark, NJ: Lawbook Exchange, 2009, 457 pp.

Program on Humanitarian Policy and Conflict Research at Harvard University. *Commentary on the HPCR manual on international law applicable to air and missile warfare.* Cambridge, MA: Program on Humanitarian Policy and Conflict Research at Harvard University, 2010, 323 pp.

Program on Humanitarian Policy and Conflict Research at Harvard University. *Manual on international law applicable to air and missile warfare, Bern, 15 May 2009.* Cambridge, MA: Program on Humanitarian Policy and Conflict Research at Harvard University, 2009, 56 pp.

Arms – books

Moyes, Richard. *Explosive violence: the problem of explosive weapons.* London: Landmine Action, 2009, 80 pp.

Nystuen, Gro and Casey-Maslen, Stuart (eds.). *The Convention on Cluster Munitions: a commentary.* Oxford: Oxford University Press, 2010, 820 pp.

Union européenne, UNIDIR. *Encourager les débats pour un traité sur le commerce des armes = Promoting discussion on an arms trade treaty.* Genève: Nations Unies, 2010, 14 pp.

Children – books

Buergenthal, Thomas; foreword by Elie Wiesel. *A lucky child: a memoir of surviving Auschwitz as a young boy.* London: Back Bay, 2010, 20 pp.

Carpenter, R. Charli. *Forgetting children born of war: setting the human rights agenda in Bosnia and beyond*. New York: Columbia University Press, 2010, 273 pp.
Maeland, Bard (ed.). *Culture, religion, and the reintegration of female child soldiers in northern Uganda*. Bern: P. Lang, 2010, 314 pp.

United Nations, Office of the Special Representative of the Secretary-General for Children and Armed Conflict. *The rights and guarantees of internally displaced children in armed conflict*. New York: United Nations, September 2010, 71 pp.

Children – articles

Waschefort, Gus. ‘Justice for child soldiers? The RUF trial of the special court for Sierra Leone’, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, pp. 189–204.

Civilians – books

Holt, Victoria and Taylor, Glyn, with Max Kelly. *Protecting civilians in the context of UN peacekeeping operations: successes, setbacks and remaining challenges*. New York: United Nations, 2009, 384 pp.

Civilians – articles

Gade, Emily Kalah. ‘Defining the non-combatant: how do we determine who is worthy of protection in violent conflict?’, *Journal of Military Ethics*, Vol. 9, No. 3, 2010, pp. 219–242.

Conflict, violence, and security – books

Clarke, Richard A. and Knake, Robert K. *Cyber war: the next threat to national security and what to do about it*. New York: HarperCollins, 2010, 290 pp.

Cordell, Karl and Wolff, Stefan (eds.). *Routledge handbook of ethnic conflict*. London and New York: Routledge, 2011, 334 pp.

Coyle, Diane, and Meier, Patrick. *New technologies in emergencies and conflicts: the role of information and social networks*. Washington, DC: United Nations Foundation; London: Vodafone Foundation, 2009, 52 pp.

Eichensehr, Kristen and Reisman, Michael W. (eds.). *Stopping wars and making peace: studies in international intervention*. Leiden; Boston: M. Nijhoff, 2009, 223 pp.

Kotovtchikhine, Stéphane, Pancraccio, Jean-Paul, et Wijffels, Alain (dir.); préface de Pierre Bodineau. *Les acteurs de la guerre: actes du colloque international, 12 et 13 mars 2009 – Dijon*. Dijon: Centre Georges Chevrier, 2010, 296 pp.

- Lebow, Richard Ned. *Why nations fight: past and future motives for war*. Cambridge: Cambridge University Press, 2010, 295 pp.
- Metmati, Jamel. *L'art de la guerre en réseaux (1991–2009): une nouvelle ère dans l'art de construire une action*. Paris: L'Harmattan, 2010, 204 pp.
- Schlee, Günther. *How enemies are made: towards a theory of ethnic and religious conflicts*. New York and Oxford: Berghahn, 2010, 194 pp.
- Tikk, Eneken, Kaska, Kadri, and Vihul, Liis. *International cyber incidents: legal considerations*. Tallinn: Cooperative Cyber Defence Centre of Excellence, 2010, 130 pp.
- United Nations Office on Drugs and Crime. *Crime and instability: case studies of transnational threats*. S.l.: UNODC, February 2010, 59 pp.

Conflict, violence, and security – articles

- Bwele, Charles, Smedts, Bart, et Roubertie, Jean. 'Cyberguerre', *Revue défense nationale*, No. 731, juin 2010, 22 pp.
- Carter, K. R. 'Should international relations consider rape a weapon of war?', *Politics and Gender*, Vol. 6, No. 3, 2010, pp. 343–371.
- de Maupeou, Stanislas. 'World war web 3.0: l'informatique dans les conflits', *Revue défense nationale*, No. 728, mars 2010, pp. 83–89.
- Lucas, George R. (guest ed.). Special issue on 'Ethics and emerging military technologies', *Journal of Military Ethics*, Vol. 9, No. 4, 2010, pp. 289–431.
- Melber, Henning (ed.). 'Responses to mass violence: mediation, protection, and prosecution', *Development Dialogue*, No. 53, November 2009, 196 pp.

Detention – books

- Belda, Béatrice; préface de F. Sudre. *Les droits de l'homme des personnes privées de liberté: contribution à l'étude du pouvoir normatif de la Cour européenne des droits de l'homme*. Bruxelles: Bruylant, 2010, 745 pp.
- Gayme, Evelyne. *Les prisonniers de guerre français: enjeux militaires et stratégiques (1914–1918 et 1940–1945)*. Paris: Economica, 2010, 185 pp.
- Turner, Frédéric. *Les oubliés de 39–45 ou La rafle des Britanniques*. Arras: JAFT, 2010, 587 pp.

Detention – articles

- Glazier, David; introductory remarks by Robert Chesney; remarks by Deborah Pearlstein, Glenn Sulmasy, and Joanne Mariner. 'Closing Guantánamo: the legal and policy issues', *Proceedings of the 103rd Annual Meeting of the American Society of International Law*, 2010, pp. 129–143.

Richard, Ronan. 'Succès et limites des puissances protectrices: le cas des prisonniers civils et militaires dans l'ouest de la France pendant la première guerre mondiale', *Relations internationales*, No. 143, 2010, pp. 61–74.

Winkler, Thomas. 'The Copenhagen process on detainees: a necessity', *Nordic Journal of International Law*, Vol. 78, No. 4, 2009, pp. 489–498.

Economy – books

Fontanel, Jacques (éd.), Galbraith, James *et al.* *Économie politique de la sécurité internationale*. Paris: L'Harmattan, 2010, 312 pp.

Economy – articles

Cohen, Amichai. 'Economic sanctions in IHL: suggested principles', *Israel Law Review*, Vol. 42, No. 1, 2009, pp. 117–149.

Environment – books

African Centre for the Constructive Resolutions of Disputes (ACCORD) and the Madariaga-College of Europe Foundation. *Natural resources, the environment and conflict*. Durban: ACCORD, 2009, 52 pp.

Evans, Alex. *Resource scarcity, climate change and the risk of violent conflict*. S.l.: s.n., September 2010, 23 pp.

Fitzmaurice, Malgosia, Ong, David M., and Merkouris, Panos. *Research handbook on international environmental law*. Cheltenham and Northampton, MA: E. Elgar, 2010, 703 pp.

Environment – articles

Crahay, Philippe *et al.* 'Climate change: food and nutrition security implications', *SCN News*, No. 38, early 2010, pp. 1–82.

Hassan, Fekri *et al.* 'Protéger les générations futures ...', *Chronique ONU*, Vol. 46, Nos. 3–4, 2009, 99 pp.

Malone, Linda A., Evans, Gareth, and Luck, Edward C. 'Responsibility to protect in environmental emergencies', *Proceedings of the 103rd Annual Meeting of the American Society of International Law*, 2010, pp. 19–38.

Geopolitics – books

Abraham, Itty, Newman, Edward, and Weiss, Meredith L. (eds.). *Political violence in South and Southeast Asia: critical perspectives*. Paris: United Nations University Press, 2010, 224 pp.

- Anderson, Ewan W., and Anderson, Liam D.; cartography by Ian M. Cool. *An atlas of Middle Eastern affairs*. London and New York: Routledge, 2010, 278 pp.
- Betancourt, Ingrid. *Même le silence a une fin*. Paris: Gallimard, 2010, 689 pp.
- Boyer, Béatrice; préface de François Grünewald. *Villes afghanes, défis urbains: les enjeux d'une reconstruction post-conflit*. Paris: Karthala; Plaisions: Groupe URD, 2010, 407 pp.
- Desmond Arias, Enrique, and Goldstein, Daniel M. (eds.). *Violent democracies in Latin America*. Durham, NC and London: Duke University Press, 2010, 324 pp.
- Karagiannis, Emmanuel. *Political Islam in Central Asia: the challenge of Hizb ut-Tahrir*. London and New York: Routledge, 2010, 172 pp.
- Lowe, Robert, and Stansfield, Gareth (eds.). *The Kurdish policy imperative*. London: Chatham House, 2010, 211 pp.
- Merlin, Aude, et Serrano, Silvia (éds). *Ordres et désordres au Caucase*. Bruxelles: Éditions de l'université de Bruxelles, 2010, 228 pp.
- Schofield, Victoria. *Kashmir in conflict: India, Pakistan and the unending war*, fully rev. edn. London and New York: I. B. Tauris, 2010, 318 pp.

Geopolitics – articles

- Jaquemet, Iolanda. 'Fighting amnesia: ways to uncover the truth about Lebanon's missing', *International Journal of Transitional Justice*, Vol. 3, No. 1, March 2009, pp. 69–90.
- Man-Ho, Heo *et al.* 'La Corée dans les conflits du XX^e siècle', *Guerres mondiales et conflits contemporains: revue d'histoire*, No. 239, juillet 2010, 106 pp.
- Racine, Jean-Luc *et al.* 'Géopolitique du Pakistan', *Hérodote: revue de géographie et de géopolitique*, No. 139, 4^e trimestre 2010, 189 pp.
- Stansfield, Gareth *et al.* 'Post-American Iraq', *International Affairs*, Vol. 86, No. 6, November 2010, pp. 1261–1409.

Health/Medicine – books

- Singer, Merrill, and Hodge, Derrick G. (eds.). *The war machine and global health: a critical medical anthropological examination of the human costs of armed conflict and the international violence industry*. Plymouth: AltaMira Press, 2010, 339 pp.

Health/Medicine – articles

- Couldrey, Marion, and Herson, Mauriceson (eds.). 'HIV/AIDS, security and conflict: making the connections', *Forced Migration Review Supplement*, October 2010, 31 pp.

History – books

Gross, Jan T.; traduction de l'anglais par Jean-Pierre Ricard et du polonais par Xavier Chantry; préface d'Audrey Kichelewski. *La peur: l'antisémitisme en Pologne après Auschwitz*. Paris: Calmann-Lévy, 2010, 381 pp.

Vaizey, Hester. *Surviving Hitler's war: family life in Germany, 1939–48*. Basingstoke and New York: Palgrave Macmillan, 2010, 252 pp.

Wylly, Harold Carmichael. *The campaign of Magenta and Solferino, 1859: the decisive conflict for the unification of Italy*. S.l.: Leonaur, 2009, 175 pp.

History – articles

Foppiani, Oreste. 'La "Croix-Rouge de Mussolini" et les internés militaires italiens (1943–1945)', *Relations internationales*, No. 142, Printemps 2010, pp. 23–36.

Human rights – books

Deng, Francis *et al.*; ed. by William Twining. *Human rights: southern voices*. Cambridge: Cambridge University Press, 2009, 238 pp.

Dive, Gérard et Hennebel, Ludovic. *Bibliographie sélective sur les droits de l'homme: sélection d'ouvrages publiés ou diffusés en Communauté Wallonie-Bruxelles*. Bruxelles: Bruylant, 2009, 118 pp.

Fagan, Andrew. *The atlas of human rights: mapping violations of freedom worldwide*. London: Earthscan, 2010, 128 pp.

Shelley, Louise. *Human trafficking: a global perspective*. Cambridge: Cambridge University Press, 2010, 341 pp.

Wouters, Jan *et al.*(eds.). *Accountability for human rights violations by international organisations*. Oxford: Intersentia, 2010, 625 pp.

Human rights – articles

Chevalier-Watts, Juliet. 'The phenomena of enforced disappearances in Turkey and Chechnya: Strasbourg's noble cause?', *Human Rights Review*, Vol. 11, No. 4, December 2010, pp. 469–489.

Tankiev, V.-G. Kh. 'International humanitarian law and the law of human rights: their similarity and differences' [in Russian], *Russian Year-book of International Law* 2008, 2009, pp. 155–165.

Humanitarian aid – books

Fassin, Didier, and Pandolfi, Mariella (eds.). *Contemporary states of emergency: the politics of military and humanitarian interventions*. New York: Zone Books, 2010, 403 pp.

Featherstone, Andrew, and Abouzeid, Amany. *It's the thought that counts: humanitarian principles and practice in Pakistan*. Johannesburg: ActionAid International, 2010, 57 pp.

Groupe urgence réhabilitation développement (u.r.d.) and Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP). *Participation handbook for humanitarian field workers: involving crisis-affected people in a humanitarian response*. Plaisians: Groupe Urgence Réhabilitation Développement (u.r.d.), 2009, 275 pp.

International Federation of Red Cross and Red Crescent Societies. *Believe in humanity: a consultation with G20 governments, November 2009*. Geneva: International Federation of Red Cross and Red Crescent Societies, 2009, 39 pp.

Middleton, Neil. *Humanitarian assistance? Haiti and beyond*. London: Seagull, 2010, 93 pp.

Rubio, Francisco et Huré, Christelle. *Dictionnaire pratique de l'humanitaire*. Paris: Ellipses, 2010, 269 pp.

Humanitarian aid – articles

Abiew, Francis Kofi. 'Humanitarian intervention and the responsibility to protect: redefining a role for "kind-hearted gunmen"', *Criminal Justice Ethics*, Vol. 29, No. 2, August 2010, pp. 93–109.

Akonor, Kwame. 'Assessing the African Union's right of humanitarian intervention', *Criminal Justice Ethics*, Vol. 29, No. 2, August 2010, pp. 157–173.

Andreopoulos, George J. 'Challenges and opportunities in advancing human protection: rethinking the global–local nexus', *Criminal Justice Ethics*, Vol. 29, No. 2, August 2010, pp. 142–156.

Andreopoulos, George J., and Lantsman, Leonid. 'The evolving discourse on human protection', *Criminal Justice Ethics*, Vol. 29, No. 2, August 2010, pp. 73–92.

Andreopoulos, George J. *et al.* 'The ethics of intervention/protection: contending approaches', *Criminal Justice Ethics*, Vol. 29, No. 2, August 2010, pp. 73–207.

Cook, Martin L. 'Accountability for international intervention/protection activities', *Criminal Justice Ethics*, Vol. 29, No. 2, August 2010, pp. 129–141.

Dijkzeul, Dennis, and Wakenge, Claude Iguma. 'Doing good, but looking bad? Local perceptions of two humanitarian organisations in eastern Democratic Republic of the Congo', *Disasters: The Journal of Disaster Studies and Management*, Vol. 34, No. 4, October 2010, pp. 1139–1170.

Fast, Larissa A. 'Mind the gap: documenting and explaining violence against aid workers', *European Journal of International Relations*, Vol. 16, No. 3, September 2010, 25 pp.

Hilhorst, Dorothea, and Jansen, Bram J. 'Humanitarian space as arena: a perspective on the everyday politics of aid', *Development and Change*, Vol. 41, No. 6, November 2010, pp. 1117–1139.

Jaeger, Torris. 'Humanitarian and military action in armed conflict: side by side, not hand in hand', *Nordic Journal of International Law*, Vol. 78, No. 4, 2009, pp. 567–579.

Mindzie, Mireille Affa'a. 'Intervention and protection in African crisis situations: evolution and ethical challenges', *Criminal Justice Ethics*, Vol. 29, No. 2, August 2010, pp. 174–193.

Salignon, Pierre (dossier piloté par). 'Haïti: sortir de la dépendance humanitaire?', *Humanitaire: enjeux, pratiques, débats*, No. 27, décembre 2010, pp. 12–81.

ICRC/International Movement of the Red Cross and Red Crescent – books

Corthésy, Bruno (textes). *Henry Dunant, Gustave Moynier: un combat*. Genève: Association Henry Dunant et Gustave Moynier: 1910–2010, 2010, 87 pp.

Kreutzmann, Hermann, and Schütte, Stefan (eds.); Centre for Development Studies (ZELF) and Institute of Geographical Sciences, Freie Universität Berlin. *Three years after: evaluation of the GRC–ICRC livestock programme in the earthquake-affected areas of Pakistan-administered Kashmir*. Berlin: Centre for Development Studies (ZELF), 2009, 101 pp.

Vanni, Paolo; présentation par Jakob Kellenberger. *Histoire de la chrétienté et l'Avenir sanglant: manuscrits de Henry Dunant 4549–4561*(film n. 815, CD F1717). Firenze: Fondazione Giorgio Ronchi and Croce Rossa Italiana, 2010, 3 vols., 631 pp.+ 1 CD-ROM.

ICRC/International Movement of the Red Cross and Red Crescent – articles

Crossland, James. 'Expansion, suspicion and the development of the International Committee of the Red Cross: 1939–45', *Australian Journal of Politics and History*, Vol. 56, No. 3, 2010, pp. 381–392.

Franke, Mark F. N. 'Responsible politics of the neutral: rethinking international humanitarianism in the Red Cross Movement via the philosophy of Roland Barthes', *Journal of International Political Theory*, Vol. 6, No. 2, 2010, pp. 142–160.

Huber, Peter et Pitteloud, Jean-François. 'Une puissance protectrice inédite: la "mission" Wehrlin du CICR à Moscou (1920–1938)', *Relations internationales*, No. 143, été 2010, pp. 89–101.

International criminal law – books

Cassese, Antonio, Scalia, Damien, et Thalmann, Vanessa. *Les grands arrêts de droit international pénal*. Paris: Dalloz, 2010, 475 pp.

Combs, Nancy Amoury. *Fact-finding without facts: the uncertain evidentiary foundations of international criminal convictions*. Cambridge: Cambridge University Press, 2010, 420 pp.

Eboe-Osuji, Chile (ed.). *Protecting humanity: essays in international law and policy in honour of Navanethem Pillay*. Leiden and Boston: M. Nijhoff, 2010, 882 pp.

Garibian, Sévane. *Le crime contre l'humanité au regard des principes fondateurs de l'État moderne: naissance et consécration d'un concept*. Genève: Schulthess; Bruxelles: Bruylant; Paris: LGDJ, 2009, 578 pp.

Mendes, Errol P. *Peace and justice at the International Criminal Court: a court of last resort*. Cheltenham and Northampton, MA: E. Elgar, 2010, 215 pp.

Rotberg, Robert I. (ed.). *Mass atrocity crimes: preventing future outrages*. Washington, DC: Brookings Institution Press; Cambridge, MA: World Peace Foundation; Harvard Kennedy School Program on Intrastate Conflict, 2010, 255 pp.

Schuelter, Birgit. *Developments in customary international law: theory and the practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia*. Leiden and Boston: M. Nijhoff, 2010, 369 pp.

Stewart, James G. and the Open Society Justice Initiative. *Corporate war crimes: prosecuting the pillage of natural resources*. New York: Open Society Foundations, 2010, 157 pp.

International criminal law – articles

Freeland, Steven. 'A prosecution too far? Reflections on the accountability of heads of states under international criminal law', *Victoria University of Wellington Law Review*, Vol. 41, No. 2, 2010, pp. 179–204.

Harhoff, Frederik. 'It is all in the process: reflections on the relation between international criminal trials and international humanitarian law', *Nordic Journal of International Law*, Vol. 78, No. 4, 2009, pp. 469–480.

Haskell, John D. 'The complicity and limits of international law in armed conflict rape', *Boston College Third World Law Journal*, Vol. 29, No. 1, Winter 2009, pp. 35–84.

Olowu, Dejo. 'The imperative of extending international criminal accountability to violent internal strife and disturbances in Africa: filling a dangerous lacuna', *African Yearbook on International Humanitarian Law 2009/2010*, 2009/2010, pp. 1–19.

Rodríguez, Jacobo Riós. 'La restriction de la compétence universelle des juridictions nationales: les exemples belge et espagnol', *Revue générale de droit international public*, T. 114, No. 3, 2010, pp. 563–595.

Swart, Mia. 'Is there a text in this court? The purposive method of interpretation and the ad hoc tribunals', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* = *Heidelberg Journal of International Law* 70, Jahrgang 4/2010, 2010, pp. 767–787.

Vardanyan, V. D. 'Legal position of the constitutional court of the Republic of Armenia on the problem of the constitutionality of obligations provided for in the statute of the International Criminal Court and some legal problems linked to the possibility of its ratification by the Republic of Armenia' [in Russian], *Russian Year-book of International Law* 2008, 2009, pp. 197–210.

Weisbord, Noah; introductory remarks by Davis Brown; remarks by Larry May *et al.* 'Evolutions of the *jus ad bellum*: the crime of aggression', *Proceedings of the 103rd Annual Meeting of the American Society of International Law*, 2010, pp. 435–453.

International humanitarian law: generalities – books

Federici, Renato. *Guerra o diritto? Il diritto umanitario e i conflitti armati tra ordinamenti giuridici*, 2. ed. Napoli: Editoriale Scientifica, 2010, 307 pp.

Greppi, Edoardo, e Venturini, Gabriella; con la collab. di Monica Rovera e Ludovica Poli. *Codice di diritto internazionale umanitario*, 3. ed. Torino: G. Giappichelli, 2010, 489 pp.

Huhn, Armin. *Amtshaftung im bewaffneten Auslandseinsatz: Anwendbarkeit und Leistungsfähigkeit des Amtshaftungsrechts bei Verletzung des ius in bello*. Bern: P. Lang, 2010, 284 pp.

International humanitarian law: generalities – articles

Brown, Neil *et al.* 'The law of armed conflict in Iraq', *International Law Studies*, Vol. 86, 2010, pp. 127–206.

Bugnion, François. 'Customary international humanitarian law' [in Russian], *Russian Year-book of International Law* 2008, 2009, pp. 15–65.

Corn, Geoffrey. 'Mixing apples and hand grenades: the logical limit of applying human rights norms to armed conflict', *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, pp. 52–94.

Fleck, Dieter. 'Contemporary challenges of international humanitarian law' [in Russian], *Russian Year-book of International Law* 2008, 2009, pp. 65–79.

Henckaerts, Jean-Marie. 'Customary international humanitarian law: taking stock of the ICRC study', *Nordic Journal of International Law*, Vol. 78, No. 4, 2009, pp. 435–468.

Ibragimov, A. M. 'Legal guarantees in the system of international humanitarian law norms' [in Russian], *Russian Year-book of International Law* 2008, 2009, pp. 165–171.

Ishoj, Rikke (guest ed.) *et al.* 'International humanitarian law: celebrating the 60th anniversary of the Geneva Conventions', *Nordic Journal of International Law*, Vol. 78, No. 4, 2009, pp. 433–598.

Ivanenko, V. S. 'The 1868 Saint-Petersburg Conference and its role in the formation of international humanitarian law' [in Russian], *Russian Year-book of International Law* 2008, 2009, pp. 95–103.

Kapustin, A. Ja. 'Contribution of international ad hoc tribunals to the development of international humanitarian law: problem statement' [in Russian], *Russian Year-book of International Law* 2008, 2009, pp. 79–95.

Khelfane, Karim. 'Fragmentation du droit international et lex specialis ou L'interaction entre les droits de l'homme et le droit international humanitaire à la lumière des conflits armés contemporains', *Revue algérienne des sciences juridiques économiques et politiques*, No. 2, 2010, pp. 65–89.

Korotkiy, T. R. 'Humanization of international law: an attempt at systematic analysis' [in Russian], *Russian Year-book of International Law* 2008, 2009, pp. 111–123.

Kretzmer, David *et al.* 'Symposium on complementing international humanitarian law: exploring the need for additional norms to govern contemporary conflict situations', *Israel Law Review*, Vol. 42, No. 1, 2009, 205 pp.

Liebermann, Michael M. 'Pragmatism and principle in international humanitarian law', *Israel Law Review*, Vol. 42, No. 1, 2009, pp. 150–167.

Modirzadeh, Naz K., Bill, Brian J., and Colassis, Laurent. 'Human rights and the law of war in Iraq', *International Law Studies*, Vol. 86, 2010, pp. 349–476.

New Zealand Red Cross. 'The Red Cross and the Geneva Conventions: 60 years on', *Victoria University of Wellington Law Review*, Vol. 41, No. 2, 2010, pp. 113–121.

Österdahl, Inger. 'Dangerous liaison? The disappearing dichotomy between *jus ad bellum* and *in bello*', *Nordic Journal of International Law*, Vol. 78, No. 4, 2009, pp. 553–566.

Thynne, Kelisiana *et al.* 'Global and regional perspectives on international humanitarian law', *Victoria University of Wellington Law Review*, Vol. 41, No. 2, 2010, pp. 107–288.

International humanitarian law: conduct of hostilities – books

Gill, Terry D. and Fleck, Dieter (eds.); in collaboration with Nils Melzer *et al.* *The handbook of the international law of military operations*. Oxford: Oxford University Press, 2010, 657 pp.

International humanitarian law: conduct of hostilities – articles

Al-Duaij, Nada. 'The volunteer human shields in international humanitarian law', *Oregon Review of International Law*, Vol. 12, No. 1, 2010, pp. 117–139.

Arai-Takahashi, Yutaka. 'So-called targeted killings in volatile occupied territories: critical appraisal through the concept of direct participation in hostilities and the principle of proportionality', *Kokusaiho gaiko zasshi*=*Revue mensuelle de droit international et diplomatique*=*Journal of International Law and Diplomacy*, Vol. 108, No. 4, 2009, pp. 1–47.

Boothby, William H. 'Direct participation in hostilities: a discussion of the ICRC interpretive guidance', *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, pp. 143–164.

Combrink, Quintin. 'Operation Cast Lead: ex post review as a mechanism for compliance with proportionality in international humanitarian law', *African Yearbook on International Humanitarian Law 2009/2010*, 2009/2010, pp. 43–69.

Dreveskracht, Ryan. 'Just war in international law: an argument for a deontological approach to humanitarian law', *Buffalo Human Rights Law Review*, Vol. 16, 2010, pp. 237–288.

Geiss, Robin. 'Military necessity: a fundamental "principle" fallen into oblivion', *Select Proceedings of the European Society of International Law*, Vol. 2 (2008), 2010, pp. 554–568.

Melzer, Nils; remarks by Stephen Pomper. 'Direct participation in hostilities: operationalizing the International Committee of the Red Cross' guidance', *Proceedings of the 103rd Annual Meeting of the American Society of International Law*, 2010, pp. 299–310.

Riordan, K. J. 'Shelling, sniping and starvation: the law of armed conflict and the lessons of the siege of Sarajevo', *Victoria University of Wellington Law Review*, Vol. 41, No. 2, 2010, pp. 149–178.

Solomon, Solon. 'The great oxymoron: *jus in bello* violations as legitimate non-forcible measures of self-defense: the post-disengagement Israeli measures towards Gaza as a case study', *Chinese Journal of International Law*, Vol. 9, No. 3, 2010, pp. 501–536.

International humanitarian law: implementation – [articles](#)

Borubashov, B. I. 'Compliance with international humanitarian law norms by the Kyrgyz Republic' [in Russian], *Russian Year-book of International Law 2008*, 2009, pp. 222–230.

Burchill, Richard. 'Regional approaches to international humanitarian law', *Victoria University of Wellington Law Review*, Vol. 41, No. 2, 2010, pp. 205–233.

Dzhaparidze, N. 'Criminalization of the significant violations of international humanitarian law in Russia: problems and prospects' [in Russian], *Russian Year-book of International Law 2008*, 2009, pp. 253–260.

Guilfoyle, Douglas. 'The laws of war and the fight against Somali piracy: combatants or criminals?', *Melbourne Journal of International Law*, Vol. 11, No. 1, May 2010, pp. 1–13.

Hellman, Cecilia, and Lindvall, Kristina. 'From Cold War to hotspots: the changing needs for dissemination of international humanitarian law in Sweden', *Nordic Journal of International Law*, Vol. 78, No. 4, 2009, pp. 527–539.

Ingadottir, Thordis. 'The ICJ armed activity case: reflections on states' obligation to investigate and prosecute individuals for serious human rights violations and grave breaches of the Geneva Conventions', *Nordic Journal of International Law*, Vol. 78, No. 4, 2009, pp. 581–598.

Ishoy, Rikke. 'It should never be questioned', *Nordic Journal of International Law*, Vol. 78, No. 4, 2009, pp. 481–488.

Keith, K. J. 'Tutti fratelli? Perspectives and challenges for international humanitarian law', *Victoria University of Wellington Law Review*, Vol. 41, No. 2, 2010, pp. 123–134.

Puzireva, Yu. V. 'Implementation of international humanitarian law norms on the protection of objects in the legislation of the Russian Federation' [in Russian], *Russian Year-book of International Law* 2008, 2009, pp. 241–253.

Radzhabov, S. A. 'Implementation of international humanitarian law norms in the Republic of Tajikistan: status and prospects' [in Russian], *Russian Year-book of International Law* 2008, 2009, pp. 210–222.

Semenova, E. S. 'Model law as a means of the implementation of international humanitarian law norms' [in Russian], *Russian Year-book of International Law* 2008, 2009, pp. 230–241.

Thynne, Kelisiana. 'The universality of IHL: surmounting the last bastion of the Pacific', *Victoria University of Wellington Law Review*, Vol. 41, No. 2, 2010, pp. 135–147.

Wrange, Pal. 'The EU guidelines on promoting compliance with international humanitarian law', *Nordic Journal of International Law*, Vol. 78, No. 4, 2009, pp. 541–552.

International humanitarian law: law of occupation – articles

Pedrozo, Raul A. (ed.). 'The war in Iraq: a legal analysis', *International Law Studies*, Vol. 86, 2010, 494 pp.

Shany, Yuval. 'The law applicable to non-occupied Gaza: a comment on *Bassiouni v. the Prime Minister of Israel*', *Israel Law Review*, Vol. 42, No. 1, 2009, pp. 101–116.

Tate, Clyde J. *et al.* 'The occupation of Iraq', *International Law Studies*, Vol. 86, 2010, pp. 209–286.

Wilde, Ralph. 'Complementing occupation law? Selective judicial treatment of the suitability of human rights norms', *Israel Law Review*, Vol. 42, No. 1, 2009, pp. 80–100.

International humanitarian law: types of actor – books

Bäumler, Jelena (Hrsg.) *et al.* *Akteure in Krieg und Frieden*. Tübingen: Mohr Siebeck, 2010, 240 pp.

Köhler, Anna. *Private Sicherheits- und Militärunternehmen im bewaffneten Konflikt: eine völkerrechtliche Bewertung*. Bern: P. Lang, 2010.

Odello, Marco and Beruto, Gian Luca (eds.). *Non-state actors and international humanitarian law: organized armed groups: a challenge for the 21st century: 32nd round table on current issues of international humanitarian law, Sanremo*,

11–13 September 2009. International Institute of Humanitarian Law. Milan: Franco Angeli, 2010, 255 pp.

Sorel, Jean-Marc et Fouchard, Isabelle (dir.). *Les tiers aux conflits armés et la protection des populations civiles*. Université Paris 1 Panthéon-Sorbonne, Centre d'étude et de recherche en droit international. Paris: Pedone, 2010, 238 pp.

International humanitarian law: types of actor – articles

Bartolini, Giulio. 'The "civilianisation" of the contemporary armed conflicts', *Select Proceedings of the European Society of International Law*, Vol. 2 (2008), 2010, pp. 569–597.

Brenner, Susan W. and Clarke, Leo L. 'Civilians in cyberwarfare: casualties', *SMU Science and Technology Law Review*, Vol. 13, No. 3, Summer 2010, pp. 249–282.

Brenner, Susan W., with Clarke, Leo L. 'Civilians in cyberwarfare: conscripts', *Vanderbilt Journal of Transnational Law*, Vol. 43, No. 4, 2010, pp. 1011–1076.

Engdahl, Ola. 'Compliance with international humanitarian law in multinational peace operations', *Nordic Journal of International Law*, Vol. 78, No. 4, 2009, pp. 513–526.

Falco, Valentina. 'The internal legal order of the European Union as a complementary framework for its obligations under IHL', *Israel Law Review*, Vol. 42, No. 1, 2009, pp. 168–205.

Ibezim, Emmanuel C. 'Contemporary challenges to international humanitarian law: the private military companies', *African Yearbook on International Humanitarian Law 2009/2010*, 2009/2010, pp. 86–110.

Sassòli, Marco. 'Taking armed groups seriously: ways to improve their compliance with international humanitarian law', *Journal of International Humanitarian Legal Studies*, Vol. 11, No. 1, 2010, pp. 5–51.

Stigall, Dan E. 'The thickest grey: assessing the status of the civilian response corps under the law of international armed conflict and the U.S. approach to targeting civilians', *American University International Law Review*, Vol. 25, No. 5, 2010, pp. 885–914.

International humanitarian law: types of conflict – articles

Bridgeman, Tess. 'The law of neutrality and the conflict with Al Qaeda', *New York University Law Review*, Vol. 85, No. 4, October 2010, pp. 1186–1224.

Corn, Geoffrey S. and Talbot Jensen, Eric. 'Transnational armed conflict: a "principled" approach to the regulation of counter-terror combat operations', *Israel Law Review*, Vol. 42, No. 1, 2009, pp. 46–79.

Kretzmer, David. 'Rethinking the application of IHL in non-international armed conflicts', *Israel Law Review*, Vol. 42, No. 1, 2009, pp. 8–45.

Lehto, Marja. 'War on terror: armed conflict with Al-Qaida?', *Nordic Journal of International Law*, Vol. 78, No. 4, 2009, pp. 499–511.

Mastorodimos, Konstantinos. 'The character of the conflict in Gaza: another argument towards abolishing the distinction between international and non-international armed conflicts', *International Community Law Review*, Vol. 12, No. 4, 2010, pp. 437–469.

Ostroukhov, N. V. 'On the content of the concepts of "conflict" and "armed conflict"' [in Russian], *Russian Year-book of International Law* 2008, 2009, pp. 130–140.

Pedrozo, Raul A. *et al.* 'The legal bases for military operations', *International Law Studies*, Vol. 86, 2010, pp. 45–123.

Peterke, Sven. 'Urban insurgency, "drug war" and international humanitarian law: the case of Rio de Janeiro', *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, pp. 165–187.

Svarc, Dominika. 'Application of international humanitarian law to contemporary peace operations: mapping the "grey areas"', *Select Proceedings of the European Society of International Law*, Vol. 2 (2008), 2010, pp. 529–553.

International organizations: NGOs and United Nations – articles

Weissman, Fabrice. "'Not in our name": why Médecins sans Frontières does not support the "responsibility to protect"', *Criminal Justice Ethics*, Vol. 29, No. 2, August 2010, pp. 194–207.

Media – books

Keeble, Richard Lance, Tulloch, John, and Zollmann, Florian (eds.). *Peace journalism, war and conflict resolution*. Bern: P. Lang, 2010, 373 pp.

Rohde, David and Mulvihill, Kristen. *A rope and a prayer: a kidnapping from two sides*. London: Viking, 2010, 362 pp.

Media – articles

Bosch, Shannon. 'Journalists: shielded from the dangers of war in their pursuit of the truth?', *South African Yearbook of International Law*, No. 34, 2009, pp. 70–100.

National Red Cross and Red Crescent societies – books

Bus, Erhard. *"Lasset uns Gutes tun und nicht müde werden!" zur Geschichte des Roten Kreuzes im Kreis Gelnhausen*. Herausgeber Deutsches Rotes Kreuz Kreisverband Gelnhausen. Gelnhausen: Kürle, 2010, 240 pp.

Kurosawa, Fumitaka, and Kawai, Toshinobu (eds.). *The history of the Japanese Red Cross society and humanitarian assistance*. Tokyo: University of Tokyo Press, 2009, 326 pp.

Protection of cultural property – articles

Buijs, Sebastiaan. 'Protecting our cultural property: article 3(d) of the statute of the ICTY', *African Yearbook on International Humanitarian Law* 2009/2010, 2009/2010, pp. 70–85.

Cox, Douglas. 'Archives and records in armed conflict: international law and the current debate over Iraqi records and archives', *Catholic University Law Review*, Vol. 59, No. 4, Summer 2010, pp. 1001–1055.

Psychology – books

Cyrulnik, Boris. *Autobiographie d'un épouvantail*. Paris: O. Jacob, 2010, 279 pp.

Holleufer, Gilbert, and Cotter, Philippe; translation by Helen Mistry. *Humiliation and war: Afghanistan, Israel/Palestine, Bosnia*. Geneva: Eclectica, 2010, 102 pp.

Morrocco, Richard. *The psychology of genocide and violent oppression: a study of mass cruelty from Nazi Germany to Rwanda*. Jefferson, NC and London: McFarland, 2010, 254 pp.

Public international law – books

Corten, Oliver; foreword by Bruno Simma; translation by Christopher Sutcliffe. *The law against war: the prohibition on the use of force in contemporary international law*. Oxford and Portland: Hart, 2010, 569 pp.

Coyle, Alan *et al.* (drafting team). *Rules of engagement handbook*. Sanremo: International Institute of Humanitarian Law, November 2009, 85 pp.

Eggermont, Frederic, and Smis, Stefaan. *Research guide to instruments of European regional organizations*. Oxford: Intersentia, 2010, 164 pp.

Helmke, Belinda. *Under attack: challenges to the rules governing the international use of force*. Farnham and Burlington, VA: Ashgate, 2010, 296 pp.

Schmeer, Elis. *Responsibility to protect und Wandel von Souveränität: untersucht am Fallbeispiel des Krieges in Darfur*. Berlin: Berliner Wissenschafts-Verlag, 2010, 140 pp.

Public international law – articles

Gierycz, Dorota. 'From humanitarian intervention (HI) to responsibility to protect (R2P)', *Criminal Justice Ethics*, Vol. 29, No. 2, August 2010, pp. 110–128.

Hurpy, Hélène *et al.* 'Quelle place pour la victime en droit international?', *L'observateur des Nations Unies*, Vol. 28, 2010–11, 2010, 217 pp.

Refugees/displaced persons – books

Chatty, Dawn and Finlayson, Bill (eds.). *Dispossession and displacement: forced migration in the Middle East and North Africa*. Oxford: Oxford University Press, 2010, 298 pp.

Likibi, Romuald. *L'Union africaine face à la problématique migratoire*. Paris: L'Harmattan, 2010, 478 pp.

McAdam, Jane (ed.). *Climate change and displacement: multidisciplinary perspectives*. Oxford and Portland: Hart, 2010, 258 pp.

Roberts, Rebecca. *Palestinians in Lebanon: refugees living with long-term displacement*. London and New York: I. B. Tauris, 2010, 241 pp.

Refugees/displaced persons – articles

Biegon, Japhet and Swart, Sarah. 'The African Union convention for the protection and assistance of internally displaced persons in Africa: a panoramic view', *African Yearbook on International Humanitarian Law 2009/2010*, 2009/2010, pp. 20–42.

Ojeda, Stéphane. 'The Kampala convention on internally displaced persons: some international humanitarian law aspects', *Refugee Survey Quarterly*, Vol. 29, No. 3, 2010, pp. 58–66.

Ojeda, Stéphane *et al.* 'New challenges of migration in Africa', *Refugee Survey Quarterly*, Vol. 29, No. 3, 2010, 144 pp.

Religion – books

Bassiouni, M. Cherif and Guellali, Amna (eds.); with the co-operation of Ann O'Brien. *Jihad and its challenges to international and domestic law*. The Hague: Hague Academic Press, 2010, 276 pp.

Werkner, Ines-Jacqueline und Liedhegener, Antonius (Hrsg.). *Gerechter Krieg – gerechter Frieden: Religionen und friedensethische Legitimationen in aktuellen militärischen Konflikten*. Wiesbaden: VS Verlag für Sozialwissenschaften, 2009, 397 pp.

Terrorism – articles

Aleshin, V. V. 'Legal foundations of the regime of anti-terrorism operation' [in Russian], *Russian Year-book of International Law 2008, 2009*, pp. 171–178.

Ibaev, V. 'Torture and the fight against terrorism in the context of international humanitarian law and the law of human rights' [in Russian], *Russian Year-book of International Law 2008, 2009*, pp. 178–197.

Korbut, L. V. 'Humanitarian law in the global fight against terrorism' [in Russian], *Russian Year-book of International Law 2008, 2009*, pp. 141–155.

Kotlyarov, I. I. 'International humanitarian law on illegality of terrorism' [in Russian], *Russian Year-book of International Law* 2008, 2009, pp. 123–130.

Volova, L. I. 'Interconnection of international terrorism and the rules of international humanitarian law' [in Russian], *Russian Year-book of International Law* 2008, 2009, pp. 104–111.

Women – books

Edwards, Alice. *Violence against women under international human rights law*. Cambridge: Cambridge University Press, 2011, 375 pp.

Isikozlu, Elvan and Millard, Ananda S. *Towards a typology of wartime rape*. Bonn: Bonn International Center for Conversion, September 2010, 86 pp.

Women – articles

Ayat, Mohammed. 'Quelques apports des Tribunaux pénaux internationaux, ad hoc et notamment le TPIR, à la lutte contre les violences sexuelles subies par les femmes durant les génocides et les conflits armés', *International Criminal Law Review*, Vol. 10, No. 5, 2010, pp. 787–827.

Edwards, Alice *et al.* 'Gender equality and refugee women', *Refugee Survey Quarterly*, Vol. 29, No. 2, 2010, 121 pp.

INTERNATIONAL REVIEW of the Red Cross

The Review is printed in English and is published four times a year, in March, June, September and December.

Annual selections of articles are also published on a regional level in Arabic, Chinese, French, Russian and Spanish.

Published in association with
Cambridge University Press.

Submission of manuscripts

The International Review of the Red Cross invites submissions of manuscripts on subjects relating to international humanitarian law, policy and action. Most issues focus on particular topics, decided by the Editorial Board, which can be consulted under the heading Future Themes on the website of the Review. Submissions related to these themes are particularly welcome.

Articles may be submitted in Arabic, Chinese, English, French, Russian and Spanish. Selected articles are translated into English if necessary.

Submissions must not have been published, submitted or accepted elsewhere. Articles are subjected to a peer-review process; the final decision on publication is taken by the Editor-in-Chief. The Review reserves the right to edit articles. Notification of acceptance, rejection or the need for revision will be given within four weeks of receipt of the manuscript. Manuscripts will not be returned to the authors.

Manuscripts may be sent by e-mail to:
review@icrc.org

Manuscript requirements

Articles should be 5,000 to 10,000 words in length. Shorter contributions can be published under the section Notes and comments.

For further information, please consult the Information for contributors and Guidelines for referencing on the website of the Review:
www.icrc.org/eng/review.

©icrc

Authorization to reprint or republish any text published in the Review must be obtained from the Editor-in-Chief. Requests should be addressed to the Editorial Team.

Subscriptions

Requests for subscriptions can be made to the following address:

Cambridge University Press, The Edinburgh Building, Shaftesbury Road, Cambridge CB2 8RU; or in the USA, Canada and Mexico, email journals@cambridge.org; Cambridge University Press, 32 Avenue of the Americas, New York, NY 10013-2473, email journals_subscriptions@cup.org.

The subscription price which includes delivery by air where appropriate (but excluding VAT) of volume 92, 2010, which includes print and online access is £199.00 (US \$385.00 in USA, Canada and Mexico) for institutions; £30.00 (US \$57.00 in USA, Canada and Mexico) for individuals, which includes print only. Single parts are £55.00 (US \$100.00 in USA, Canada and Mexico) plus postage. EU subscribers (outside the UK) who are not registered for VAT should add VAT at their country's rate. VAT registered members should provide their VAT registration number. Japanese prices for institutions (including ASP delivery) are available from Kinokuniya Company Ltd, P.O. Box 55, Chitose, Tokyo 156, Japan.

Cover photo: Afghanistan, Ghor region, combatants. CICR/Pagetti, Franco.

Conflict in Afghanistan II

Part 2: Law and humanitarian action

Interview with Ms Fatima Gailani

President of the Afghan Red Crescent Society

Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?

Robin Geiss and Michael Siegrist

International law and armed non-state actors in Afghanistan

Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen

The *Layha* for the *Mujahideen*: an analysis of the code of conduct for the Taliban fighters under Islamic law

Muhammad Munir

Annex: The Islamic Emirate of Afghanistan. The Layha [Code of Conduct] For Mujahids

Combatants, not bandits: the status of rebels in Islamic law

Sadia Tabassum

Between a rock and a hard place: integration or independence of humanitarian action?

Antonio Donini

The International Committee of the Red Cross in Afghanistan: reasserting the neutrality of humanitarian action

Fiona Terry

The protective scope of Common Article 3: more than meets the eye

Jelena Pejic

Volume 93 Number 881 March 2011

INTERNATIONAL REVIEW of the Red Cross



ICRC

ISSN 1816-3831

www.icrc.org/eng/review

Cambridge Journals Online

For further information about this journal please
go to the journal web site at:

<http://www.journals.cambridge.org/irc>

CAMBRIDGE
UNIVERSITY PRESS

